ERIC | THE ERISA INDUSTRY COMMITTEE
Shaping benefit policies before they shape you.

DILLON CLAIR
Director, State Advocacy and Litigation

September 30, 2024

Commissioner Laura Fortman
Maine Department of Labor
54 State House Station
Augusta, ME 04333-0054

Submitted Electronically

Re: Maine Proposed Rule – 12-702 Department of Labor, Paid Family and Medical Leave Program – Public Comments from The ERISA Industry Committee

Dear Commissioner Fortman:

The ERISA Industry Committee ("ERIC") appreciates the opportunity to comment on the proposed regulations contained in "12-702 Department of Labor, Paid Family and Medical Leave Program" ("Proposed Rules") issued by the Maine Department of Labor ("Department") covering implementation and administration of the Maine Paid Family and Medical Leave program.

ERIC is a national advocacy organization exclusively representing the largest employers in the United States in their capacity as sponsors of employee benefit plans for their nationwide workforces. With member companies that are leaders in every economic sector, ERIC is the voice of large employer plan sponsors on federal, state, and local public policies impacting their ability to sponsor benefit plans. ERIC member companies offer benefits to tens of millions of employees and their families, located in every state and city.

Our member companies already voluntarily offer a wide range of high quality, cost-efficient paid leave benefits for their nationwide workforces. Unfortunately, these generous private benefits are often difficult to provide due to a growing patchwork of individual state paid leave laws and programs.[1] These programs often do not account for the significant value of privately-provided benefits. Therefore, it is critical that state paid leave programs do not interfere with existing employer-provided benefits and recognize the multistate compliance challenges that employers currently face.

ERIC appreciates efforts by the Department to establish regulations that bring greater clarity to the design and administration of Maine's program. However, there are several areas of the Proposed Rules that should be amended to prevent unnecessary compliance complications and encourage employers to continue providing valuable benefits. **On behalf of our member**

[1] ERIC advocates for federal policies that aim to harmonize state paid leave standards. See, e.g., https://www.eric.org/press_release/the-erisa-industry-committee-emphasizes-need-for-uniformity-in-paid-family-and-medical-leave-standards-in-comments-to-bipartisan-working-group/.

companies, ERIC offers the following comments regarding the Proposed Rules, and urges the Department to address the impact that key provisions would have on employer-provided paid leave benefits across the state.

Comments

Sections 5 and 6 – Role of Health Care Provider in Undue Hardship Determination

Sections 5 of the Proposed Rules establishes employee "reasonable notice" requirements as well as standards for employers to use when determining whether a requested leave schedule would create an undue hardship for their operations. Similarly, Section 6(H) of the Proposed Rules lays out the process for these employer hardship claims and outlines the key role that state program administrators would play in reviewing and deciding these determinations. While this undue burden approach could streamline scheduling processes and help employers maintain operation during leaves of absence, Section 5(D) of the Proposed Rules would grant health care providers disproportionate influence on this determination process, and threaten the ability of employers to avoid undue hardship.

Specifically, Section 5(D) of the Proposed Rules states that "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." Importantly, an employee's leave schedule is typically discussed and agreed upon by an employee and their employer and is developed based on a range of factors impacting both parties. Section 6(H) of the Proposed Rules recognizes this give and take, essentially directing state program administrators to arbitrate these discussions when needed, determine whether undue hardship exists, and impose a reasonable leave schedule based on that determination.

While the role of health care providers in these discussions has historically been only to certify the medical necessity of an employee's leave, Section 5(D) of the proposed rules would drastically expand that role and make health care providers the unquestioned decider of employers' undue hardship as well as employee leave schedules. In fact, this provision of the Proposed Rules does not have a basis in the underlying state statute, which only grants health care providers the role of supplying documentation required for proof of a serious health condition. Section 5(D), therefore, would amount to regulatory overreach.

To prevent health care providers from unilaterally dictating leave schedules and instead allow these determinations to be made based upon agreement between employees and employers, we urge the Department to remove Section 5(D) from the Proposed Rules. At minimum, we urge the Department to amend Section 5(D) to weigh a health care provider's review as merely one of several factors used to determine reasonable leave schedules.

Section 6 – Family Member Definition and Employee Designation of a "Significant Personal Bond"

Section 6 of the Proposed Rules outlines the process by which an employee may apply to Maine's state paid family and medical leave program for benefits. The Proposed Rules would now include updated standards used to determine whether an employee's relationship with an individual amounts to a "significant personal bond" that would allow the employee to take leave to care for that individual. The family member definition and related procedural requirements impede employer compliance and invite abuse.

State "catch-all" family member definitions that go beyond an employee's parent, spouse, child, grandparent, grandchild, or sibling stray too far from the standards established by the federal *Family and Medical Leave Act of 1993*, creating substantial and counterproductive challenges for employers. First, these subjective "catch-all" definitions vary from state to state, forcing employers to constantly reassess and redesign private paid leave benefits to comply. Second, these open-ended definitions also open the door for fraud and abuse that could threaten the longevity of the state's benefit program. We therefore encourage the Department to reconsider the inclusion of a "significant personal bond" in the definition of family member.

