SPONSOR: Sen. S. McBride & Sen. Townsend & Sen. Brown & Sen. Gay & Sen. Mantzavinos & Sen. Pinkney & Rep. Heffernan & Rep. Longhurst & Rep. Baumbach & Rep. Dorsey Walker & Rep. Morrison & Rep. Osienski Sens. Ennis, Hansen, Lockman, Paradee, Poore, Sokola, Sturgeon, Walsh; Reps. Bentz, Bolden, Chukwuocha, Cooke, Freel, Griffith, K. Johnson, Kowalko, Lambert, Lynn, Matthews, Minor-Brown, Mitchell, S. Moore, K. Williams, Wilson-Anton

DELAWARE STATE SENATE
151st GENERAL ASSEMBLY

# SENATE SUBSTITUTE NO. 2
FOR
SENATE BILL NO. 1
AS AMENDED BY
HOUSE AMENDMENT NO. 1

AN ACT TO AMEND TITLE 19 OF THE DELAWARE CODE RELATING TO THE FAMILY AND MEDICAL LEAVE INSURANCE PROGRAM.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF DELAWARE (Three-fifths of all members elected to each house thereof concurring therein):

Section 1. Amend Title 19 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows:

Part V. Family and Medical Leave Insurance Program.

Chapter 37. Family and Medical Leave Insurance Program.

§ 3701. Definitions.

For purposes of this chapter:

(1) "Application year" means the 12-month period as defined in the FMLA.

(2) "Child" means "son or daughter" as defined in the FMLA.

(3) "Covered individual" means an individual who meets all of the following:

a. Has been employed for at least 12 months by the employer with respect to whom leave is requested.

b. Has been employed for at least 1,250 hours of service with the employer during the previous 12-month period. For purposes of determining whether an individual meets the service hours requirement under this paragraph (3)b., the legal standards established under the FMLA apply.

c. The administrative requirements under this chapter.

d. Has submitted an application under this chapter.

(4) "Covered leave" means leave provided under this chapter.



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(5) “Department” means the Department of Labor.

(6)a. “Employee” means an individual employed by an employer. For the purposes of this chapter, individuals primarily reporting for work at a worksite in this State are employees unless otherwise excluded. Individuals primarily reporting for work at a worksite outside of this State are not considered employees under this chapter unless the employer elects to classify them as such. Employers may reclassify an employee as primarily reporting for work at a worksite in another state for the purposes of this chapter through the duration of that individual’s tenure at the out-of-state worksite.

b. “Employee” does not include an individual covered under § 5903(17)a. of Title 29, an individual employed by entities in Title 14 in a position that would be covered under § 5903(17)a. of Title 29, or an individual in an equivalent position with an entity covered by State employee benefits.

(7)a. “Employer” means all those who employ employees working anywhere in this State.

1. Employers with 10 to 24 employees during the previous 12 months shall be subject to only the parental leave provisions of this chapter. For purposes of this paragraph (7)a.1., “employees” includes those who meet the requirements of a covered individual under § 3701(3)a. and (3)b. of this title or are reasonably expected to meet the requirements of a covered individual under § 3701(3)a. and b. of this title during the previous 12 months.

2. Employers with 25 or more employees during the previous 12 months shall be subject to all parental, family caregiving, and medical leave provisions of this chapter. For purposes of this paragraph (7)a.2., “employees” includes those who meet the requirements of a covered individual under § 3701(3)a. and (3)b. of this title or are reasonably expected to meet the requirements of a covered individual under § 3701(3)a. and b. of this title during the previous 12 months.

b. “Employer” does not include any of the following:

1. Anyone who employs less than 10 employees in this State during the previous 12 months.

2. The federal government.

3. Any business that is closed in its entirety for 30 consecutive days or more per year.

(8) “Family and medical leave benefits” means benefits provided under this chapter.

(9) “Family caregiving leave” includes leave under § 3702(a)(2) and (a)(4) of this title.

(10) “Family caregiving leave benefits” means benefits paid under § 3704 of this title and provided under § 3702(a) of this title to a covered individual while the covered individual is on family leave.

(11) “Family member” means all of the following:

a. A parent, as defined under the FMLA.

b. A child.

c. A spouse, as defined under the FMLA.

(12) "FMLA" means the Family and Medical Leave Act, 29 U.S.C. Chapter 28.

(13) "Fund" means the Family and Medical Leave Insurance Account Fund created under this chapter.

(14) "Health care provider" means as defined under the FMLA.

(15) "Medical leave" includes leave under § 3702(a)(3) of this title.

(16) "Medical leave benefits" means benefits paid under § 3704 of this title and provided under § 3702(a) of this title to a covered individual while the covered individual is on medical leave.

(17) "Parental leave" includes leave under § 3702(a)(1) of this title.

(18) "Parental leave benefits" means benefits paid under § 3704 of this title and provided under § 3702(a) of this title to a covered individual while the covered individual is on parental leave.

(19) "Qualifying exigency" means as defined under the FMLA.

(20)a. "Retaliatory personnel action" means an adverse action against an employee for the exercise of, or good faith attempt to exercise, a right guaranteed under this chapter, including any threat, discharge, suspension, demotion, or reduction of hours, or report or threat to report an employee's suspected citizenship or immigration status or the suspected citizenship or immigration status of a family member of the employee to a federal, state, or local agency.

b. "Retaliatory personnel action" includes interference with or punishment for participating or assisting, in any manner, in an investigation, proceeding, or hearing under this chapter.

(21) "Secretary" means the Secretary of the Department.

(22) "Serious health condition" means as defined under the FMLA.

(23) "Small business" means all of the following:

a. For purposes of parental leave, all those that employ 9 or less employees working anywhere in this State.

b. For purposes of family caregiving leave and medical leave, all those that employ 24 or less employees working anywhere in this State.

