

September 30, 2024

Luke Monahan
Director Paid Family and Medical Leave Program
Maine Department of Labor
50 State House Station
Augusta, Maine, 04333-0054

Dear Director Monahan,

Thank you for the opportunity to submit comments to the updated proposed rules relating to the Maine Paid Family and Medical Leave (“PFML”). The Maine Chamber of Commerce is a statewide organization representing more than 5,000 small and large businesses and is the largest statewide business group in Maine and has a profound interest in making the PFML program work for its members and employees. The PFML program is the most consequential state initiative to affect employers and employees alike in decades.

We appreciate the time and effort from the Department of Labor to draft an updated set of proposed rules in a short period of time. There are notable improvements in this updated rule. However, the Maine State Chamber continues to have significant concerns with some aspects of the rules. Most notably, the hardship provision we believe is inconsistent with the statute and must be revised. Moreover, there are necessary clarifications so that employers and employees will have the guidance and direction in the implementation.

The Chamber’s comments are divided into three topics: 1. Proposed rules that are contrary to the statute and need to be changed; 2. Proposed rules that need clarification; and 3. Topics that are not addressed in the updated proposed rules that need to be addressed in the final rules. We have attempted to outline the issues in the most expeditious way possible to identify concerns, but also suggest solutions.

Thank you for your consideration of these comments and we look forward to partnering in the implementation of Maine’s PFML program.

Sincerely,

Patrick Woodcock
President and CEO
Maine State Chamber of Commerce

I. PROPOSED RULES THAT ARE CONTRARY TO THE STATUTE AND NEED TO BE CHANGED

A. Rule Governing Application For and Approval Of Private Plans

1. Section XIII- Substitution of Private Plans

“Employer Substitution

- 1. An employer may request to substitute a substantially equivalent private plan pursuant to 26 M.R.S. § 850-H. The employer must identify when the proposed substitute plan is a) a fully-insured private plan, approved pursuant to section B, below, or b) a self-insured plan, approved pursuant to section C, below.*
- 2. Applications for substitution may be made after April 1, 2025. Applications for substitution must be submitted online 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...*
- 3. An approved substitution is valid for a period of three years.*
- 4. The exemption from the obligation of premiums being on the first day of the quarter in which the substitution is approved, except if the application for substitution is submitted less than 30 days prior to the end of a quarter, in which case the exemption is effective on the first day of the quarter following when the application for substitution was submitted, assuming it is an approval. If employee withholdings were made prior to the substitution being approved, the employer must refund the withholdings to the effective date of the exemption within 30 days from approval of the substitution and failure to do so may result in a revocation of substitution. The employer is responsible for premiums provided under the Act and this rule until the effective date of exemption and premiums provided under the Act and this rule until the effective date of exemption must be remitted and are non-refundable. While an employer must have entered a contractual obligation with a certified fully-insured plan or have submitted a bond if a self-insured plan to submit a substitution, the employer may choose to start benefit coverage by May 1, 2026 at the latest. If an employer is found to have not commenced benefit coverage after May 1, 2026 for a substitution approved prior to that date, they will be responsible for paying retroactive premiums from the date of the start of the exemption to May 1, 2026 and cannot deduct the employee’s share of the premium for these retroactive premiums. For substitutions approved after May 1, 2026, benefit coverage must commence on the first day of the first month following the approval of a substitution.” (Sec. XIII A1,2,4 emphasis added).*

The proposed rule on employer substitution of private plans, as amended, is contrary to the language and intent of the statute and exceeds the scope of the Department’s authority. Section 850-Q. The statute provides that, “Beginning on January 1, 2025, for each employee, an employer shall remit to the fund premiums in the form and manner determined by the administrator. Premiums must be remitted quarterly.” Section 850-F(2). This same section goes on to state, “An employer with an approved private plan under section 850-H is not required to remit premiums under this section to the fund.” Section 850-F(8). Section 850-H provides that, “An employer may apply to the administrator for approval to meet its obligations under this subchapter through a private plan. In order to be approved, a private plan must confer all of the same rights, protections and benefits provided to employees under

this subchapter, ..." Section 850-H(1). The proposed rule, as amended, delays the submission of applications for private plans until April 1, 2025 and fails to provide a deadline for the approval or denial of the applications for private plans. The proposed rule, in effect, requires employers to remit premiums to the fund for at least 3 months (or potentially much longer) before a private plan can ever be approved and without a mechanism for recovering those premiums once a private plan becomes effective. There is nothing in the statute that authorizes the Department to require employers to remit premiums to the fund for 3 months before approving a private plan. To the contrary, the statute expressly provides that an employer with an approved plan is not required to remit premiums to the fund. In order to cure this defect, employers should be permitted to apply for the substitution of a private plan prior to January 1, 2025 and the remittance of premiums should be stayed pending the Department's approval or denial of the private plan.

The proposed rule, as amended, provides that *"If employee withholdings were made prior to the substitution being approved, the employer must refund the withholdings to the effective date of the exemption within 30 days from approval of the substitution and failure to do so may result in a revocation of substitution. The employer is responsible for premiums provided under the Act and this rule until the effective date of exemption and premiums provided under the Act and this rule until the effective date of exemption must be remitted and are non-refundable."* This language suggests that the employer is responsible for the entire premium during the first quarter of 2025 and perhaps longer. Not only is this proposed rule contrary to the statute for the reasons set forth above, but it directly contradicts the statutory provision which allows an employer with 15 or more employees to deduct up to 50% of the premium for an employee from the employee's wages. Section 850-F(5).

The proposed rule, as amended, is also unconstitutional and will not survive judicial scrutiny. As currently written, the proposed rule amounts to an unconstitutional taking without just compensation, violates the equal protection clause of the constitution, and violates the due process clause of the constitution. The Chamber's prior comments, dated July 8, 2024, with regard to its constitutional challenges are incorporated herein by reference.

a. Unconstitutional Taking Of Private Property Without Just Compensation

The Takings Clause of the Fifth Amendment of the United States Constitution, applied to the states through the Fourteenth Amendment, prohibits the taking of private property for public use without just compensation. *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 122 (1978); *Hoffman v. City of Warwick*, 909 F.2d 608, 615 (1st Cir. 1990). The United States Supreme Court has recognized that even without taking physical possession, "if regulation goes too far it will be recognized as a taking." *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 326 (2002) (quoting *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922)).

In the proposed rule, as revised, the Department seeks to finance the Fund (Section 850-A(21)) by requiring all employers, including those who elect to substitute a private plan for the Program (Section 850-1(25)), to remit premiums to the Fund beginning on January 1, 2025. Employers who elect to use a private plan must still remit premiums for a period of at least 3 months, without any intention of using any benefits from the Fund, and without any ability to recover the premiums paid into the Fund between January 1, 2025 and the effective date of substitution. This amounts to an unconstitutional

taking of private property without just compensation. See *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 111, 160 (1980).

