

# CLASP

The Center for Law and Social Policy

Christopher Counihan  
Division Director, Division of Paid Leave  
Delaware Department of Labor  
4425 North Market Street, 4th Floor  
Wilmington, DE 19802

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*Submitted via e-mail to PFML@Delaware.gov*

Dear Director Counihan:

The Center for Law and Social Policy (CLASP) appreciates the opportunity to submit these comments on the proposed rules defining and regulating the Healthy Delaware Families Act. The first section lists proposed regulatory provisions that CLASP supports, the second section lists provisions that we support with our suggested modifications, the third section includes provisions we have concerns about and recommend modifying, and the final section lists provisions we strongly recommend removing. The comments below are listed in each section in the order they appear in the proposed regulations.

CLASP is a national, nonpartisan, nonprofit advancing anti-poverty policy solutions that disrupt structural, systemic racism and remove barriers blocking people from economic justice and opportunity. With deep expertise in a wide range of programs and policy ideas, longstanding relationships with anti-poverty, child and family, higher education, workforce development, and economic justice stakeholders, including labor unions and worker centers, and over 50 years of history, CLASP works to amplify the voices of directly-impacted workers and families and help public officials design and implement effective programs.

CLASP seeks to improve the quality of jobs for low-income workers, especially workers of color, women, immigrants and youth. Our work includes working with policymakers to raise wages, increase access to benefits, implement and enforce new and existing labor standards such as paid family and medical leave, and ensure workers can strengthen their voice through collective bargaining. Quality jobs enable workers to balance their work, school, and family responsibilities—promoting economic stability and security.

## **I. CLASP supports the following provisions:**

**Section 3.4 & 3.5 - Employee thresholds:** The proposed requirement that employers who meet the employer size threshold to qualify for coverage must continue to provide coverage for the following twelve months is critical to ensuring predictability for employers and employees, as well as the Division of Paid leave. These clear guidelines will help the agency administer and enforce the program.

**Section 3.11 - Self-certification of family relationships:** Allowing workers to self-certify a family relationship will ensure the ability of workers to effectively use the benefits to which they are entitled without unnecessary administrative and paperwork burdens on workers, the people for whom they care, or the Division. It is also consistent with the relevant rules under the FMLA, making compliance with both laws easier for both employers and employees.

**Section 4.1.1.3 - Timeline to notify employees of reduction of benefits:** Providing notice to employees of a qualifying employers' intent to reduce parental leave benefits here will be critical to ensuring that employees are fully aware of their rights under the law.

**Section 17.5 - Rules regarding grandfathered plans:** While CLASP does not support the use of private plans in public paid family and medical leave programs due to their propensity to increase inequities, the Healthy Delaware Families Act does allow employers to apply for the approval of private plans (which must provide benefits that are comparable to the state plan). The proposed rules appear to fulfill the statutory command while also providing protection to workers by attempting to ensure that only those plans that are meaningfully comparable qualify.

- **Section 17.5.2** makes clear that employers seeking special grandfathered status must apply by January 1, 2024, as set out in the statute, and that employers who fail to apply by that deadline or whose applications are denied will be subject to the full requirements of the law. This reinforces the statutory commitment to ensuring the full protections of the law as the default.
- **Section 17.5.4** explicitly states that, in order for a plan to be considered comparable, employees must not be required to pay more than they would be required to contribute under the state paid leave plan established by law. This is a critical protection for ensuring that the comparable plan does not impose unfair financial burdens on workers.
- **Section 17.5.4 to 17.5.5** details that, for a plan to be considered comparable and accepted by the Division, the plan must be within 10 percent of the statutory benefit in benefit percent, maximum benefit, and benefit duration, ensuring a baseline of coverage for comparability across these critical criteria. This fulfills the statutory flexibility afforded to grandfathering, without depriving workers of coverage under the law if their employers provide notably less generous benefits. Any higher allowable variation undermines the promise made by the law to Delaware workers by grandfathering benefits that are not truly comparable.

## II. CLASP supports the following provisions with suggested modifications:

**Section 3.9 & 3.10 - Recertification:** Section 3.9 requires that a request for recertification be based on “objective, specific evidence of an event that brings the seriousness of the health issue into doubt,” developing a strong baseline for the necessity of the request. Furthermore, the requirement that a request for recertification be supported by a sworn, notarized statement (section 3.9.1) will ensure that employers must give due consideration to the impact of requiring recertification, rather than doing so casually or with ill intention. Additionally, requiring employers requesting recertification to cover any portion of the cost not covered by insurance

(section 3.10) will remove any financial burden imposed on workers by the employers' request for recertification.