(24) "Wages" means remuneration for employment as determined for purposes of old-age, survivors, and disability insurance for employees and employers under the Federal Insurance Contribution Act, 26 U.S.C. Chapter 21.

§ 3702. Eligibility for benefits; serious health condition; certification or documentation of leave.

(a) Beginning 1 year after the start of contributions under § 3705 of this title, and subject to subsection (c) of this section, family and medical leave benefits are payable to a covered individual who meets one of the following:

(1) Because of a birth, adoption, or placement through foster care of a child, is caring for the child during the first year after the birth, adoption, or placement of the child.

(2) Is caring for a family member with a serious health condition.

(3) Has a serious health condition that makes the covered individual unable to perform the functions of the covered individual's position.

(4) Has a qualifying exigency.

(b) In applying and construing serious health condition, consideration must be given to the application and construction given to serious health condition under the FMLA.

(c)(1) An employer or an approved private plan under § 3716 of this title shall collect and retain information from covered individuals verifying parental leave status, serious health condition, or qualifying exigency when a covered individual submits an application under this chapter. An employer shall require that a request for leave based on a serious health condition under paragraph (a)(2) or (a)(3) of this section be supported by a certification issued by the health care provider of the covered individual or of the family member of the covered individual, as appropriate. The covered individual shall provide, in a timely manner, a copy of the certification to the employer or an approved private plan under § 3716 of this title.

(2) A certification required under paragraph (c)(1) of this section is sufficient if it includes all of the following:

a. The date on which the serious health condition commenced.

b. The probable duration of the condition.

c. The appropriate medical facts within the knowledge of the health care provider regarding the condition.

d. A statement of the following, as appropriate:

1. For purposes of leave under paragraph (a)(2) of this section, a statement that the covered individual is needed to care for the family member who has a serious health condition and an estimate of the time that the covered individual needs to care for the family member.

2. For purposes of leave under paragraph (a)(3) of this section, a statement that the covered individual is unable to perform the functions of the covered individual's position.

e. If the leave is to be taken intermittently or on a reduced leave schedule under § 3706 of this title for planned medical treatment, the dates on which the medical treatment is expected to be given and the duration of the medical treatment.

f. If the leave is to be taken intermittently or on a reduced leave schedule under § 3706 of this title for purposes of leave under paragraph (a)(2) of this section, a statement that the covered individual's intermittent leave or leave on a reduced leave schedule is necessary for the care of the family member who has the serious health condition, or will assist in the family member's recovery, and the expected duration and schedule of the intermittent leave or reduced leave schedule.

g. If the leave is to be taken intermittently or on a reduced leave schedule under § 3706 of this title for purposes of leave under paragraph (a)(3) of this section, a statement of the medical necessity of the intermittent leave or leave on a reduced leave schedule and the expected duration of the intermittent leave or reduced leave schedule.

(3)a. If the employer or an approved private plan under § 3716 of this title has reason to doubt the validity of a certification provided under this subsection, the employer or private plan may require, at the expense of the employer or private plan, that the covered individual obtain the opinion of a second health care provider designated or approved by the employer or private plan concerning any information certified under this subsection. A health care provider designated under this paragraph (c)(3)a. may not be employed on a regular basis by the employer, Department or private plan.

b. If the second opinion under paragraph (c)(3)a. of this section differs from the opinion in the original certification provided by the covered individual under this subsection, the employer or private plan may require, at the expense of the employer or private plan, that the employee obtain the opinion of a third health care provider designated or approved jointly by the employer or private plan and the covered individual concerning any information certified under this subsection. The third opinion is final and binding on the employer or private plan and the covered individual.

(4)a. The employer or an approved private plan under § 3716 of this title may require that the covered individual obtain subsequent recertifications on a reasonable basis.

b. The standards for determining what constitutes a reasonable basis for recertification may be governed by a collective bargaining agreement between the employer or private plan and a labor organization which is the collective bargaining representative of the unit of which the covered individual is a part if such a collective bargaining agreement is in effect.

c. Unless otherwise required by the covered individual's health care provider, the employer or private plan may not require recertification more than once during a 30-day period and, in any case, may not unreasonably require recertification.

d. The employer or an approved private plan under § 3716 of this title shall pay for any recertification that is not covered by the covered individual's health insurance.

(d) The employer or an approved private plan under § 3716 of this title shall require that a request for leave based on a serious health condition under paragraph (a)(2) of this section of a family member be supported by documentation demonstrating the nature and extent of the relationship.

§ 3703. Duration of benefits.

(a) A covered individual is eligible for a maximum of 12 weeks of family and medical leave benefits in an application year.

(1) The maximum number of weeks during which parental leave benefits are payable under § 3702(a)(1) of this title in an application year is 12 weeks.

(2) The maximum aggregate number of weeks during which medical leave and family caregiving leave benefits are payable under § 3702(a)(2), (a)(3), and (a)(4) of this title in an application year is 6 weeks in any 24-month period.

(b) If 2 parents are entitled to leave under § 3702(a)(1), (a)(2), or (a)(4) of this title and are employed by the same employer, the aggregate number of weeks of leave to which both may be entitled may be limited by the employer to 12 weeks during any 12-month period. The Department may adopt regulations limiting aggregate family caregiving leave claimed by multiple family members for the same qualifying event under § 3702(a) of this title.

(c) Except for parental leave benefits, and as permitted under § 3706 of this title, a covered individual is eligible for benefits under this chapter not more than once in a 24-month period.

(d) An employer must approve or deny an application for benefits under this section within 5 business days of receipt of a completed application that includes documentation necessary to review the claim. If the claim is denied, the employer shall notify the covered individual of the reason for the denial.