The Fifth Amendment's guarantee "was designed to bar Government from forcing some people alone to bear public burdens, which in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). To protect against unlawful takings, such forced exactions are only permissible when they are "a fair approximation of the costs of benefits supplied." *United States v. Sperry Corp.*, 493 U.S. 52, 60 (1989). As a result, when the government attempts to finance a benefit through a premium, rather than generally applicable taxes, it may only require the payment of those premiums by those who use the service or receive the benefit. Here, the proposed rule acts as a forced contribution to the Fund by all employers, without regard to the actual use of or benefit from the Fund and, therefore, cannot withstand a Fifth Amendment challenge.

The Department's attempt to finance the Fund by requiring all employers (regardless of whether they elect to use a private plan) to remit premiums to the Fund is inconsistent with the Fifth Amendment's fundamental principle. Indeed, where an employer elects to use a private plan, the premium payments required by the Department bear absolutely no relationship, let alone a reasonable relationship, to the benefits provided by the Fund since those employers will receive no benefit from the Fund. Instead, after remitting premiums to the Fund, those same employers will separately have to pay for benefits through the private plans they elect to use.

In addition, premiums are based on wages (Section 850-F(3)), which includes, among other things, bonuses. (Section IA27). However, the payment of benefits provision specifically excludes bonuses from the calculation of weekly benefits. (Section 850-C(2)). Clearly there is no reasonable relationship between the benefit and the premium.

The Department could have avoided this legal challenge by only requiring those employers who intend to use the Program, rather than a private plan, to remit premiums. That is what was envisioned by the statute which expressly provides that an employer with an approved plan is not required to remit premiums to the fund. Section 850-F(8).

b. Violation Of the Equal Protection Clause Of The Constitution

The Fourteenth Amendment of the United States Constitution, applied to states through the Fifth Amendment, prohibits state deprivations of life, liberty, or property without due process of law. *Bolling v. Sharpe*, 347 U.S. 497 (1954); *Amsden v. Moran*, 904 F.2d 748, 753-53 (1st Cir. 1990). By requiring all employers (regardless of whether they elect to use a private plan) to pay premiums to the Fund, the Department has deprived employers of their constitutional right to equal protection under the law. The Department arbitrarily creates a class of individuals (employers who elect a private plan) and imposes the costs of operating the Fund on that class of individuals who are no more likely to use or benefit from the Fund than an undifferentiated member of the general public who has not right or ability to use or benefit from the Fund.

Here, the Department has arbitrarily created a classification of individuals that are subject to unfavorable governmental treatment, and it has no legitimate basis for doing so. Instead of requiring employers to remit premiums to the Fund based on anticipated use of or benefit from the Fund, the Department has issued a blanket requirement for all employers doing business in the State of Maine to

pay premiums into the Fund. There is no rational relationship between the classification at issue and the end the government seeks to achieve. The Department subjects employers who elect a private plan to the same treatment as employers that participate in the Program, even though only the latter will receive any benefits from the Fund. This is a classic violation of the Equal Protection Clause.

c. Violation Of the Due Process Clause Of The Constitution

The Fourteenth Amendment of the United States Constitution prohibits the denial of equal protection under the laws to any person. Due process requires that the governmental action “employed must be appropriate to the achievement of the ends sought” and the “manner of exercising the power must not be unduly arbitrary or capricious.” *Seven Islands Land Co. v. Maine Land Use Regulation Com.*, 450 A.2d 475 (1981); *State v. Rush*, 324 A.2d 748, 752-53 (Me. 1974). As it relates to taxes and user fees, this means that there must be a reasonable fit between the tax or fee imposed and the benefit received. *Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines, Inc.*, 405 U.S. 707, 726 n.5 (1972) (“[t]he State’s jurisdiction to tax is, however, limited by the due process requirement that the ‘taxing power exerted by the state [bear] fiscal relation to protection, opportunities and benefits given by the state.’”) (quoting *Wisconsin v. J.C. Penney Co.*, 311 U.S. 435, 444 (1940)). For many of the same reasons discussed regarding the Takings and Equal Protection Clauses, the Department’s proposed rules regarding the remittance of premiums violates the Due Process Clause as there is no reasonable relationship between the premium imposed and the use of benefits and the Department’s blanket requirement is arbitrary and capricious.

d. Delay Of Approval Of Private Plans Is Also Inherently Unfair To Employees

The proposed rules regarding the timing of approvals of private plans are inherently unfair to Maine employees who, like their employers, will be required to pay into a program from which they will never receive any benefit. At least 50% of the cost of premiums will fall to employees through deductions from their hard-earned wages. This is particularly harmful to employees when premiums are based, in part, on the bonuses they receive in the first quarter of 2025, which in some instances, can be substantial. Employees who work for small employers with less than 15 employees in Maine will pay the entire premium. It is illogical and patently unfair to force employees to pay for benefits that they will never use. It also runs counter to the stated purpose of the program, which is to help Maine employees. Forcing them to pay for a program that they will never use will irreparably hurt Maine employees.

e. Suggested Solutions To The Issue of Timing Of Private Plan Approvals

The proposed rules regarding the timing of approvals for private plans must be removed from the final rules due to the constitutional challenges cited above and the negative and unfair impact to employees. There are options available that will allow the Department to ensure that private plans adhere to statutory requirements while also promoting fair and equitable treatment of employers and employees.

Maine should follow the example of several other states, notably Massachusetts, Connecticut, and Oregon, which granted employers the ability to declare their intent to seek a private plan before contributions started. This approach has been proven to be effective and financially successful. Massachusetts, for instance, has the highest integration of private plans in the country, while also having the highest level of fund solvency.

The proposal would allow employers to opt into a private plan prior to January 1, 2025. Employers would be permitted to file a Declaration of Intent to seek a private plan and would not have to submit contributions once the Declaration of Intent was accepted. Opt outs would be available on a quarterly basis until the program begins. Like Massachusetts, the Department would require that declarations be issued by an insurance carrier. This provides the Department with additional confidence that the employer has worked with a carrier with an approved plan. Carriers will work with the Department to follow-up on declarations to ensure compliance. To ensure full accountability, the Department would outline a rule that requires employers who declare intent to seek private plan coverage to be held accountable in the following ways:

- As a condition of having a Declaration of Intent accepted, employers agree to be held responsible for full contributions retroactive to January 1, 2025 if they fail to match their declaration with an approved equivalent policy.
- Employers would be held responsible for both the employer and employee share of the contribution in such a scenario, preventing employees from being harmed.

This proposal ensures compliance while acknowledging the importance of facilitating the employer's ability to select a plan that best meets their needs. This proposal also meets the requirements in the statute for the private plan exemption provision, minimizing the burden on Maine employers and employees. Finally, this proposal would promote a viable private plan market that reduces risk and administrative efforts on the state.

