STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

LAW COURT DOCKET NO. KEN-25-53

MAINE STATE CHAMBER OF COMMERCE and
BATH IRON WORKS CORPORATION

Plaintiffs-Appellants

v.

STATE OF MAINE DEPARTMENT OF LABOR and
LAURA A. FORTMAN, in her official capacity as
Commissioner of the State of Maine Department of Labor

Defendants- Appellees

On Questions Reported by the Kennebec County Superior Court
DOCKET NO. AUGSC-CV-2025-00007

APPENDIX

Joshua D. Dunlap, Bar No. 4477
Sara A. Murphy, Bar No. 5423
Katherine E. Cleary, Bar No. 10299
Pierce Atwood LLP
Merrill's Wharf
254 Commercial Street
Portland, Maine 04101
(207) 791-1100

Attorneys for Appellants

TABLE OF CONTENTS

Page

Rule 8(d) Mandatory Content

Docket Sheet 3

Order on Consented-to Motion to Report to the Law Court Pursuant to M.R. App. 24(a), February 10, 2025. 7

Verified Complaint, dated January 13, 2025 10

Consented-to Motion to Report to the Law Court Pursuant to M.R. App. P. 24(a) with Incorporated Memorandum of Law, dated February 5, 2025 30

Attachment A – Agreed Upon Statements of Fact 39

Exhibit 1 – 12-702 C.M.R. ch.I 45

Exhibit 2 – Basis Statement and Summary and Response to Comments 71

Exhibit 3 – Maine State Chamber of Commerce Testimony of Patrick Woodcock, dated June 10, 2024 199

Exhibit 4 - Maine State Chamber of Commerce Comments, dated July 8, 2024 201

Exhibit 5 - Maine State Chamber of Commerce Comments, dated September 30, 2024 221

MAINE STATE CHAMBER OF COMMERCE, ET AL - PLAINTIFF
128 STATE STREET STE 101

AUGUSTA ME 04330

Attorney for: MAINE STATE CHAMBER OF COMMERCE, ET AL
JAMES R ERWIN - RETAINED 01/13/2025
PIERCE ATWOOD
254 COMMERCIAL STREET
PORTLAND ME 04101

Attorney for: MAINE STATE CHAMBER OF COMMERCE, ET AL
SARA A MURPHY - RETAINED 01/13/2025
PIERCE ATWOOD
254 COMMERCIAL STREET
PORTLAND ME 04101

BATH IRON WORKS CORPORATION - PLAINTIFF
700 WASHINGTON STREET
BATH ME 04530

Attorney for: BATH IRON WORKS CORPORATION
JAMES R ERWIN - RETAINED 01/13/2025
PIERCE ATWOOD
254 COMMERCIAL STREET
PORTLAND ME 04101

Attorney for: BATH IRON WORKS CORPORATION
SARA A MURPHY - RETAINED 01/13/2025
PIERCE ATWOOD
254 COMMERCIAL STREET
PORTLAND ME 04101

v.

LAURA A FORTMAN, COMMISSIONER - DEFENDANT
54 STATE HOUSE STATION
AUGUSTA ME 04333-0054

Attorney for: LAURA A FORTMAN, COMMISSIONER
ANNE F MACRI - RETAINED 01/24/2025
ATTORNEY GENERAL OFFICE OF AG
111 SEWALL STREET
6 STATE HOUSE STATION
AUGUSTA ME 04333-0006

STATE OF MAINE DEPARTMENT OF LABOR, ET AL - DEFENDANT
54 STATE HOUSE STATION
AUGUSTA ME 04333-0054

Attorney for: STATE OF MAINE DEPARTMENT OF LABOR, ET AL
NANCY MACIROWSKI - RETAINED
ATTORNEY GENERAL OFFICE OF AG
111 SEWALL STREET
6 STATE HOUSE STATION
AUGUSTA ME 04333-0006

SUPERIOR COURT
KENNEBEC, ss.
Docket No AUGSC-CV-2025-00007

DOCKET RECORD

Filing Document: COMPLAINT Minor Case Type: DECLARATORY JUDGMENT
Filing Date: 01/13/2025

Docket Events:

01/13/2025 FILING DOCUMENT - COMPLAINT FILED ON 01/13/2025

01/13/2025 Party(s): MAINE STATE CHAMBER OF COMMERCE, ET AL
ATTORNEY - RETAINED ENTERED ON 01/13/2025
Plaintiff's Attorney: SARA A MURPHY

01/13/2025 Party(s): BATH IRON WORKS CORPORATION
ATTORNEY - RETAINED ENTERED ON 01/13/2025
Plaintiff's Attorney: SARA A MURPHY

01/13/2025 Party(s): BATH IRON WORKS CORPORATION
ATTORNEY - RETAINED ENTERED ON 01/13/2025
Plaintiff's Attorney: JAMES R ERWIN

01/13/2025 Party(s): MAINE STATE CHAMBER OF COMMERCE, ET AL
ATTORNEY - RETAINED ENTERED ON 01/13/2025
Plaintiff's Attorney: JAMES R ERWIN

01/24/2025 Party(s): STATE OF MAINE DEPARTMENT OF LABOR, ET AL,LAURA A FORTMAN, COMMISSIONER
SUMMONS/SERVICE - ACK OF RECEIPT OF SUMM/COMP SERVED ON 01/15/2025