(e) The employer must notify the Department, in a manner determined by the Department, within 3 business days of a claim being approved under this chapter. The first payment of benefits to a covered individual must be made within 30 days after the employer has notified the Department of the approved claim. Subsequent payments must be made every 2 weeks.

(f) An employer with less than 25 employees may elect, with notice to the Department and employees, for each employee to exercise not less than half of the employee's parental leave for 5 years from the start of benefits under § 3702 of this title.

§ 3704. Amount of benefits.

(a) The amount of family and medical leave benefits is to be determined as follows:

(1) The weekly benefit must be 80% of the covered individual's average weekly wages rounded up to the nearest even $1.00 increment during the 12 months preceding submission of the application.

(2) The minimum weekly benefit may not be less than $100 a week, except that if the covered individual's average weekly wage is less than $100 a week, the weekly benefit must be the covered individual's full wage.

(3) The maximum weekly benefit in 2026 and 2027 must be $900. In each year after 2027, the maximum weekly benefit must increase in proportion to the annual average increase, if any, in the Consumer Price Index for All Urban Consumers, Philadelphia-Camden-Wilmington Metropolitan area that is published by the Bureau of Labor Statistics of the United States Department of Labor. In each year after 2027, the period of change must be calculated from October 2026 to the October before the start of the calendar year. When the Department determines a maximum weekly benefit amount using the Consumer Price Index under this paragraph (a)(3), the amount must be rounded to the nearest even $5.00 increment as determined in the discretion of the Secretary.

(b) Family and medical leave benefits are not payable for less than 1 work day of covered leave taken in 1 work week.

(c) The Department shall determine, by regulation, how benefits are to be calculated for covered individuals with more than 1 source of wages and when 12 months of wages preceding the submission of application for benefits are not available to the Department.

§ 3705. Contributions.

(a) Payroll contributions are authorized to finance the payment of benefits under this chapter. The Department shall regulate the deduction, withholding, and payment of the contribution.

(b) Beginning on January 1, 2025, for each employee, an employer shall quarterly, or more frequently as regulated by the Department, remit to the Fund contributions in the form and manner determined by the Department.

(1) The contribution rate for medical leave benefits is as follows:

a. For 2025 and 2026, the contribution rate for medical leave benefits as a percentage of wages is 0.4%.

b. For 2027, and each calendar year after 2027, the Department shall set the contribution rate for medical leave benefits as a percentage of wages based on sound actuarial principles. The Department may not set the

contribution rate higher than the rate necessary to obtain a total amount of contributions equal to 125% of the medical leave benefits paid during the immediately preceding calendar year plus an amount equal to 125% of the cost of administration of the payment of those benefits during the immediately preceding calendar year, less the amount of net assets remaining in the Fund as of December 31 of the immediately preceding calendar year.

(2) The contribution rate for family caregiving leave benefits is as follows:

a. For 2025 and 2026, the contribution rate for family caregiving leave benefits as a percentage of wages is 0.08%.

b. For 2027, and each calendar year after 2027, the Department shall set the contribution rate for family caregiving leave benefits based as a percentage of wages on sound actuarial principles. The Department may not set the contribution rate higher than the rate necessary to obtain a total amount of contributions equal to 125% of the family caregiving leave benefits paid during the immediately preceding calendar year plus an amount equal to 125% of the cost of administration of the payment of those benefits during the immediately preceding calendar year, less the amount of net assets remaining in the Fund as of December 31 of the immediately preceding calendar year.

(3) The contribution rate for parental leave benefits is as follows:

a. For 2025 and 2026, the contribution rate for parental leave benefits as a percentage of wages is 0.32%.

b. For 2027, and each calendar year after 2027, the Department shall set the contribution rate for parental leave benefits as a percentage of wages based on sound actuarial principles. The Department may not set the contribution rate higher than the rate necessary to obtain a total amount of contributions equal to 125% of the parental leave benefits paid during the immediately preceding calendar year plus an amount equal to 125% of the cost of administration of the payment of those benefits during the immediately preceding calendar year, less the amount of net assets remaining in the Fund as of December 31 of the immediately preceding calendar year.

(c) *Limitation on benefits and contribution rates; evidentiary standard.*

(1) *General.* Notwithstanding a provision of this chapter to the contrary, this subsection controls with respect to benefits available under, and contributions required by, this chapter.

(2) *Contribution rate; limitation.*

a. For purposes of this subsection, "contribution rate" means the sum of the contribution rate for medical, family caregiving, and parental leave benefits.

b. If, after using the actuarial principles under § 3705(b) of this title, the Department determines that the contribution rate would exceed 1.00%, paragraph (c)(3) of this section applies.

(3) *Contribution redetermination; benefits reduction.* If, under paragraph (c)(2)b. of this section, the Department determines that the contribution rate effective as of the first day beginning on the next calendar year would exceed 1.00%, effective as of and for such calendar year the Department shall reduce the percentage of average weekly wages for employees from 80% to the lowest percentage of average weekly wages for employees as necessary to compute a contribution rate that does not exceed 1.00%.

(4) *Preservation of Fund balance.* Notwithstanding anything in this chapter to the contrary, after using the actuarial principles under § 3705(b) of this title and considering other information deemed appropriate under the circumstances by the Secretary, the Secretary may at any time reduce the percentage of average weekly wages for employees to the lowest percentage of average weekly wages for employees as necessary to attempt to prevent the projected balance of the Fund during the ensuing 12 month period from falling below a specific balance or other actuarially sound measure adopted by the Department.

(5) *Evidentiary standard*. An allegation of abuse in the exercise of the discretion authorized by this section must be established by clear and convincing evidence of actual abuse of discretion in the court then having primary jurisdiction.