In response to concerns expressed with the rules regarding timing of private plan approvals, the Benefits Authority recently discussed the motion quoted below:

“MOTION: Instruct the DOL to revisit the timeline and ramp up period associated with private plans to ensure employers may select a private plan prior to 01/01/26, exempting employers from contributions to the state fund once an approved plan has been purchased and become active”

This proposal is not realistic and would violate the statute. Insurers cannot simply start administering private plans before the effective date of the program. Insurers cannot charge premiums before they begin providing benefits. They cannot legally begin providing benefits prior to May 1, 2026, because the statute clearly states that leave taken by an employee prior to the effective date of the program cannot be counted as ME PFML. Therefore, private plan administrators cannot begin administering the program before it legally exists. The better solution is to allow employers to file Declarations of Intent, as outlined above.

B. Rules Regarding Undue Hardship

As noted in more detail in the following discussion, the updated proposed rules regarding undue hardship are contrary to the statute and the statutory intent. Before discussing the ways in which these rules are contrary to the statute, we want to put into perspective the impact of these rules on businesses and employees in Maine. As noted below, although the statute allows an employer to determine when leave creates an undue hardship on the business, the updated proposed rules eviscerate that right. This issue has tremendous impact on employers and employees.

The proposed rule parachutes a “30 day” provision into the rule where the statute specifically allows the determination to be made by the employer. Effectively a business will not be able to claim an undue hardship if an individual requests leave 30 days prior to the scheduled time. The Maine DOL should spend more time with Maine businesses and understand the hardships they are currently experiencing with labor and meeting the seasonality of Maine’s economy.

Just one example is the impact on the restaurant industry. There are approximately 3360 restaurants in Maine. Many of these restaurants operate seasonally and earn the vast majority of their income over several months each summer. Many restaurant owners approached the Chamber with dire concerns over the limitations imposed by the draft rules on their ability to claim undue hardship when an employee takes leave. We would like to share their story with you.

A small restaurant operates seasonally. At the height of the summer, the restaurant employs 30 people. In the winter, only several part-time employees are employed. The income made in 3 months in the summer finances the restaurant for the entire year. If the chef (or dishwasher) is out of work for 12 weeks during the summer, the owner simply cannot operate the restaurant. They cannot find a replacement on 30 days’ notice (assuming notice is even provided) to work on a short-term basis without the security of continued employment. The owner will be forced to close the restaurant and lay off all of the other workers who were counting on that job. That is the reality of depriving employers in Maine of the ability to claim undue hardship.

There are many more examples to share. Just a few to consider. A small retail gift shop with 3 employees that earns the majority of its annual revenue in December. The store cannot open on December 23, the busiest day of the year, because the only employee scheduled to work that day unexpectedly took ME PFML leave. An owner of a lobster boat whose sole employee takes leave prior to the summer haul, which in 2023 the Maine lobster fishery landings for the months of July, August, and September and October accounted for 66 percent of the total catch. A small blueberry company whose employee takes leave at the start of the harvest. These are just a few real examples of Maine employers who need to have the ability to claim undue hardship that is provided to them in the statute and which, at a minimum, is necessary for them to survive. This program was intended to help Maine employers and employees, not hurt them and the updated proposed rules will harm many Maine employers and the employees that count on them for their livelihood.

1. Section V-Notice and Undue Hardship

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.”*

This provision conflicts with the statutory language. The statute allows the employer to determine what creates an undue hardship. There is no support in the statute for any presumption that as long as the employee provides sufficient notice, an employer cannot claim an undue hardship, even if it would have a significant impact on the business. There is also no support for a presumption that 30 days is reasonable notice. In fact, in the statute, use of leave and notice are two completely separate concepts, as noted in the statutory language quoted below.:

“Absent an emergency, illness or other sudden necessity for taking leave, an employee shall give reasonable notice to the employee’s supervisor of the employee’s intent to give notice under this subchapter. Use of such leave must be scheduled to prevent undue hardship on the employer as reasonably determined by the employer.” Section 850-B (7).

There are situations where a requested leave could result in an undue hardship regardless of how much advance notice is provided. For example, if a small employer receives multiple requests for PFML, the first request might not cause an undue hardship but the second or third request may cause undue hardship. Notice does not negate undue hardship, and the statute does not support the conclusion that it does.

b. *“The employer may reasonably determine that scheduling of leave creates an undue hardship. An employer may not claim an undue hardship with respect to the scheduling of foreseeable leave if sufficient notice has been provided, pursuant to paragraph A, unless the employer establishes that, in the specific context of the employer’s business, the amount of notice provided was insufficient. “Undue hardship” means a significant impact on the operation of the business or significant expenses, considering the financial resources of the employer, the size of the workforce, and the nature of the industry. An employer’s determination of undue hardship shall be considered reasonable if:*

1. The employer provided a written explanation of the undue hardship to the employee, demonstrating, based on the totality of the circumstances, how the absence of the specific employee and the specific timing of the employee’s requested leave will cause significant impact on the operation of the business or significant expenses;

2. The employee retains the ability to take leave within a reasonable time frame relative to the proposed schedule; and

3. The employer has made a good faith attempt to work out a schedule for such leave that meets the employee’s needs without unduly disrupting the employer’s operations.” (Sec. VC5)

The updated proposed rules on undue hardship do not comport with the statute or statutory intent. The statute provides that “Use of such leave must be scheduled to prevent undue hardship on the employer as reasonably determined by the employer.” Section 850-B (7). The updated proposed rule impermissibly goes beyond what is clearly written in the statute and in fact, completely rewrites the statutory provision. The statute places *on the employee* the burden of scheduling leave in a manner that prevents undue hardship. Yet, the updated proposed rule places that burden on the employer. It also burdens the employer with providing written notice to the employee of the hardship. This requirement is not contemplated in the statute and will create administrative burden on the employer. It will also impede the process of discussion of alternatives. Moreover, under the updated proposed rules, the employer must still permit the employee to take leave within a reasonable time frame relative to the proposed schedule. If the requested time frame creates an undue hardship, how will the employer be able to approve leave within the same time frame? This completely contradicts the statutory language that permits the employer to determine what creates an undue hardship.

Finally, *the employer* has to make a good faith effort to work out a schedule that *meets the employee’s needs*. This is the exact opposite of what is required in the statute. The statute clearly places the burden for arranging foreseeable leave in a manner that does not create an undue hardship on the employer. The statute provides a framework that is similar to the FMLA, which requires the employee to schedule

leave for planned medical treatment in a manner that is least disruptive to the employer's operation. At a minimum, the entire section discussing undue hardship must be re-written to be in line with the statute (see additional discussion of proposed resolutions below).

Another significant issue with the updated proposed rules is that there is no undue hardship defense for unforeseeable leave. Unforeseeable leave can create more of a hardship on an employer than foreseeable leave. The rules also do not define what is foreseeable vs. unforeseeable. For instance, if an employee knows that they will need surgery 20 days in advance, is that unforeseeable because they do not have 30 days' notice of the need for leave? Who judges what is foreseeable? How will the administrator or employer test whether the employee could have given notice earlier?

