Maine Forest Products Council

The voice of Maine's forest economy

June 10, 2024

Maine Department of Labor
45 Commerce Dr.
Augusta, ME 04330

Re: Comments regarding Paid Family and Medical Leave Program Chapter 1, Rules Governing Paid Family and Medical

To whom it may concern,

The Maine Forest Products Council (the Council) submits comments today to highlight our concerns regarding the Maine Department of Labor's draft rules establishing a new Paid Family and Medical Leave Program, Chapter 1, Rules Governing Paid Family and Medical.

As background as to who we are, since 1961, the Maine Forest Products Council has been the voice of Maine's forest economy. The Council represents the diverse needs of Maine's forest products community. Our members are landowners, loggers, truckers, paper mills, tree farmers, foresters, lumber manufacturers and more. We welcome this opportunity to comment on the draft proposal before you today, as it would have ongoing and significant impacts on our membership, and the workforce that supports Maine's $8 billion forest economy.

Below you will find a breakdown by page of some specific concerns upon our initial review of the draft rules. As you will see, we have found a number of areas where we feel that the rules lack the clarity that is needed prior to the implementation of the program. Some areas are conflicting within the rules, or with statute. Others are drafted in ways that will make it next to impossible for operations to continue at current capacity when considering Maine's constrained workforce realities. Measures to prevent fraud within the draft are inadequate, and some obvious loopholes exist that would make the program too easy to exploit.

A more in-depth analysis is included below, however, a few of our more grievous concerns include:

- As drafted, the rules don't seem to include the requirement for a medical professional to sign off on the need for medical leave, as is required by other programs such as short-term disability. Without the backstop of a medical professional, this program is ripe for abuse.

- The timeline for employers to opt-out of the program is unreasonable, and out of step with how other states have handled private plans. Businesses who intend to opt-out of the program should be allowed to apply for an exemption the same day that payroll taxes begin, January 1, 2025. That would provide a three-month runway for the plan without overly burdening employers and employees that do not intend to participate in the program.

- The rules are written in a way that locks employers into specific private plans without allowing for flexibility to change plans once an exemption has been granted. There are many legitimate reasons why an employer may seek to change plans. It is unclear why the rules are so rigid when flexibility here may benefit both employers and employees.

- While the rules include mandatory penalties for noncompliance for employers, employees may not even have to repay the fund if found guilty of fraud. Penalties should be consistent to prevent fraud, and to protect fund solvency.

- The rules should require a waiting period in between qualifying events. Otherwise, employees could utilize this program, through intermittent or reduced-schedule leave, on an ongoing basis.

- Regarding undue hardship, the rules are out-of-step with statute. The statute says, "Use of such leave must be scheduled to prevent undue hardship on the employer as reasonably determined **by the employer**." [PL 2023, c. 412, Pt. AAA, §7 (NEW).] The draft rules state, "…all facts and circumstances surrounding the determination shall be considered **by the Department**…" This interpretation is inconsistent with the intent of the law and needs to be reworked. Additionally, the Department should not have the authority to unilaterally dictate work schedules and arrangements with decisions not being "subject to review."

- Affinity relationships are too loosely defined and lacks accountability. For example, there is no requirement for the individual being claimed as an affinity relationship to be notified or provide consent. There is also no inclusion of a medical provider. Additionally, as drafted, the rules would allow for multiple individuals to claim an individual as their "affinity" person, again, making the program vulnerable to abuse.

Finally, it will be critical for the rules to be drafted in a way to encourage employees and employers to work together to find alternative schedules that work for all parties involved, especially considering that employees will be allowed to utilize this program to care for individuals outside of their immediate family units.

The Council remains concerned about the impact these rules will have on our members' ability to operate. Without consideration of this new program, it is estimated that our industry will need an additional 5,000 employees by the year 2030 due to our aging workforce. And our industry isn't alone in these struggles. Just last week, at a Maine International Trade Center event, Governor Mills said, "… our economic growth is continuing to outpace the number of people who are available to work in Maine." We agree, which is why it is critical for DOL to take the time that is necessary to address these concerns before the program is live.

While it is understandable that employees deserve the ability to deal with personal family and medical matters, this program goes well beyond maternity/paternity leave. Adequate guardrails must be included to provide accountability and flexibility for Maine workers and businesses.