(d) From the wages of an employee for whom a contribution is required under subsection (b)(1) of this section, an employer shall deduct not greater than 50% of the contribution required for the employee. However, an employer may elect to pay all or any portion of the employee's share of the contribution listed in subsection (b)(1) of this section.

(e) From the wages of an employee for whom a contribution is required under subsection (b)(2) of this section, an employer shall deduct not greater than 50% of the contribution required for the employee. However, an employer may elect to pay all or any portion of the employee's share of the contribution listed in subsection (b)(2) of this section.

(f) From the wages of an employee for whom a contribution is required under subsection (b)(3) of this section, an employer shall deduct not greater than 50% of the contribution required for the employee. However, an employer may elect to pay all or any portion of the employee's share of the contribution listed in subsection (b)(3) of this section.

(g) An employer's deduction from an employee's wages under this section may only be made concurrent with, and proportionate to, the liability incurred by the employer and the payment of wages to the employee. The employer is liable for the contribution at the time that wages are paid and shall remit the total contribution required under subsection (b) of this section to the Fund. If the employer fails to deduct wages of an employee when the wages are paid, the employer remains liable for the full amount of the contribution, including that amount not deducted from an employee's wages.

(h) A contribution that remains unpaid on the date it is due and payable, as determined by the Department, accrues interest, at a rate determined by the Department by regulation, from and after the due date until payment plus the accrued interest is received by the Fund. Interest collected under this section must be paid into the Fund.

(i)(1) An employer with an approved private plan under § 3716 of this title for medical leave benefits may not be required to remit the contributions required under subsection (b)(1) of this section.

(2) An employer with an approved private plan under § 3716 of this title for family caregiving leave benefits may not be required to remit the contributions required under subsection (b)(2) of this section.

(3) An employer with an approved private plan under § 3716 of this title for parental leave benefits may not be required to remit the contributions required under subsection(b)(3) of this section.

(j) The Department may require from an employer a sworn or unsworn report with respect to employees of the employer which the Department deems necessary for the effective administration of this chapter. Information provided to the Department in the report must be held confidential and must not be published or be open to public inspection, other than to employees of the Department, in a manner that reveals an employee's or employer's identity. However, an employer or employer's legal representative must be supplied with information from the report for purposes related to this chapter, and an employee or employee's legal representative must be supplied with information from the report that relates only to the employee for purposes related to this chapter.

(k) An employee and employer may opt to file a waiver of the payroll contributions required under this section when an employee's work schedule or length of employment with the employer is not expected to meet the requirements for eligibility for family and medical leave benefits.

(1) The employer shall provide notice to the employee that employee's work schedule or length of employment with the employer is not expected to meet the requirements for eligibility for family and medical leave benefits.

(2) The employee shall sign, and the employer shall submit to the Department, a form waiving the payroll contributions required under this section because employee's work schedule or length of employment with the employer is not expected to meet the requirements for eligibility for family and medical leave benefits.

(3) If, after an employee signs a waiver under paragraph (k)(2) of this section, the employee becomes eligible for family and medical leave benefits, the employee shall sign, and the employer shall submit to the Department, a form revoking the waiver under paragraph (k)(2) of this section. Deductions from wages may not begin until a waiver is revoked.

(4) The Department shall adopt a form for the waiver under paragraph (k)(2) of this section and the revocation of the waiver under paragraph (k)(3) of this section.

§ 3706. Reduced leave schedule.

(a) A covered individual may take covered leave on an intermittent or reduced leave schedule in which all of the leave authorized under this chapter is not taken sequentially. Intermittent or reduced leave may be taken only when medically necessary and supported by documentation as required by the certification requirements under § 3702 of this title. Family and medical leave benefits for intermittent or reduced leave schedules must be prorated.

(b) The covered individual shall provide the employer with prior notice of the schedule on which the covered individual will take the covered leave, to the extent practicable. Covered leave taken under this section may not result in a reduction of the total amount of leave to which an employee is entitled beyond the amount of leave actually taken.

(c) Nothing in this section is to be construed to entitle a covered individual to more leave than required under § 3703 of this this title.

§ 3707. Leave and employment protection.

(a) A covered individual who exercises the covered individual's right to family and medical leave benefits shall, on the expiration of the covered leave, be entitled to be restored by the employer to the position held by the covered individual when the covered leave commenced, or to a position with equivalent seniority, status, employment benefits, pay, and other terms and conditions of employment, including fringe benefits and service credits, which the covered individual had been entitled to at the commencement of the covered leave.

(b) During covered leave, the employer shall maintain any health care benefits the covered individual had before taking the leave for the duration of the leave as if the covered individual had continued in employment continuously from the date the covered individual commenced the leave until the date the family and medical leave benefits terminate. The covered individual shall continue to pay the covered individual's share of the cost of health care benefits as required before the commencement of the leave.

(c) An employer who violates this section or § 3708 of this title is liable to an employee affected for all of the following:

(1) Damages equal to all of the following:

a. The amount of any of the following:

1. Any wages or employment benefits denied or lost to the employee by reason of the violation.

2. In an action in which wages or employment benefits have not been denied or lost to the employee, any actual monetary losses sustained by the employee as a direct result of the violation, such as the cost of providing care, up to a sum equal to 12 weeks of wages or employment benefits for the employee.

b. Interest on the amount under paragraph (c)(1)a. of this section, calculated at the legal rate.

c. An additional amount as liquidated damages equal to the sum of the amount described in paragraph (c)(1)a. of this section and the interest under paragraph (c)(1)b. of this section. If an employer who has violated this section or § 3708 of this title proves to the satisfaction of the court that the act or omission that violated this section or § 3708 of this title was in good faith and that the employer had reasonable grounds for believing that the act or omission was not a violation of this section or § 3708 of this title, the court may reduce the amount of the liability to the amount and interest determined under paragraph(c)(1)a. and (c)(1)b. of this section, respectively.