*c. "If medical leave is requested, the employer's proposed schedule is subject to the review of the employee's health care provider. If the employee's medical provider states that the employer's proposed schedule is not reasonable, then undue hardship does not apply."
(Sec. VD)*

No hardship can be claimed if the employee's medical provider disagrees with the employer's reasonable determination. This is not contemplated in the statute (instead, it is based solely on what is reasonable for the employee without consideration of the impact on the employer or its other employees) and will create a significant burden on employers. Lack of provider agreement does not negate undue hardship to the business.

d. "If the Administrator finds that the employer's determination of undue hardship is not reasonable, the Administrator shall notify the employer in writing, and the application shall be processed in accordance with these rules with the employee's requested schedule. The employer or employee may appeal the Administrator's finding in this section pursuant to section XV within 15 business days of the notice."

The Administrator can override the employer's good faith finding of undue hardship. This is not contemplated in the statute. The mechanism for proving undue hardship is exceedingly difficult and is already stacked against the employer. The Administrator should not be second guessing the employer's determination, particularly since the Administrator will have no first-hand knowledge of the impact of the leave on the employer's operation. In addition to being contrary to the statute, Section V, in its entirety, is contrary to the statutory intent. The intent in including an undue hardship defense was to allow employers to deny leave if it would create an undue hardship on business operations. This entire section is aimed at preventing employers from being able to avail themselves of the defense that is lawfully theirs to use. At a minimum, this section needs to be amended to conform to the statute and a reasonable list of factors that could be found to create an undue hardship should be included. Such factors should include a presumption that an undue hardship exists whenever any of the following factors exist: 1. the employee has a specialized role with the company; 2) the unemployment rate in the county in which the employee works is below 5 percent; 3) the size of the employer and 4) the employee is a seasonal worker taking leave from June-August. There should also be special consideration for employers with less than 15 employees, as leaves impact them tremendously and can result in an inability to continue operations.

Undue hardship would also be negated if ME PFML matches the FMLA provisions regarding intermittent and reduced schedule leave when the leave is not medically necessary. Under the FMLA, an employer can decide whether to allow employees to take bonding leaves on an intermittent or reduced schedule.

Employees are still allowed to take bonding leave, but the employer has discretion to ensure that such leave is taken in a way that minimizes disruption to business operations. Adding a similar provision to the final rules would greatly assist employers and would alleviate the administrative burden and negative business impacts that the updated proposed rules will impose on employers.

Ultimately, a more effective solution is to remove the right to reinstatement from ME PFML and utilize the existing strong protections under state and federal law. Employees have the right to job protection and reinstatement under the FMLA and ME FMLA. These laws provide more than adequate protection for Maine employees. ME PFML should be an income replacement vehicle only, and employers should continue to provide job protection/reinstatement rights when required under FMLA and ME FMLA. Since ME FMLA applies to small employers and covers employees regardless of the hours worked for the employer, it provides significant protection to Maine employees. It would also ease confusion and complexity if ME PFML were a source of income protection only, since employers and employees will be forced to try to understand how at least three (3) different laws which provide varying degrees of job protection will apply to the same absence. This is the approach taken by other states, and of particular note, is the approach taken by California, which is undoubtedly a state that provides very generous employment protections to employees. CA does not provide reinstatement rights through its statutory paid family and medical leave program, since federal and state laws provide job protection to employees. Other programs, such as CT PFML, DC PFL, HI TDI, NJ TDI (except for organ donation), NJ TCI, NY DBL and RI TDI do not provide job reinstatement rights. DE PFML will mirror FMLA and provides no greater job protection rights than FMLA. Removing reinstatement rights will allow an employer to fill the position if there is an undue hardship, but will continue to provide the employee with the income protection that they may need.

II. PROPOSED RULES THAT NEED CLARIFICATION

The following rules are vague or unclear and need further clarification in order to ensure consistent interpretation and understanding. Although these issues were raised during the comment period for the first set of rules, they were not addressed in the updated proposed rules. For ease of review, we have included the text of the rule verbatim in most instances so that the reader does not have to cross reference the updated proposed rules when reviewing the comments.

A. Section IA-Definitions

1. *“Calendar week’ means a period of seven consecutive calendar days, beginning on a Sunday.” (Sec. IA6)*

Since the benefit year is defined in the statute as “the 12-month period beginning on the first day of the calendar week immediately preceding the date on which family leave benefits or medical leave benefits commence,” (Section 850-A(5)) this presumably impacts the definition of benefit year to make it the 12-month period that starts on the Sunday before leave starts (and ends 52 weeks later). If that is accurate, it should be more clearly articulated to reduce confusion. Moreover, if that is accurate, the benefit year does not align to the 12-month period under FMLA and could result in ME PFML not having the same 12-month period as FMLA, which can create confusion and increase complexity. Additionally, many employers do not use a Sunday-Saturday workweek. How will this work for those employers? Since the statute does not define the benefit year as starting on the Sunday before leave starts, employers should be allowed the option of using their workweek or the 12-month period that they use for FMLA. At a

minimum, since private plans may have a different measurement period under the proposed rules (see Section VIII D4c), the Department should affirmatively state that employers with private plans have that option, although it would be helpful for all employers.

2. *“‘Family leave’ means leave requested by an employee for the reasons set forth in 26 M.R.S. § 850-B (2) or 26 M.R.S. § 843 (4). For the purposes of this rule, a self-employed individual who has elected coverage and a salaried employee as defined by 26 M.R.S. § 663(3)(K) have a scheduled workweek of 40 hours, Monday-Friday, 8 hours per day.” (Sec. IA11)*

The definition of “family leave” is the same definition as the statute; however, the definition includes reference to medical leave, which is defined separately in the proposed regulations. If family leave and medical leave are to be defined separately, this definition should be changed to remove the inconsistency and to make it clear that “family leave” does not include medical leave. This conflation of family and medical leave is also not just related to an imprecise definition. Throughout the updated proposed rules, medical and family leave are treated the same, even though the standards for each can sometimes vary. For instance, although undue hardship is addressed in the same manner for family leave and medical leave, the proposed rules render a hardship defense all but impossible for requests for medical leave.

4. *“‘Waiting period’ means the period in which medical leave benefits are not payable for approved leave under this Act beginning on the day the claim was filed.” (Sec. IA26)*

The proposed rules do not specify whether the waiting period counts towards the employee’s PFML entitlement. The Department should clarify that the waiting period counts towards the entitlement. Otherwise, individuals will receive an additional week of leave that is not contemplated by the statute since the statute provides “A covered individual may not take more than 12 weeks, in the aggregate, of family leave and medical leave under this subchapter in the same benefit year.” Section 850-B(4). Allowing the waiting period to not count towards the overall limit would contravene the statute.