Additionally, Section 6 of the Proposed Rules would currently only require an employee applying for state program benefits to identify an individual with whom the employee has a "significant personal bond" at the time they are applying for state program benefits. Similarly, a provision has been removed from Section 4 of the Proposed Rules' earlier version that would have prevented an employee from taking leave to care for more than one of these individuals within a single calendar year. This open-ended approach would remove the need for employees to "designate" one such individual for the coming benefit year and instead allow multiple relationships to be considered on a rolling basis, further encouraging potential misuse of the program.

At minimum, to help employers plan ahead for use of leave, ERIC urges the Department to amend the Proposed Rules to limit employees to one "significant personal bond" per benefit year and require them to designate that individual at the beginning of the benefit year.

Section 11 – Employer Penalties for Failure to Remit Premiums

Section 11 of the Proposed Rules outlines the penalties that employers participating in the state benefit program would face should they fail to remit premium payments to the state program for the preceding quarter. These penalties are ambiguous, arbitrary, unnecessarily punitive, and should be restructured by the Department.

Section 11 of the Proposed Rules states that an employer that fails to remit quarterly premiums to the Department will not only "be assessed a penalty of 1.0 percent of the employer's total payroll for the quarter" but will additionally "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." This combination not only goes beyond similar state paid leave penalty structures, but doubly punishes employers: first by assessing a penalty that is greater than the premiums the employer would have originally remitted, and second by forcing the employer to then directly pay for any paid leave benefits received by their employees in the future.

Furthermore, the penalties outlined by Section 11 lack clarity and raise serious questions for employers statewide. First, the Proposed Rules are vague as to whether the one percent payroll penalty that employers would face is determined by only the employees working within Maine, or by all employees nationwide. Second, the Proposed Rules do not specify the amount of time that employers would be responsible for direct payment of paid leave benefits received by employees – seeming to imply that these employers would continue to foot the bill for these benefits indefinitely.

Finally, the Proposed Rules do not establish a clear timeframe in which employers can still remit premiums to avoid substantial penalties – while Section 11 directs the department to notify delinquent employers "no later than 15 days after premiums were due," it does not specify the time in which employers can still make payments beyond "the due date established in the notice." A clear premium payment deadline is standard for similar state paid family and medical leave programs.

To avoid saddling employers with exorbitant and counterproductive assessments, ERIC encourages the Department to address provisions of Section 11 that would unnecessarily harm employers and employee benefits, including a restructuring of penalties to be equal to the costs of missed premiums.

Section 13 – Substitution of Private Plans

Section 13 of the Proposed Rules outlines the process by which employers may apply to the Department to substitute a private paid family and medical leave benefit plan for participation in the state benefit program. To better encourage innovation in paid leave benefits and generous private plans by employers, Section 13 should be amended to remove arbitrary barriers to employer plan substitution. Specifically, several provisions of Section 13 appear to place subjective time limitations on the validity, flexibility, and renewability of substituted private employer plans.

First, Section 13(A)(3) states that "an approved substitution is valid for a period of three years," meaning that an approved employer would have to go through the entire reapplication process simply to continue providing equivalent paid family and medical leave benefits that have already been approved. Because employers must give at least a 60-day notice and receive state program approval before making any material changes to an approved substitute plan, there should be no need for regular employer application and renewal requirements. Unless amended by the Department, this provision would only create unnecessary costs and red tape for both state

administrators and private employers.

Second, Section 13(A)(5) states that "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." This provision locks approved employers into their voluntary private paid family and medical leave benefit plan for years without considering the wide range of factors that could lead an employer to restructure benefits administration and potentially participate in the state benefit program. While employers are theoretically able to demonstrate good cause to the Department for cancellation, the only example provided is a rise in premiums. Again, this limitation would restrict employer flexibility to pursue the best benefits for their employees and does not seem to serve the state policy goal of improving access to or quality of paid leave benefits across the state.

Third, Sections 13(A)(5) and 13(A)(8) establish a three-year period following either employer cancellation or Department revocation of a substitute private plan during which the employer may not re-apply for another private plan substitution. Once again, these provisions seem unnecessarily punitive in that they do not serve a policy objective or lead to employees' access to more valuable paid family and medical leave benefits. Instead, they would strip employers of much-needed flexibility to respond to changing economic factors, and frustrate the ability of employers to ensure their employees have access to the best benefits possible, whether those are provided by a private benefit plan or the state benefit program.

Finally, while Section 13(D) lays out a multifactor checklist for the Department and Bureau of Insurance ("BOI") to reference when reviewing private employer substitute plans, and establishes an aggregate monetary-value standard for determining substantial equivalence, the Proposed Rules do not require the Department or BOI to explain to an applying employer the specific reasons why their proposed private benefit plan was denied. An explanation or justification of the agency's decision is critical to employers' ability to augment and improve proposed private plans in order to gain approval in the future.

Because an easier approval process will lead to more generous private paid leave benefits being made available, the Department should remove barriers to offering private benefit plans and streamline its reporting approval requirements in the Proposed Rules.

Conclusion

ERIC appreciates the opportunity to provide comments on the Proposed Rules. As discussed above, ERIC recommends that the Department amend key aspects of the Proposed Rules to prevent unnecessary compliance complications and facilitate the substitution of private employer benefit plans. If you have any questions about our regulatory comments or the impact the Proposed Rules would have on statewide paid leave benefits, please contact us at (202) 789-1400 or dclair@eric.org.

Sincerely,

Dillon Clair
Director, State Advocacy and Litigation