(2) For equitable relief as may be appropriate, including employment, reinstatement, and promotion.

(d) An action under subsection (c) of this section may be maintained against an employer in a court of competent jurisdiction in this State by any 1 or more employees for and on behalf of the employees or the employees and other employees similarly situated.

(e)(1) The court in an action under subsection (c) of this section may, in addition to any judgment awarded to the plaintiff, award reasonable attorney fees, reasonable expert witness fees, and other costs of the action to be paid by the defendant.

(2) The court in an action under subsection (c) of this section shall award reasonable attorney fees to a defendant if the court finds the action was brought in bad faith.

(f) Except as provided under subsection (g) of this section, an action may be brought for a violation of this section or § 3708 of this title not later than 2 years after the date of the last event constituting the alleged violation for which the action is brought.

(g) In an action brought for a wilful violation of this section or § 3708 of this title, the action may be brought not later than 3 years after the date of the last event constituting the alleged violation for which the action is brought.

§ 3708. Retaliatory personnel actions prohibited.

(a) It is unlawful for an employer or any other person to interfere with, restrain, or deny the exercise of, or the attempt to exercise, any right protected under this chapter.

(b) An employer, temporary help company, employment agency, employee organization, or other person may not take a retaliatory personnel action or otherwise discriminate against an individual because the individual exercised rights protected under this chapter.

(c) Rights protected under this chapter include the following:

(1) The right to request, file for, apply for, or use family and medical leave benefits or covered leave.

(2) The right to communicate to the employer or any other person or entity an intent to file a claim, a complaint with the Department or courts, or an appeal, or testify or prepare to testify or assist in any investigation, hearing, or proceeding under this chapter, at any time, including during the period in which the individual receives family and medical leave benefits under this chapter.

(3) The right to inform a person about an employer's alleged violation of this chapter.

(4) The right to inform an individual of the individual's rights under this chapter.

(d) It is unlawful for an employer's absence control policy to count covered leave taken under this chapter as an absence that may lead to or result in discipline, discharge, demotion, suspension, or any other adverse action.

(e) Protections of this section apply to an individual who mistakenly but in good faith alleges violations of this chapter.

(f) This section is to be enforced as provided in § 3707(c) through (g) of this title.

(g) This section applies only to an employee who has been employed by the employer for at least 90 days.

§ 3709. Coordination of benefits.

(a)(1) Covered leave that also qualifies as leave under the FMLA runs concurrently with leave taken under the FMLA and may not be taken in addition to leave under the FMLA.

(2) An employer may require that payment made under this chapter be made concurrently or otherwise coordinated with payment made or leave allowed under the terms of disability or family care leave under a collective bargaining agreement or employer policy. The employer shall give employees written notice of this requirement.

(3) An employer may require the use of unused accrued paid time off before accessing family and medical leave benefits, and the use of accrued paid time off may count toward the total length of leave provided under this chapter, if the employee is not required to exhaust all paid time off. For purposes of this paragraph (a)(3) of this section, "paid time off" includes an employer's provision of vacation and sick leave.

(4) A covered individual may not access family and medical leave benefits if the use of family and medical leave benefits results in the covered individual receiving more than 100% of the covered individual's weekly wages.

(b)(1) This chapter does not diminish an employer's obligation to comply with any of the following that provide more generous leave:

a. A collective bargaining agreement.

b. An employer policy.

c. Any other law.

(2) An individual's right to covered leave may not be diminished by a collective bargaining agreement entered into or renewed, or an employer policy adopted or retained, after [the effective date of this Act].

(3) An agreement by an individual to waive the individual's rights under this chapter is void as against public policy.

§ 3710. Notice.

(a) An employer shall provide written notice to each employee that includes all of the following:

(1) The employee's right to family and medical leave benefits under this chapter and the terms under which it may be used.

(2) The amount of family and medical leave benefits.

(3) The procedure for filing a claim for family and medical leave benefits.

(4) The right to job protection and benefits continuation under § 3707 of this title.

(5) That discrimination and retaliatory personnel actions against the employee for requesting, applying for, or using family and medical leave benefits is prohibited under § 3708 of this title.

(6) That the employee has a right to file a complaint for violations of this chapter.

(7) Whether family and medical leave benefits are available to the employee through the State or an approved private plan under § 3716 of this title.

(b) An employer shall provide the notice required under subsection (a) of this section as follows:

(1) On hiring of the employee.

(2) When the employee requests covered leave or when the employer acquires knowledge that an employee's leave may be for a qualifying event under § 3702(a) of this title.

(c) An employer shall display and maintain a poster in a conspicuous place accessible to employees at the employer's place of business that contains the information required under subsection (a) of this section in English, Spanish, and any language that is the first language spoken by at least 5% of the employer's workforce, if the poster has been provided by the Department.

(d) The Department may adopt regulations to establish additional requirements concerning the means by which employers shall provide notice of this chapter.

(e) An employee shall provide notice of the employee's intention to take covered leave to the employee's employer 30 days in advance, if known, or as soon as practicable.

§ 3711. Appeal.

(a) The process for review of a denial of family and medical leave benefits is as follows:

(1) On a determination of an individual's claim for family and medical leave benefits under this chapter by the employer, the individual may request review of the determination by the Department within 60 days of the issuance of the determination. The Department shall review the denial and issue a determination to the individual in a time and manner determined by the Department.

(2) On determination by the Department under paragraph (a)(1) of this subsection or final determination by a private plan under § 3716 of this title, an individual may appeal the determination to the Family and Medical Leave Insurance Appeal Board established under subsection (b) of this section within 30 days of the issuance of the determination.

(b)(1) There is established a Family and Medical Leave Insurance Appeal Board ("Board").