B. Section II-Coverage

1. *“‘Wages paid in the State’ means all remuneration for personal services, including tips and gratuities, severance and terminal pay, commissions, and bonuses, but does not include remuneration for services performed by an independent contractor as defined by 26 M.R.S. § 1043 (11) (E).” (Sec. IIA1)*

The updated proposed regulations added severance and terminal pay to the definition of wages. This is not supported in ME law. Severance is not considered wages under ME law, and there is no authority to add this to the updated proposed rules. See *Bellino v. Schlumberger Technologies, Inc.*, 753 F. Supp. 391, 393 (D. Me. 1990). It is also unclear how this addition will impact both contributions and benefits. Does this mean that employers must take contributions out of severance or an employee’s final pay? Both would be unfair to the employee. An employee may be receiving a large severance package that is intended to help the employee bridge the gap to finding new employment. Taking contributions from severance can result in financial hardship to the employee. It would also be burdensome to the employer. Employers would have to add severance amounts to their Wage Reports manually, since severance is not a wage that an employer would report.

2. *“‘Wages’ are calculated in the same manner as Maine unemployment wages in 26 M.R.S. § 1043(19)(B-E) except that employees subject to wages include all employees with the exception of*

Section II (B) of these rules, and excludes wages above the base limit established annually by the federal Social Security Administration for purposes of the federal Old-Age, Survivors, and Disability Insurance program limits pursuant to 42 U.S.C. § 430. Wages include remuneration for services performed in the State or wages which are otherwise subject to Maine unemployment tax pursuant to 26 M.R.S. § 1043(11) (A) and (D).” (Sec 2A1)

The updated proposed regulations added a provision that wages are calculated in the same manner as unemployment wages “except that employees subject to wages include all employees.” It is unclear what this means. What employees are subject to wages that are not covered under unemployment? Without clarity, it is also impossible to know if this change is permitted by the statute. This needs to be clarified and if it exceeds statutory authority, it needs to be removed.

C. Section III-Use and Types of Leave

1. *“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.” (Sec. IIIB2)*

The final rules should clarify the impact to the PFML entitlement and benefit amount if an employer agrees to allow intermittent leave in less than one day. The proposed rules address the impact of intermittent leave on pay and appear to establish that benefits will be paid for intermittent absences of less than a full day. However, that should be more clearly stated. Moreover, the rules should state the impact to the PFML entitlement and make clear that the intermittent hours will be deducted from the overall entitlement. The final rules should also address the intersection of ME PFML and FMLA. Since employers must have an FMLA increment that matches the increment they use for other time away from work (provided it is not greater than one hour), many employers use an FMLA increment that is less than one hour. If the Department does not want to issue benefit payments in less than one-hour increments, the final rules should clarify that leave taken in less than a full hour should be aggregated and once the leave reaches one hour, the employee should be required to report the time so that benefits can be paid in one-hour increments and the time can be deducted from the entitlement.

2. *“Payments will be prorated based on the number of hours of leave used by a covered individual and reported to the Administrator, divided by the number of hours the covered individual is scheduled to work in the week. If the covered individual’s schedule is so variable that it is difficult to determine how many hours the covered individual would have worked in the week were it not for taking leave, the Administrator will determine the covered individual’s scheduled workweek as the average number of hours worked by the covered individual in each of the previous 12 weeks. If the Administrator is not able to obtain information about the covered individual’s previous 12 weeks of hours worked after reasonable attempts to obtain said information the Administrator will assume a schedule of Monday through Friday, 8 hours per day. For the purposes of this paragraph, “hours worked” means any hours the employee was or is scheduled to work, regardless of whether the employee actually worked those hours or used authorized leave to cover those hours.” (Sec. IIIB3)*

This proposed rule needs to be clarified in the final rules. This section (and the definition of work week) appear to require an analysis of each week individually vs. an average work week (unless the employee has a variable schedule). Most of the paid family and medical leave programs use an average work

week. It will be administratively burdensome and complex to determine payments and entitlements based on each individual workweek. It also does not make sense to use a form of average workweek for variable schedules but not for other types of schedules.

The proposed rule defines the workweek for an employee working a variable schedule to be the average number of “hours worked” during the prior 12 weeks. Yet, although the language includes the phrase “hours worked,” it is further defined to actually be hours scheduled to work. The language should be changed to reflect this. “Hours worked” is a term of art under the Fair Labor Standards Act and means hours actually worked. It does not mean hours scheduled to work. Moreover, the variable schedule calculation does not match FMLA and will result in confusion and misalignment of ME PFML and FMLA entitlements, since FMLA uses the average number of hours the employee was *scheduled to work in the prior 12 months*. We recommend that the FMLA variable schedule calculation be used for ME PFML as well.

Additionally, although variable schedules are addressed in this proposed rule, the only variable schedules that are addressed are those that are so variable that it is difficult to know what the employee would have worked if they had not taken leave. There are many other schedules that vary or change but with regularity that do not fit the definition of “variable schedules” under this proposed rule. For instance, an employee may be regularly scheduled to work 60 hours one week and 20 hours the next week on a regular cadence. That does not meet the definition of variable schedule, but employers need to understand how the entitlement and benefits will be calculated for employees working those types of schedules.

Finally, it will be important to clarify the process for obtaining confirmation of the relevant hours to determine the possible impact and fairness of the assumption that will be made if no response is received. If the employer and employee are both asked for the information and an assumption is only made if neither responds, it is fair. If only the employer is asked for confirmation of hours, some employers may not respond if the employee is part-time since the employer will know that full-time hours will be deducted from the entitlement if the employer does not respond..

3. “A covered individual approved for intermittent leave is not required to file a separate application for each occurrence of intermittent leave but must report any leave taken to the Administrator within 15 days after each occurrence for the purposes of providing benefits. A covered individual must still inform their employer of any intermittent leave use according to the employer’s reporting policies.” (Sec. IIIB4)

Intermittent leave is consistently one of the biggest pain points for employers when it comes to managing employee leaves. There is no provision in the statute that permits an employee to report intermittent leave within 15 days. 15-day requirement for an employee to report intermittent leave is far too long and will result in business disruption and hardship for employers. Employers cannot wait 15 days to determine whether an absence is qualifying under ME PFML, particularly for employees who are eligible for job protection under the law. Although the updated proposed rule is an improvement in that it requires the employee to report intermittent absences to the employer according to the employer’s reporting policies, it does not provide for any penalties for an employee who fails to do so. We recommend amending this to provide that if an employee does not provide adequate notice to the employer, the Department may deny benefits.