Thank you for your consideration. We strongly encourage the Department to provide additional opportunities for public comment if substantial changes are made to the draft rules.

Sincerely,

Krysta West

Krysta West
Deputy Director
Maine Forest Products Council

MFPC's observations regarding proposed PFML rules

Page 1:

- 2. "Affinity relationship" means a significant personal bond between a covered individual and another individual that is or is like a family relationship, regardless of biological or legal relationship.
    - **Definition is too openly defined.**

Page 2:

- 11. "Intermittent leave" means an employee taking varying periods of leave and returning to work throughout a period of approved covered leave time. Intermittent leave may be planned (i.e., for routine appointments) or unplanned (i.e., for a flare-up of a serious health condition).
    - **It is unclear how the seven-day waiting period impacts ability of employees to use intermittent or reduced schedule leave.**
    - **There is a 12-week limit on leave per year that begins on the first day leave is taken. There is no waiting period in between qualifying events. As drafted, these rules would allow employees to utilize intermittent or reduced schedule leave on a year-round basis, permanently. This was not the intent of the law.**
    - **If an unplanned medical event, such as a flare-up of a serious health condition, requires an employee to utilize intermittent leave for a few days, that should be considered sick leave, not medical leave.**

- 15. "Reduced schedule leave" means a leave schedule that reduces the typical number of days per workweek, or hours per workday, of an employee on a planned and consistent basis.
    - **This is inconsistent with Page 4, Section 2 which says, "Intermittent and reduced schedule leave may be taken by the covered individual in increments of not less than a scheduled workday." It goes on to say that leave can be used in smaller increments if the employer is agreeable, but "An employer is not required to agree to allow the use of increments of less than a scheduled workday…" If leave is required to be taken in whole day increments, how can the program compel employers to agree to reduced schedule leave that reduces the number of hours per workday? Do employers have the choice to refuse increments down to one hour, as allowed under the program, or not?**

Page 4:

- 2. Intermittent and reduced schedule leave may be taken by the covered individual in increments of not less than a scheduled workday. If a covered individual and their employer agree in writing, the covered individual may take intermittent or reduced schedule leave in smaller increments, except that the minimum increment is one hour. An employer is not required to agree to allow the use of increments of less than a scheduled workday but cannot refuse to allow the covered individual to use a full scheduled workday if refusing the use of a partial day. A covered individual who is self-employed and has opted into the fund must take leave in increments of one scheduled workday.

- **Some of our members with multiple facilities within the state operate different shift lengths based on union negotiations and other factors. Will mills, for example, operating one facility with eight-hour shifts and another with 12-hour shifts have different thresholds for what constitutes a scheduled workday? If so, employees, even within one company, will have different access points to the program.**

Page 5:

- 3. A covered individual taking family leave to care for an individual with whom they have an affinity relationship is limited to one such designated individual per benefit year.
  - **In addition to limiting affinity relationship designations to one per benefit year, a limit should also be placed on the number of people who can claim an individual as their affinity person to prevent misuse of this designation.**

- "To receive benefits, a covered individual must…Submit an application for benefits no more than 60 days before the anticipated start date of family leave and medical leave and no more than 90 days after the start date of family leave and medical leave;
  - **There are 12.8 weeks in a 90-day period. In effect, an employee could exhaust all leave under the program before even applying for coverage. How long are employers expected to keep positions open for employees who are out on leave, but have not applied for coverage? What if an employee is a no-show for 90 days, and then applies retroactively for coverage under this program? Are employers expected to hold positions open for 90 days following no-shows just in case an application is submitted at the end of leave?**

- A. Absent an emergency, illness or other sudden necessity for taking leave, an employee must give reasonable notice to the employee's supervisor of the employee's intent to use leave. For the purposes of this rule, 30 days written notice to the employer shall be presumed to constitute reasonable notice.
  - **We would suggest lining up the notice requirement with the eligibility requirement (60 days before the beginning of leave) so that notice is required to employers, in the event of a planned leave, at the same time employees are eligible to apply to the program.**
  - **This section says that written notice to the employer 30 days prior to leave constitutes reasonable notice, but section B on the next page (6) says, "The employer may not require an employee's notice to be in or on a prescribed form as long as the information provided is sufficient. Notice need not be provided in writing." This is inconsistent and should be clarified.**

