

PUBLICATION

Delaware Becomes the 11th State to Enact Paid Family Leave

Authors: Donna M. Glover

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Following in Maryland's footsteps, on May 10, 2022, Delaware Governor Carney signed S.B. 1 known as the Healthy Delaware Families Act, which takes effect on July 1, 2022. In brief, the Act establishes a Family and Medical Leave Insurance Account Fund (Fund), which employers primarily fund with a 0.8 percent payroll tax. The Act provides eligible employees with up to 12 weeks of paid parental leave and six weeks of paid medical, caregiving, and military leave. Contributions to the Fund will begin on January 1, 2025, with benefits available to employees on January 1, 2026.

Which employers are covered by the Act?

Employers with at least 25 employees are subject to these parental, family caregiving, and medical leave provisions. Those with 10 to 25 employees must comply with parental leave provisions only, and compliance is optional for employers with fewer than 10 employees. The Act permits businesses to opt out of the obligations under the Act if they have an established paid leave program that offers comparable benefits. Employers will be required to apply to the Delaware Department of Labor for approval of any such private plan.

Who is an eligible employee under the Act?

"Employee" means any individual employed by an employer and who works in Delaware. Notably, employees "reporting for work outside of [Delaware]" are not considered employees for purposes of the Act, unless an employer chooses to consider those employees as working in Delaware.

Like the federal Family and Medical Leave Act, the Delaware paid leave law applies to employees who have worked at least 1,250 hours in the 12 months prior to the first date of leave and were employed for 12 months prior to the first date of leave.

How much is the employer payroll tax?

Employers will contribute an 0.8 percent payroll tax beginning on January 1, 2025. Employers may pass on to employees up to 50 percent of the tax, or they may pay the full tax on behalf of employees.

The tax is broken down into the following components: 0.4 percent for personal medical leave, 0.32 percent for parental leave, and 0.08 percent for caregiver and military leave. The contribution rates will remain constant for 2025 and 2026. Thereafter, the DDOL will set the contribution rates.

For what reasons may employees use benefits under the Act?

Beginning January 1, 2026, eligible employees may take paid leave for the following reasons:

- The birth, adoption, or placement through foster care of a child;
- Caring for a family member with a serious health condition (as defined under the federal FMLA);

- Having a serious health condition that makes the employee unable to perform the functions of their position; or
- A qualifying exigency (as defined under the FMLA).

Employees may take up to 12 weeks for parental leave in an application year (same as defined in the federal FMLA), and up to six weeks for medical leave and family caregiving leave in any 24-month period. Employees may not use more than 12 weeks of paid leave in an application year. They may take leave on an intermittent or reduced leave schedule basis, but only when medically necessary and supported by documentation as required by the certification requirements under the Act.

Leave taken under the Act must run concurrently with unpaid FMLA leave. Employers may require that employees use any accrued, unused paid time off before accessing benefits under the Act. If employees are not required to exhaust available paid time off but choose to do so, any paid time off used counts toward the total number of weeks of leave provided.

Employees must provide notice of their intention to take leave under the Act 30 days in advance, if known, or as soon as practicable.

What is the weekly benefit amount?

The weekly benefit will be 80 percent of the employee's average weekly wages, not to exceed \$900 in 2026 and 2027. Thereafter, the benefit amount will be adjusted for inflation.

Does the Act require employees' jobs to be protected?

Employees taking leave under the Act are entitled to return to the position held when the leave began, or to a position with equivalent seniority, status, employment benefits, pay, and other terms and conditions of employment. Employers also must maintain any existing health care benefits for the duration of the leave.

What notice must employers give to employees?

Employers are required to notify employees of the following:

- Their right to these leave benefits and the terms under which they may be used;
- The amount of leave available;
- The procedure for filing a claim for leave;
- The right to job protection and benefits continuation;
- That discrimination and retaliatory personnel actions against the employee for requesting; applying for, or using family and medical leave benefits is prohibited;
- That the employee has a right to file a complaint for violations of the law; and
- Whether family and medical leave benefits are available to the employee through the state or an approved private plan.

The notice must be given at the time of hiring and when the employee requests leave or when the employer has knowledge of a qualifying need for leave. Employers will also be required to display a poster with this information in English, Spanish, and any language that is the first language spoken by at least five percent of an employer's workforce.

The DDOL will intake leave benefit applications, process claims, and make claims determinations, and we expect the Department to issue regulations governing the Act. In the interim, employers should begin to

consider the implications of the Act on their businesses. In particular, they should consider whether a private plan submitted to the DDOL is a better option from a benefits integration standpoint. Employers also should begin to focus on readying their payroll systems for compliance with the contribution requirements, review current employer-provided paid time off and leave benefits and related policies to consider how the Act's provisions may interface with those benefits and policies, and consider what changes need to occur in current policies and handbooks.

Baker Donelson will continue to follow this development. The Firm's May 19, 2022, webinar briefly covered the steady uptick in paid family and medical leave laws in the District of Columbia and Delaware, Virginia's new law encouraging employers to establish insurance leave programs, and provided an in depth look at Maryland's recently-enacted Time to Care Act, which offers employees up to 12 weeks of paid family and medical leave and in some cases up to 24 weeks in a year. You may view the webinar [here](#).

If you have any questions or need assistance, please contact [Donna M. Glover](#) or any member of Baker Donelson's [Labor & Employment Team](#).