4. *“If an applicant applies to take intermittent or reduced schedule leave from two or more employers participating in the Fund, the applicant must provide, for each employer, a leave schedule agreed to by the applicant and the employer that provides information regarding the number of hours the applicant is scheduled or anticipated to work for a specific workweek and the number of hours the employee will use leave for on a reduced or intermittent basis for each workweek during leave for benefit proration. The Weekly Benefit Amount is prorated based on the number of hours of leave taken from any of the employers from whom the covered individual is on leave and the covered individual’s scheduled hours for all of the employers from whom the covered individual is on leave. In the absence of such agreement, the Administrator will determine the applicant’s scheduled hours.” (Sec. III B5)*

Requiring the employee to work with both employers to agree to the intermittent schedule needed is very beneficial to employers, as this will reduce disruption. However, it is unclear how this will work in practice. The final rules should confirm that either employer is permitted to refuse to agree to the intermittent schedule if it will create an undue hardship. If the employer does not agree to the schedule due to hardship, how does the department know what the scheduled hours are or should have been? It is also unclear how the entitlement will be calculated. If the entitlement will be based on total hours scheduled to work across all employers but only the time missed for each employer is counted against the entitlement, the employee will receive a larger entitlement if the employee decides not to take leave from all employers, and that is inconsistent with the statutory scheme. For instance, if an employee works 20 hours for 2 employers and the entitlement will be calculated to be 40 hours per week, if the employee only takes leave from one employer, the employee will only be using only ½ of a week’s entitlement, even though the employee is out for all scheduled weekly hours from that employer. Therefore, the final rules should confirm that the entitlement is per employer. There is nothing in the statute that would prohibit such an approach.

C. Section IV-Eligibility

1. *“to receive benefits, a covered individual must:...*

4. Be employed as of the date of application for benefits if applying in advance of leave, or be employed as of the date of leave beginning if applying retroactively for leave; (Sec. IV A4).”

This section was newly added in the updated proposed rules and should be either removed or clarified. To the extent that this section means that a terminated employee can file for benefits as long as they request benefits to begin while employed, that exceeds the statute. The way this is written it could allow an employee who has been terminated or who quits but is in an unpaid notice period to file for and receive benefits. Since employees can file for leave 60 days in advance, can an employee file for PFML and then either quit or be fired and receive benefits for a time period during which they were no longer employed or expected to work? Moreover, if an employee didn’t file for benefits, was terminated under an attendance policy and then filed within the 90-day period, they could retroactively receive job protection. This continues to be an issue since the proposed regulations do not address the consequences for failure to follow ER notice policies. To the extent this section is intended to provide terminated employees with the

right to file for PFML, it must be removed. If the intention is something else, it should be clarified. At a minimum, it should be clarified that if an employee files for benefits to start after termination, there are no reinstatement rights or anti-retaliation protections.

2. Removal of former Section IVB3-

The initial proposed regulations included the following provision: *“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.” (Former Sec. VIB3)*

This provision was removed from the updated proposed rules. Removal of the limitation of one affinity relationship per year exceeds what is permitted in the statute and cannot be done without a statutory amendment. Moreover, there is no need to allow more than one affinity relationship per benefit year. Allowing employees to designate one affinity relationship per benefit year grants employees the flexibility they need and recognizes and respects different “family” dynamics. To allow an employee to designate more than one affinity relationship per benefit year would also result in undue hardship on employers, particularly small employers. Since employees often develop close relationships at work, particularly in smaller workplaces, employees may designate other employees as their affinity relationships, which could significantly impact business operations, particularly if employees were allowed to take leave to care for more than one co-worker as an affinity relationship. The department should also consider a final rule that limits an employee’s ability to take leave if there is another person available to care for the family member, particularly for affinity relationships.

D. Section V-Notice and Undue Hardship

1. *“If the request for leave is not foreseeable due to emergency, illness or other sudden necessity, an employee shall make a good faith effort to provide written notice to the employer of the employee’s intent to use leave as soon as is feasible under the circumstances.” (Sec. VA)*

The circumstances under which no notice of leave is required to be given to an employer is too broad and will create significant disruption to employer obligations. The inclusion of ambiguous terms such as “emergency, illness (without specifying that it prevents the employee from providing notice) and sudden necessity” will result in too many leaves being taken without notice being given to the employer. Employers will be left short staffed and unable to meet business needs. The FMLA regulations provide that notice must be given 30 days in advance of foreseeable leave or as soon as practicable for unforeseeable leave. The FMLA regulations also specify that it should typically be practicable for an employee to provide leave pursuant to the employer’s usual and customary notice requirements. The final rules should mirror the FMLA notice requirements in order to provide better synergy with FMLA and give employers adequate notice of leave in order to minimize disruption and increase the employer’s ability to adapt to the employee’s anticipated absence.

The rules also fail to establish any consequences for failure to provide notice to an employer. Like the FMLA, the final rules should specify that failure to comply with the employer’s customary notice requirement will result in delay or denial of the leave. This is especially important since the employee will be covered by the law’s broad antiretaliation provisions, may be entitled to job protection, and the employer may be forced to retract previously issued performance management because the employer was unaware that the employee was requesting leave.

E. Section VI-Process for Application and Approval of Benefits

1. Requested information in support of a paid family and medical leave application may include *“Information regarding the existence of a significant personal bond, if the applicant is applying for family leave to care for an individual with a serious health condition with whom the applicant has a relationship as described in 26 M.R.S. § 850-A(19)(G). A significant personal bond is one that, when examined under the totality of the circumstances, is like a family relationship, regardless of biological or legal relationship. This bond may be demonstrated by, but is not limited to the following factors, with no single factor being determinative:*

- a. Shared personal financial responsibility, including shared leases, common ownership of real or personal property, joint liability for bills or beneficiary designations;*
- b. Emergency contact designation of the employee by the other individual in the relationship or the emergency contact designation of the other individual in the relationship by the employee;*
- c. The expectation to provide care because of the relationship or the prior provision of care;*
- d. Cohabitation and its duration and purpose;*
- e. Geographic proximity; and*
- f. Any other factor that demonstrates the existence of a family-like relationship.” (Sec VIA4)*

Although the updated proposed rule contains more structure and guidance regarding equivalent relationships than the previous version, the factors identified are still too broad and too vague, and no one factor is determinative. At a minimum, there should be an expectation of care because of the relationship every time an employee seeks to take leave to care for someone. That is the essence of an equivalent relationship. Some of these factors are also broader than the statutory intent, as they would cover relationships that do not truly meet the statutory definitions. There is also no mechanism by which an employer can challenge the relationship if the employer has a good faith belief that there is fraud.

2. Requested information in support of a paid family and medical leave application may include *“A waiver signed by the employer that the proposed schedule of leave is not an undue hardship, if applicable;” (Sec. VIA7)*

This appears to require an employer to sign a waiver for every request that does not create an undue hardship. Given the incredibly high burden of demonstrating hardship, this will require an employer to sign a waiver for the overwhelming majority, if not all, leave requests. That will create additional work for employers. This also places the burden of administration on the employer since the state will approve applications and will not ask for much information once the employer signs the waiver. Responsibility for administration of the program lies with the Department and should not be shifted to the employer, particularly when there is such a strong presumption that leave requests will not create an undue hardship. It is also unclear if an employer can later claim undue hardship if it initially signs a waiver. Employers should be able to change their determination based on changes to business needs or impact of the leave.