However, we urge the Division to revise the proposed rule at section 3.9 regarding the timing of recertification requests for consistency with the FMLA regulations. The Division should clarify that where the initial medical certification indicates a minimum duration of leave longer than 30 days (whether continuous or intermittent) recertification cannot be requested until that minimum duration expires (or six months, whichever is longer), consistent with 29 CFR § 825.308(b). This revision will ensure ease of compliance where FMLA and Delaware leave are taken concurrently, while also protecting workers and health care providers against unnecessary and burdensome requests.

**Section 4.1.2 - Family caregiving leave:** Allowing someone who was receiving family caregiving leave to continue receiving paid benefits for up to seven days after the care recipient's death will provide those dealing with a loss some time to prepare to return to work. However, we request that notification be extended from two days to five days, as visiting the online portal may not be immediately possible in the aftermath of a loved one's death.

**Section 12.5 - Employer's responsibilities, adjudication, protections:** Section 12.5.3 requires employers to "make a good faith effort to assist the employee in the gathering of all the required information" This will support employees in accessing leave and promote collaboration in the application process. However, we are concerned by section 12.5.6.1 which suggests that the length of approved leave will only be "primarily" based on the health care provider's recommendation. We recommend revising this provision so that the length of an approved leave is based solely (not just "primarily") on the recommendation of a healthcare provider, as applicable, reflecting the provider's expertise and knowledge of the situation. Most employers lack the medical knowledge required to assess an employee's required leave duration.

### **III. CLASP is concerned about the following provisions and recommends modifications:**

**Online portal for filing:** The regulations emphasize that the online portal is the main means by which workers can submit claims and other important information. For example, see section 12.1 on employee claims processing, and section 12.7 on claims reviews. While the portal should remain the primary option, making it the only option available will be a substantial barrier for those without reliable internet access, including low-income workers, rural workers and workers of color; those who may be less comfortable with technology; some workers with disabilities; individuals who need help understanding and filling out forms; and people who require materials in language other than English.

We strongly urge the Division to provide alternatives, such as paper submission by mail, in person and fax, and submission by phone. Implementation in other states has shown that creating more accessible applications (including applications in different languages), and employing multiple submission methods can make the program easier to access and more equitable.

**Section 7.2 - Minimum duration of a leave on reduced schedule:** The regulations state that the shortest leave that can be approved will be one full workday. However, some workers will need short amounts of care on a regular basis, such as those receiving radiation treatment or dialysis or caring for a loved one undergoing treatment. Using an entire day of leave when only a few hours are needed will significantly reduce the amount of leave accessible to workers. This can also encourage workers to miss a full day of work, depriving businesses of workers willing and capable of working a partial day.

We suggest modifying this provision to align with the FMLA, which allows workers to take intermittent or reduced schedule leave for medical or military family care reasons. (Employees may use FMLA leave intermittently or on a reduced leave schedule for bonding with a new child if they and their employer agree.) Aligning with FMLA will make compliance with both laws easier for both employers and employees.

**Section 15.0 - Federal and state income tax:** The proposed regulation would have the Division withhold federal taxes from all worker benefits at the average federal effective income tax rate, regardless of workers' actual earnings and resulting tax liability. This would substantially over-withhold from workers with lower incomes, who may owe little or no federal income taxes, delaying access to much needed money for workers who are barely making ends meet and do not have savings to fall back on. Moreover, lower income workers may not have an obligation to file a return otherwise, so they may have to file just to get their income back. This has real costs in both time and money, if people use a paid preparer. It also creates an unnecessary administrative burden for workers, as well as state and federal officials.

For higher income workers, this flat withholding could incorrectly lead workers to assume that their federal income tax liability is addressed, when it is not, subjecting those workers to tax penalties down the line. A flat withholding tax is also highly unusual for a state paid leave program. In light of the Division's statutory obligation under section 3714(3) to withhold federal and state income taxes, the Division should request the necessary individual income information to calculate and apply appropriate withholding for each individual worker.

**Section 17.0 - Private Plans:** In addition to the existing language, we urge the Division to provide additional regulations detailing the requirements that private plans (including both those provided through commercial insurance and those that are self-insured) must meet to qualify, including those requirements outlined in section 3716(a) of the statute.

#### **IV. CLASP strongly recommends removing the following provision:**

**Section 6.2.2.2 - Different employee/employer contribution splits for different classes of employees:** We strongly recommend deleting this provision, which would allow employers to institute different employer/employee contribution splits for different classes of employee. Allowing such a practice would compound systemic racism and sexism and xenophobia in the labor market, making it incompatible with the statute's goal of equity. Additionally, it would be highly unusual for a state paid family and medical leave insurance program to institute such a provision, since no other state program employs such a practice.

Thank you for the opportunity to provide comments and for your work to implement paid family and medical leave in Delaware. We look forward to continuing to work with you in implementing the state's paid family and medical leave program. If you have any questions, please do not hesitate to reach out.

Sincerely,

Sapna Mehta, Senior Policy Analyst  
Center for Law and Social Policy