- 4. When determining an employee's eligibility to obtain benefits, the number of days an employee has worked for an employer shall not be considered by the Administrator.
  - **The rules allow access to employees on day one of employment. This will create a level of unpredictability for employers that isn't workable.**

Page 9:

- V. If the Administrator finds that the employer's determination is reasonable and the application would otherwise be approved, the Administrator shall instruct the applicant and employer to attempt to work out a schedule that does not constitute an undue hardship within 14 days. If the applicant and the employer are unable to agree upon a schedule, the Administrator shall set a schedule it deems reasonable, and such decision shall not be subject to review.
  - **Every business is unique and has differing needs. An outside administrator should not be given the authority to set work schedules that are "not subject to review." If the administrator's resolution is unworkable, there must be an opportunity for the employer to appeal the decision.**

- B. If an applicant is not approved to obtain benefits, the Administrator shall notify the applicant and state the reason or reasons for the denial in the notification.
    - **The employer also need to be notified that the applicant is ineligible for leave.**

Page 10:

- 2. Medical leave benefits are not payable to a covered individual for the first seven (7) consecutive calendar days beginning with the first day of leave.
    - **Are employees eligible to utilize sick time in the first seven days? If using leave consecutively, does this waiting period extend the total leave time to 13 weeks?**

Page 11:

- 3. The covered individual's Weekly Benefit Amount is not subject to reduction by any of the following…b. Wages received from any other employer from whom the covered individual is not on leave;
    - **Allowing the employee to work other jobs while dipping into the PFML program leaves the program vulnerable to abuse.**

Page 12:

- D. A covered individual found to have committed PFML fraud shall be designated as ineligible pursuant to 26 M.R.S. § 850-D (5) and disqualified from benefits for a period of one year from the date of the final determination. The Department may demand repayment of any benefits paid as a result of PFML fraud.
    - **One year disqualification for fraud is not adequate. There should also be stiffer penalties for subsequent findings of fraud, including permanent disqualification from the program.**
    - **Suggested edit: The Department *shall* demand repayment of any benefits paid as a result of PFML fraud.**

Page 13:

- G. Employers with 15 or more covered employees shall remit one hundred percent (100%) of the premium but may deduct up to fifty percent (50%) of the premium from the employees' gross wages. Employers with fewer than 15 employees shall remit fifty percent (50%) of the premium but may deduct up to fifty percent (50%) of the premium from employees' gross wages.
    - **Employers with fewer than 15 employees should be exempt from paying the employer side of the tax.**

Page 14:

- A. An employer that has failed to remit premiums in whole or in part or failed to submit contribution reports on or before the last day of the month following the close of the quarter following the close of the quarter shall be assessed a penalty of 1.0 percent of the employer's total payroll for the quarter. The assessment imposed will apply to only the quarter in which the employer failed to remit premiums in whole or in part or submit contribution reports. In addition, the employer shall be liable for the full amount of family leave benefits and medical leave benefits paid to covered individuals for whom it failed to make premium contributions.
    - **Self-employed participants who are delinquent in paying into the fund should also be assessed a 1.0 percent penalty. All employers should be treated the same with regard to nonpayment.**

Page 16:

- Applications for substitution may be made after January 1, 2026, but an exemption may not be effective prior to April 1, 2026. Applications for substitution must be submitted on a form provided by the Department. Applications for substitution may be accepted on a rolling basis. An application fee set by the Department must be included with the submission of the application.
    - **Employers who plan to seek a substitution of a private or self-insured plan should not be required to pay payroll taxes into the system for five quarters before being allowed to apply for an employer substitution.**

- Employers approved for a substitution may not request cancellation of their substitution prior to the substitution expiration date except by a demonstration to the Department of good cause. Good cause includes, but is not limited to, evidence of a premium increase. If the Department approves the employer's request for cancellation, the employer may not re-apply for another substitution for three years from the date of cancellation.
    - **As drafted, if an employer seeks to change insurance carriers or plans, they cannot apply for another substitution for three years. It is not clear what the rule is trying to accomplish with this rigid prohibition, however, there are many good reasons why an employer may seek to change carriers or plans (cost of premiums, another comparably priced plan may provide more generous benefits for employees, etc.). It does not make sense to penalize employers who seek to change private plans, so long as the employees don't suffer from a lapse in benefits.**