3. *“An application for safe leave must include a signed statement that the applicant meets the requirements for safe leave set forth in the Act.” (Sec. VIC)*

It is unclear whether this is the only documentation/verification that can be required for SAFE leave. The statute provides that the administrator can establish reasonable documentation requirements including the right to ask for “any documentation required by the administrator with regard to a claim for safe leave.” Section 850-D(1). Other PFML programs require employees to provide documentation from third-party sources (i.e., police reports, notes from assistance agencies, etc.) of the need for leave, provided that the details of the domestic violence are not required to be shared. The final rules should contain similar documentation requirements.

3. *“A complete application for paid family or medical leave benefits may be submitted to the Administrator no more than 60 days prior to the start of family and medical leave and no more than 90 days after the start date of family leave and medical leave.” (Sec. VIF)*

The proposed rules permit an applicant for benefits to complete their application no more than 60 days prior to the start of family and medical leave and no more than 90 days after the start date of family and medical leave. Although we recognize that the 90-day post leave application window is included in the statute, it will create significant operational challenges for employers. Employers will be prevented from engaging in attendance management or making efforts to acquire replacement workers for 90 days each time a ME employee is absent. Employees may be “no-call/no-show,” and employers will be hesitant to address the issue for fear that they may later receive job protection under PFML, particularly given the breadth of the antiretaliation provision as noted earlier. We suggest that a statutory amendment be considered to decrease the filing deadline to 30 days to minimize disruption and enhance predictability of leave events. The rules already provide a mechanism for possible exception to the deadlines if extenuating circumstances exist that would prevent an employee from meeting the filing deadline (See Section VIG).

4. Section VI does not provide a mechanism for the state to gather information about any wages received by an employee while on PFML. This information is critical to avoid overpayments and to ensure that employees are not receiving wages and PFML benefits for the same time periods. In addition to payments made by an employer, there is no mechanism by which the state will know whether the employee is receiving Workers’ Compensation or Unemployment benefits. Both should be a reduction from benefits but this information is not required as part of application process.

5. *“A failure to provide reasonably necessary information or documentation may result in a delay in processing or denial of the application. Before denying a claim for incomplete information, the Administrator must provide the applicant an opportunity to provide the outstanding information. If such information is not provided within 10 business days of the Administrator’s request, the application may be denied.”*

Failure to provide information *should* result in delay or denial of the application, not may result in delay or denial. Also, the updated proposed regulations changed the deadline for the employee to remedy an incomplete application from 7 to 10 days. 10 days is too long and will slow down the process and leave employers without certainty as to whether an absence will be protected.

G. Section VIII- Calculation of Benefits

1. *“Proration of Benefits. Benefits shall be prorated for covered individuals taking leave for less than a full week as follows: the amount of time taken as leave will be divided by the amount of time the covered individual was scheduled to work for any employer in the week.” (Sec. VIII C1)*

The final rules need to clarify whether and how this rule impacts and works with the rules relating to entitlements. Since ME PFML provides both income protection and leave, the rules need to be clear regarding how both income replacement and entitlement are impacted. For instance, does the same rule apply to the entitlement, i.e., is the entitlement prorated in the same way as the benefit? How does this rule impact employees who work variable schedules? Does the variable schedule definition referenced above apply to payments as well as entitlement? For example, is the amount of time scheduled to work 1/12 of the amount scheduled to work over the past 12 weeks and is the deduction from the entitlement the same as the prorated benefit? The rules should ensure that the impact to benefits and entitlements is consistent.

Also, the updated proposed rules added the qualification that the amount of time scheduled to work “for any employer” is to be used to determine proration. This will result in an inaccurate and potentially unfair leave calculation. For instance, if an employee is scheduled to work 40 hours for one employer and 10 hours for another employer, the amount of leave taken will now be based on a 50-hour workweek. If an employee takes off 10 hours of work from the employer for whom the employee works 40 hours, that will count as 20% of the workweek when it is actually 25% of the workweek. It will also count as 20% of the workweek if taken for the employer for whom the employee works 10 hours a week when the employee has taken off 100% of the week for that employer. Furthermore, it will be administratively difficult (if not impossible) to determine how to allocate the time if one of the employers uses a private plan or both use different private plans. The calculation should be made on a per employer basis, not overall.

2. *“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;

c. Wages received from the employer from whom the covered individual is on leave for hours actually worked or authorized leave time used during the same week;”

d. Wages received from the employer if the employer voluntarily pays the difference between the covered individual’s Weekly Benefit Amount and their typical weekly wage. If the employer voluntarily pays such wages, the employer may charge that time against the covered individual’s leave balances...” (Sec. VIII C2)

If benefits will not be offset by wages received from another employer, benefits should be calculated per employer. That is the approach taken by other paid family and medical leave programs and is the most equitable. If the employee’s benefit is based on wages from all ME employers, if the employee continues to work for employer one while taking ME PFML from employer two, the employee will receive a windfall since the employee will continue to receive their full salary from employer one and will receive benefits that are also based on wages from both employer one and two.

The term “authorized leave time” needs to be defined. This should be specifically defined to exclude paid corporate leaves, ME paid sick leave and other accruals or employer-provided paid leave since an employee should not be allowed to receive employer-provided paid leave and their full ME PFML

benefits at the same time. This could result in an employee using employer-provided paid leave in combination with PFML to exceed 100% of pay, which should be specifically prohibited.

The final rules should also clearly state that top up or use of paid time off should be governed by employer policy. Massachusetts recently amended their guidance on this topic to confirm that whether and how an employee can use paid time off to top up MA PFML is dictated by employer policy. Maine should do the same.

The term “employee's typical weekly wage” is also not defined. It is unclear whether it relates to wages used to determine ME PFML benefits (i.e., using the lookback period) or is the employee’s current salary at time the employee goes on leave. For ease of administration, it should be interpreted to be the employee’s current salary at the time the employee goes on leave.

Finally, the final rules should allow an employer to receive reimbursement of benefits from the department (or private plan) if the employer voluntarily provides a paid leave benefit that pays 100% and runs concurrently with ME PFML. For example, if an employee were entitled to receive \$500 in weekly ME PFML benefits and an employer pays the employee \$750 per week pursuant to a paid parental leave policy, the employer should be allowed to file for reimbursement of the \$500 weekly benefit that the department would have paid the employee. This is allowed under other state programs, such as in MA and NY, and is more efficient for the employer and employee.

H. Section IX Fraud and Ineligibility

a. *“PFML fraud’ exists where a covered individual has obtained paid family or medical leave benefits based upon a willful false statement, willful misrepresentation of a material fact, or the willful withholding of a material fact or facts.” (Sec. IXA).*

This section was changed to add the word “willful” throughout. This raises the bar on fraud to a level that is not supported in the statute and is unfair to employers. Fraud should be found to exist whenever a false statement is made. Adding the requirement for a finding of willfulness will almost always result in fraud not being found. This standard betrays the fiduciary responsibility that exists to protect plan funds and ensure solvency of the plan.

b. *“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.” (Sec. IXD)*

The penalties for fraud are inadequate as Section IXD provides that the Department “may” demand repayment of benefits paid as a result of fraud. At a minimum, benefits should always be required to be repaid. Under the program, there is a fiduciary responsibility to protect plan funds and ensure the solvency of the program. That should include a method to ensure that fraud is rectified, and plan funds are repaid. It should also include a clear mechanism for reporting fraud. Employers should have a mechanism by which they can alert the Department to fraud and in which fraud will be quickly investigated and appropriately remedied.