(2) The Board consists of 3 members, appointed by the Governor for a term of 6 years.

(3) The Governor shall fill a vacancy on the Board during a member's term for the unexpired portion of the term.

(4) The Governor may, at any time, after notice and hearing, remove any Board member for gross inefficiency, neglect of duty, malfeasance, misfeasance, or nonfeasance in office. For purposes of this section, a member who is absent without adequate reason for 3 consecutive meetings or fails to attend at least half of all regular meetings during any calendar year is deemed to be in neglect of duty.

(5) Two members of the Board constitute a quorum. A vacancy does not impair the right of the remaining Board members to exercise all of the powers of the Board.

(6) The Governor shall designate 1 member of the Board as the Chair. If the term of the Chair expires or if the Chair becomes vacant for any cause, the Governor shall designate another member as Chair.

(7)a. The Chair of the Board must be paid $225 for each meeting attended, not to exceed 80 meetings each year.

b. Each of the other members of the Board is to be paid $175 for each meeting attended, not to exceed 80 meetings each year.

c. The members of the Board shall devote to the duties of the members' office the time necessary for the satisfactory execution of the office.

(c) The decision of the Board with respect to an individual's claim for family and medical leave benefits is final and binding on the parties.

(d) The Department shall implement procedures to ensure confidentiality of all information related to a claim filed or an appeal taken, to the maximum extent permitted by applicable laws.

(e) The Board shall conduct hearings under the Administrative Procedures Act, Chapter 101 of Title 29, except that the Board's hearings are exempt from the public meeting requirements of Chapter 100 of Title 29 to protect confidential health and privacy information.

(f) The Board may adopt regulations to implement this section.

§ 3712. Erroneous payments; disqualification for benefits.

(a) A covered individual is disqualified from family and medical leave benefits for 3 years if the covered individual is determined by the Department to have wilfully made a false statement or misrepresentation regarding a material fact, or wilfully failed to report a material fact, to obtain benefits under this chapter.

(b) If family and medical leave benefits are paid erroneously or as a result of wilful misrepresentation, or if a claim for family and medical leave benefits is rejected after benefits are paid, the Department may seek repayment from the recipient of benefits, with interest in an amount to be determined by the Department, consistent with § 3718 of this title. If benefits are paid due to wilful misrepresentation, the Department may seek an additional penalty of up to 50% of the overpayment and a penalty as permitted by § 3719 of this title.

(c) When the Department determines that an individual obtained an overpayment by fraud, in addition to any disqualification under subsection (a) of this section, the individual is disqualified from receiving family and medical leave benefits until the Department determines that all of the following have occurred:

(1) The total amount of the fraud overpayment, with interest, has been repaid in full.

(2) Any monetary penalty under this section has been paid in full.

§ 3713. Family and Medical Leave Insurance Program.

(a)(1) By January 1, 2025, the Department shall establish and administer a family and medical leave insurance program.

(2) By not later than the date specified in § 3702(a) of this title, the Department shall pay family and medical leave benefits as specified under this chapter.

(b) The Department shall establish, and make available to employers, reasonable procedures and forms for filing claims for benefits under this chapter and shall specify the supporting documentation necessary to support a claim for benefits, including any documentation required from a health care provider for proof of a serious health condition.

(c) The Department shall use information sharing and integration technology to facilitate the disclosure of relevant information or records so long as a covered individual consents to the disclosure as required under state law.

(d) Information contained in the files and records pertaining to a covered individual under this chapter is confidential and not open to public inspection, other than to public employees in the performance of their official duties. However, the covered individual, or an authorized representative of the covered individual, may review the records or receive specific information from the records on the presentation of the covered individual's signed authorization.

§ 3714. Federal and state income tax.

The employer or an approved private plan under § 3716 of this title shall advise a covered individual filing a new claim for family and medical leave benefits, at the time of filing the claim, of all of the following:

(1) Family and medical leave benefits may be subject to federal and state income taxes.

(2) Requirements exist pertaining to federal and state estimated tax payments on family and medical leave benefits.

(3) Under regulations established by the Secretary, applicable taxes will be deducted and withheld from the covered individual's payment of family and medical leave benefits.

§ 3715. Family and Medical Leave Insurance Account Fund; establishment and investment.

(a) A special fund designated as the Family and Medical Leave Insurance Fund is created. The Fund holds all revenues collected under this chapter. All moneys credited to the Fund are continuously available for expenditure in accordance with this chapter.

(b) The State Treasurer shall invest the Fund consistent with the investment policies established by the Cash Management Policy Board. The State Treasurer shall credit interest to the Fund on a monthly basis consistent with the rate established by the Cash Management Policy Board. Expenditures from the Fund may be used only for the purposes of the family and medical leave benefits program under this chapter. Only the Secretary or the Secretary's designee may authorize expenditures from the Fund.

(c) The Department may use expenditures from the Fund to pay for the costs associated with administering the provisions of this chapter.

§ 3716. Private plans.

(a)(1) Except as provided under subsection (e) of this section, an employer may apply to the Department for approval to meet the employer's obligations under this chapter through a private plan. To be approved as meeting an employer's obligations under this chapter, a private plan must do all of the following:

a. Provide one or more of the following:

1. Family caregiving leave to a covered individual for the reasons under § 3702(a)(2) and (a)(4) of this title for the maximum number of weeks in a benefit year required under § 3703(a)(2) of this title.

2. Medical leave to a covered individual for the reasons under § 3702(a)(3) of this title for the maximum number of weeks in a benefit year required under § 3703(a)(2) of this title.