I. Section X-Premiums

1. *“For the purposes of determining premium liability, any employer that employed 15 or more covered employees per that employer’s Federal Employer Identification Number (FEIN) on their established payroll in 20 or more calendar workweeks in the 12-month period preceding September 30th of each year will be considered to be an employer of 15 or more employees for the calendar year thereafter. This count includes the total number of persons on establishment payrolls employed full or part time who received pay for any part of the pay period. Temporary and intermittent employees are included, as are any workers who are on paid sick leave, on paid holiday, or who work during only part of the specified pay period.” (Sec. XF)*

This rule needs to be clarified to provide that covered employees are those employees who physically work in Maine, whether they report into an office in the state or work remotely from their home in Maine. It should specifically state that it does not apply to employees who physically work in another state, even if they report into Maine. Although the unemployment definition is used to determine when work is localized in Maine, it is a complicated test and employers and employees would benefit from the clarity that will come from addressing more modern concepts of work arrangements, such as hybrid work arrangements and fully remote arrangements. It would also be beneficial to address how the law applies to an employer with little or no ties to Maine, including employers with no physical location in Maine who may have one or more remote employees in Maine.

I. Section XI-Failure to Remit Premiums and Contribution Reports

1. *“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 shall be assessed a penalty of 1.0 percent of the employer’s total payroll for the quarter.” (Sec. XIA)*

It should be clarified that the penalty is based on Maine payroll and not on payroll that the employer may have in other states. There should also be a mechanism added for the department to waive penalties in the case of good faith and honest mistakes where the employer pays retroactive premium within 30 days of request. There is nothing in the statute that would prohibit these suggested changes from being implemented. Finally, there should be the option for a lesser penalty if an employer remitted contributions in part. If an employer missed one employee by mistake, there should be discretion to prorate the penalty accordingly.

K. Section XIII-Substitution of Private Plans

1. *“An approved substitution is valid for a period of three years.” (Sec. XIII A3) “During the duration of an employer’s substitution, if an employer seeks to make any material change to the approved plan, the employer must notify the Department at least 60 days in advance of the effective date of any proposed change and must receive written approval from the Department. A material change is any change which affects the rights, benefits or protections afforded to employees under the Act.” (Sec. XIII A6)*

The term “material change” is too broadly defined. The final rules should provide more clarity regarding how the term will be interpreted. In addition, it is unclear whether the employer can change prior plans during the three-year approval period. The final rule should clearly state whether this is allowed.

2. *“An employer with an approved substitution must submit to the Department contribution reports for each employee on a quarterly basis online, pursuant to section X of this rule of this rule.” (Sec. XIII A10)*

Private plans should not be subject to the same reporting requirements as the state plan. Many other PFML programs do not require quarterly reports for private plans. There is nothing in the statute that supports this requirement. In fact, the statute ties the obligation to file wage reports with the requirement to remit contributions. Since private plans are not required to remit contributions, they should also not be forced to file quarterly reports. The department has reserved the right to audit private plans, and employees an appeal private plan decisions to the department. That should be sufficient to ensure that private plans are abiding by program requirements.

3. *“The following minimum requirements must be met in order to be determined substantially equivalent:*

b. The plan must provide leave to care for a family member, except that the definition of family member need not be identical to the definition in §850-A(19);

c. The plan must allow a covered individual to take intermittent or reduced schedule leave, except that the requirements of section II(B) of this Rule need not be met...” (sec. XIID2)

Can plan cover same family members as FMLA? Limits on affinity?

The reference to Section II(B) in subsection c appears incorrect. Section II(B) of the Rules addresses non-covered individuals. We assume the reference is intended to be to Section III(B), which governs intermittent leave. This should be updated in the final rule.

4. *“Examples of a plan that is substantially equivalent but not identical include, but are not limited to, the following...:*

c. A plan that calculates an employee’s benefit using a different lookback period or based upon the employee’s actual wages at the time that leave begins may be found to be substantially equivalent if the requirements of paragraph 3, above, are met.” (Sec. XIID3)

Allowing private plans the flexibility to use different lookback periods is a helpful provision. However, the final rule should include additional details that outline how this provision would work. Paragraph 3 provides that an equivalent plan must provide the same or greater “aggregate monetary benefits” to the employee as the state plan. How is the determination of aggregate monetary benefit made? Does it have to be made on a per claim basis or can it be made based on an analysis of all of the employer’s employees’ claims or the private plan administrator’s block of ME PFML business? For example, if a lookback method provides the same aggregate benefits for the majority of employees, that should be sufficient.

L. Section XVI Advisory Rulings

a. “Advisory rulings may be made by the program with respect to the applicability of any statute or rule administered by the program.” (Sec. XVIA).

The updated proposed regulations contain a new section that permits the issuance of advisory rulings. It is unclear why this section was added. To the extent that it will be used to issue rulings to which employers will be bound without having to go through the formal rulemaking procedures, this section should be removed.

III. TOPICS THAT ARE NOT ADDRESSED IN THE PROPOSED RULES THAT NEED TO BE ADDRESSED IN THE FINAL RULES

- A. Whether recertifications and second/third opinions are available.
- B. Whether medical certifications will have to include information about the frequency and duration of absences for both treatment and flare ups for intermittent leave.
- C. What options are available to an employer if an employee exceeds estimated frequency and duration of intermittent leave.
- D. How will the Department seek information regarding wages received by an employee (i.e., paid corporate leaves, paid sick leave, short term disability benefits, salary continuation) since it is not listed in Section VI (Application Process).
- E. Whether an application can be delayed or denied if an employee refuses to sign an authorization and the Department does not have sufficient information to adjudicate or approve a request for benefits.
- F. The timeframes for benefit claim review, including but not limited to, the time the department has to make a decision on an application and reconsideration request.
- G. How the weekly benefit amount is set for the benefit year, including but not limited to how, if at all, increases to the state average weekly wage during an existing claim impact benefit amounts.
- H. The amount of the bond that will need to be posted for self-insured plans.
- I. Notice that will be given to an employer concerning an employee's application for leave and benefits. Employers should receive the same notices that employees receiving contemporaneously to when employees are informed of decisions.
- J. The process by which an employer can alert the department to potential fraud. Although the proposed rules address fraud investigations, they do not address the process by which the employer can alert the department to concerns of potential fraud.
- K. Whether leave can be taken for events that predate the effective date of the program. For example, if a baby is born or adopted on January 1, 2026, can an employee take ME PFML to bond with the baby? What if the baby is born on April 1, 2026 and, and the employee is on FMLA leave on May 1, 2026?
- L. The specific requirements of medical certifications, including confirmation that an employee is incapacitated from work and daily activities due to a covered medical condition.