3. Parental leave to a covered individual for the reasons under § 3702(a)(1) of this title for the maximum number of weeks in a benefit year required under § 3703(a)(1) of this title.

b. Allow a covered individual to take, in the aggregate, the maximum number of weeks of covered leave in a benefit year or 24-month period as required under § 3703(a) and (d) of this title.

c. If family caregiving leave is provided, allow family caregiving leave to be taken for all purposes specified under § 3702(a)(2) and (a)(4) of this title.

d. If family caregiving leave is provided, allow family caregiving leave under § 3702(a)(2) and (a)(4) of this title to be taken to care for any family member.

e. If medical leave is provided, allow medical leave under § 3702(a)(3) of this title to be taken by a covered individual with any serious health condition.

f. Provide a wage replacement rate during all covered leave of at least the amount required under § 3704(a)(1) of this title.

g. Provide a maximum weekly benefit during all covered leave of at least the amount specified under § 3704(a)(3) of this title.

h. Provide a minimum weekly benefit during all covered leave of at least the amount specified under § 3704(a)(2) of this title.

i. Allow covered leave to be taken intermittently or on a reduced schedule as authorized under § 3706 of this title.

j. Impose no additional conditions or restrictions on the use of covered leave beyond those explicitly authorized by this chapter or regulations issued under this chapter.

k. Allow an employee covered under the private plan who is eligible to take covered leave under this chapter to take covered leave under the private plan.

*l.* Providing that the cost to employees covered by a private plan is not greater than the cost charged to employees under the State program.

m. Provide an internal administrative review process and notice to employees of the option to appeal a final determination of the private plan to the Family and Medical Leave Insurance Appeal, consistent with § 3711 of this title.

(2) For a private plan to be approved as meeting an employer's obligations under this chapter, the private plan must also comply with all of the following:

a. If the private plan is in the form of self-insurance, the employer must furnish a bond running to the State, with a surety company authorized to transact business in this State as surety, in a form as may be approved by the Department and in an amount as may be required by the Department. This paragraph (a)(2)a. does not apply to public employers.

b. Provide for all eligible employees throughout their period of employment.

c. If the private plan provides for insurance, the policy must be issued by an admitted insurer, as defined under § 1904 of Title 18.

d. Submit a certification to the Department, in a form regulated by the Department, certifying that the plan meets the obligations of this chapter

(b) An employer may provide all family and medical leave coverage through an approved private plan or may provide 1 or more of medical leave coverage, family caregiving leave coverage, or parental leave coverage using an approved private plan and provide the remaining coverage not provided through an approved private plan using the State program.

(c) The Department may withdraw approval for an employer's use of a private plan granted under subsection (a) of this section when terms or conditions of the plan have been violated. The Department may withdraw approval for an employer's use of a private plan for any of the following:

(1) Failure to pay approved benefits.

(2) Failure to pay benefits timely and in a manner consistent with the State program.

(3) Failure to maintain an adequate security deposit.

(4) Misuse of private plan trust funds.

(5) Failure to submit reports to the Department as required by regulations adopted by the Department.

(6) Failure to comply with this chapter or the regulations adopted under this chapter.

(d) An employee covered by a private plan approved under this section retains all applicable rights under §§ 3707 and 3708 of this title.

(e)(1) Private benefits in existence on [the enactment date of this Act] that the Department deems to be comparable to the Family and Medical Leave Program under § 3713 of this title qualify as a private plan under this chapter for a period of 5 years from the start of contribution payments under § 3705 of this title if the Department's approval of private plans under this subsection would not adversely impact the solvency of the Fund.

(2) The Department may determine comparable value through consideration of factors including wage replacement, length of leave, interrelated benefits, eligibility criteria, or frequency of allowed leave.

(3) An employer seeking to qualify as a private plan under this subsection must notify the Department before January 1, 2024.

(f) The Department's denial of an employer's application under subsection (a) of this section, withdrawal of approval for an employer's use of a private plan under subsection (c) of this section, and decision under subsection (e) of this section are subject to the appeal process under § 3711 of this title.

(g) An employer that meets the employer's obligations under this chapter through a private plan may provide benefits greater than those required under paragraph (a)(1) of this section.

§ 3717. Small business opt-in.

(a) A small business may opt-in to provide parental leave benefits to its employees who are covered individuals. The small business may opt-in by providing notice to the Department in a manner determined by the Department. After the small business opts-in, the small business must remain opted-in for a period of at least 3 years and may opt-out of coverage for parental leave benefits with 12 months' notice to its employees and the Department, to take effect not sooner than the end of the 3-year period.

(b) A small business may opt-in to provide medical leave benefits to its employees who are covered individuals. The small business may opt-in by providing notice to the Department in a manner determined by the Department. After the small business opts-in, the small business must remain opted-in for a period of at least 3 years and may opt-out of coverage for medical leave benefits with 12 months' notice to its employees and the Department, to take effect not sooner than the end of the 3-year period.

(c) A small business may opt-in to provide family caregiving leave benefits to its employees who are covered individuals. The small business may opt-in by providing notice to the Department in a manner determined by the Department. After the small business opts-in, the small business must remain opted-in for a period of at least 3 years and may opt-out of coverage for family caregiving leave benefits with 12 months' notice to its employees and the Department, to take effect not sooner than the end of the 3-year period.

§ 3718. Powers of the Department.

(a) The Department shall administer and enforce this chapter.

(b) A complaint, on a form created by the Department, may be filed with the Department for noncompliance with this chapter.

(c)(1) The Department may audit employers for compliance with this chapter, as determined by the Department.

(2) Nothing in this chapter limits the Department of Insurance's jurisdiction over an insurer issuing an approved private plan.

(d) The Department may do all of the following under the Department's audit and investigative authority to determine noncompliance with this chapter:

(1) Enter and inspect, after 1 day's notice to the employer, the premises or place of business or employment and, on demand, examine and copy, wholly or partly, any or all books, registers, payrolls, and other records, including those required to be made, kept, and preserved under this chapter.

(2) Question any employer, employee, or other person in the premises or place of business or employment.

(3) Require from an employer full and correct statements in writing, including sworn statements, on forms prescribed or approved by the Department, with respect to the compliance with this chapter, as the Department may deem necessary or appropriate.

(4) Investigate such facts, conditions, or matters as the Department may deem necessary or appropriate to determine whether this chapter has been or is being violated.

(5) Hold hearings, administer oaths, and examine witnesses under oath, issue subpoenas, compel the attendance of witnesses and the production of papers, books, accounts, records, payrolls, documents, and testimony, and take depositions and affidavits in any proceeding before the Department. If a person fails to comply with a subpoena lawfully issued or a witness refuses to testify to a matter that the witness may be lawfully interrogated, the Superior Court, on application by the Department, shall compel obedience as in the case of disobedience of the requirements of a subpoena issued from the Court or a refusal to testify to the Court.

(e)(1) Following an investigation in which the Department makes an initial determination that an employer has violated 1 or more provisions of this chapter, or an initial determination that a covered individual received an overpayment or violated § 3712 of this title, the Department shall notify the employer or covered individual of the initial determination and of any amounts owed and shall provide the employer or covered individual with an opportunity to appeal the Department's determination to the Family and Medical Leave Insurance Appeal Board ("Board"). If the Department finds a violation of this chapter, the Department may issue civil penalties under § 3719 of this title.

(2) An initial determination that is not appealed within 15 days of the date of the notice is deemed a final determination, and the employer or covered individual shall pay any payments or penalties included in the initial determination to the Fund.

(3) If the initial determination is appealed within 15 days from the date of the notice, the Board shall hear the appeal within a reasonable time.

(4) The Board shall conduct a hearing on appeal under the Administrative Procedures Act, Chapter 101 of Title 29, and the regulations adopted by the Board. The decision of the Board is final unless appealed to the Superior Court within 30 days.

(f) The Department may institute an action in a court of competent jurisdiction for overpayments, penalties, unpaid contributions, or violations of this chapter. In an action brought by the Department under this subsection where judgment is entered for the Department, a court may award costs and, when so awarded, the same amount of costs must be allowed, taxed, and collected as are allowed, taxed, and collected for like services in the court.

(g) The Department has exclusive authority to settle any claim related to noncompliance with this.

(h) Nothing in this chapter limits the Department's power or authority under other law of this State which may be otherwise applicable to administer or enforce this chapter.

(i) The Department may not be required to pay the filing fee or other costs of the action or fees of any nature or to file bond or other security of any nature in connection with an action under this chapter or with supplementary proceedings as a condition precedent to the availability of any process in aid of the action or proceedings. The Department may join various claimants in 1 cause of action.

(j) Nothing in this chapter prevents a person from pursuing an action at law or in equity against an employer arising under other applicable law.

(k) In addition to the methods of collection authorized by this chapter, the Department may collect a final determination of liability of an employer or covered individual to the Fund by any manner available under other law of this State, including by any manner that unemployment tax assessments may be collected under Chapter 33 of this title, including §§ 3358, 3360, 3361, 3363, 3368, and 3369 of this title.

§ 3719. Penalties.

(a) An employer who violates or fails to comply with any requirement of this chapter, including failing to file reports as prescribed by the Department, failing to make contributions as required by this chapter, and failing to properly handle and remit wage deductions from employees to the Department, is deemed in violation of this chapter and is subject to a civil penalty of not less than $1,000 nor more than $5,000 for each violation.

(b) An employer who discharges or in any manner discriminates against an employee because that employee has made a complaint or has given information to the Department under this chapter, or because the employee has caused to be instituted or is about to cause to be instituted any proceedings under this chapter, or has testified or is about to testify in any proceedings is deemed in violation of this chapter and is subject to a civil penalty of not less than $1,000 nor more than $5,000 for each violation.

(c) A civil penalty claim may be filed in any court of competent jurisdiction.

(d) Funds from any civil penalty under this chapter, including an overpayment penalty as authorized by § 3712 of this title, must be deposited in the Fund.

§ 3720. Regulations.

(a) The Department may adopt regulations as the Department deems necessary or appropriate to administer or enforce this chapter. Except as may be otherwise provided by the Department, a regulation adopted under this section takes effect on publication.

(b) The Department of Insurance may adopt regulations with respect to private plans under § 3716 of this title.

§ 3721. Reports.

Beginning in 2027, the Department shall report to the General Assembly by April 1 of each year on projected and actual program participation by purpose under § 3702(a) of this title, gender of beneficiary, Fund balances, outreach efforts, and total utilization and amounts paid out of the Fund by category.

§ 3722. Public education.

(a) The Department shall conduct a public education campaign to inform employees and employers regarding the availability of family and medical leave benefits.

(b) The Department may use a portion of the funds collected for the family and medical leave benefits program in a given year to pay for the public education program.

(c) Outreach information provided under this section must be available in English, Spanish, and other languages spoken by more than 5% of the state's population.

§ 3723. Sharing technology.

The Department is encouraged to use State data collection and technology to the extent possible and to integrate the family and medical leave benefits program with existing state policies.

§ 3724. Departmental Report.

The Department shall, before July 1, 2029, submit a report to the General Assembly and the Governor on the family and medical leave insurance program. The report shall include information and data on program usage, program efficiency, finances, employee and employer program experience and feedback, program impact on recruitment, retention, cost, operations, worker morale, and productivity, and recommendations for program improvements.

Section 2. If any provision of this Act or the application of this Act to any person or circumstance is held invalid, the remainder of this Act or the application of the provision to other persons or circumstances is not affected.

Section 3. This Act takes effect on July 1, 2022.

Section 4. This Act is known as the “Healthy Delaware Families Act”.