01/24/2025 Party(s): STATE OF MAINE DEPARTMENT OF LABOR, ET AL,LAURA A FORTMAN, COMMISSIONER
SUMMONS/SERVICE - ACK OF RECEIPT OF SUMM/COMP FILED ON 01/23/2025

01/24/2025 Party(s): STATE OF MAINE DEPARTMENT OF LABOR, ET AL
SUMMONS/SERVICE - CIVIL SUMMONS FILED ON 01/23/2025

01/24/2025 Party(s): LAURA A FORTMAN, COMMISSIONER
SUMMONS/SERVICE - CIVIL SUMMONS FILED ON 01/24/2025

01/24/2025 Party(s): MAINE STATE CHAMBER OF COMMERCE, ET AL,BATH IRON WORKS CORPORATION
MOTION - DETERMINE COURSE PROCEEDINGS FILED ON 01/23/2025
Plaintiff's Attorney: SARA A MURPHY
WITH MEMORANDUM OF LAW, DRAFT ORDER, NOTICE OF HEARING CONSENTED TO
MOTION TO SPECIFY COURSE OF FUTURE PROCEEDINGS

01/24/2025 Party(s): STATE OF MAINE DEPARTMENT OF LABOR, ET AL
ATTORNEY - RETAINED ENTERED ON 01/24/2025
Defendant's Attorney: NANCY MACIROWSKI

01/24/2025 Party(s): LAURA A FORTMAN, COMMISSIONER
ATTORNEY - RETAINED ENTERED ON 01/24/2025
Defendant's Attorney: ANNE F MACRI

01/24/2025 Party(s): STATE OF MAINE DEPARTMENT OF LABOR, ET AL,LAURA A FORTMAN, COMMISSIONER
OTHER FILING - ENTRY OF APPEARANCE FILED ON 01/24/2025
Defendant's Attorney: NANCY MACIROWSKI
AND ANN MACRI, AAG

01/31/2025 Party(s): MAINE STATE CHAMBER OF COMMERCE, ET AL,BATH IRON WORKS CORPORATION
MOTION - DETERMINE COURSE PROCEEDINGS GRANTED ON 01/31/2025
DANIEL MITCHELL , JUDGE
COPIES TO PARTIES/COUNSEL

01/31/2025 ORDER - COURT ORDER ENTERED ON 01/31/2025
DANIEL MITCHELL , JUDGE
ORDERED INCORPORATED BY REFERENCE AT THE SPECIFIC DIRECTION OF THE COURT. COPIES TO PARTIES/COUNSEL ORDER ON PL'S CONSENTED TO MOTION TO SPECIFY COURSE OF PROCEEDING

02/03/2025 Party(s): STATE OF MAINE DEPARTMENT OF LABOR, ET AL,LAURA A FORTMAN, COMMISSIONER
SUMMONS/SERVICE - ACK OF RECEIPT OF SUMM/COMP SERVED ON 01/15/2025

02/03/2025 Party(s): STATE OF MAINE DEPARTMENT OF LABOR, ET AL,LAURA A FORTMAN, COMMISSIONER
SUMMONS/SERVICE - ACK OF RECEIPT OF SUMM/COMP FILED ON 02/03/2025

02/03/2025 Party(s): STATE OF MAINE DEPARTMENT OF LABOR, ET AL,LAURA A FORTMAN, COMMISSIONER
LETTER - FROM PARTY FILED ON 02/03/2025
Defendant's Attorney: NANCY MACIROWSKI
DEFENDANT'S INTEND TO OPPOSE THIUS ACTION ON THE MERITS, AND AGREE WITH THE STIPULATED FUTURE COURSE OF PROCEEDINGS FILED BY PLAINTIFF'S COUNSEL ON JANUARY 23

02/06/2025 Party(s): MAINE STATE CHAMBER OF COMMERCE, ET AL
MOTION - OTHER MOTION FILED ON 02/05/2025
Plaintiff's Attorney: NANCY MACIROWSKI
AND ANNE MACRI, AAG CONSENTED TO MOTION TO REPORT TO THE LAW COURT PURSUANT TO M.R.APP.P.24(A) WITH AGREED UPON STATEMENT OF FACTS WITH EXHIBITS 1 THROUGH 5 AND PROPOSED ORDER

02/06/2025 HEARING - OTHER MOTION SCHEDULED FOR 02/10/2025 at 03:30 p.m.
ZOOM CONFERENCE

02/10/2025 ORDER - COURT ORDER ENTERED ON 02/10/2025
DANIEL MITCHELL , JUDGE
ORDERED INCORPORATED BY REFERENCE AT THE SPECIFIC DIRECTION OF THE COURT. COPIES TO PARTIES/COUNSEL BY EMAIL 2/10/25 ORDER ON CONSENTED TO MOTION TO REPORT TO THE LAW COURT PURSUANT TO M.R. APP. P. 24(A)

02/10/2025 HEARING - OTHER MOTION NOT HELD ON 02/10/2025
ZOOM CONFERENCE CANCELLED AFTER ORDER ISSUED

02/10/2025 Party(s): MAINE STATE CHAMBER OF COMMERCE, ET AL
MOTION - OTHER MOTION GRANTED ON 02/10/2025
DANIEL MITCHELL , JUDGE
AND ANNE MACRI, AAG CONSENTED TO MOTION TO REPORT TO

THE LAW COURT PURSUANT TO M.R.APP.P.24(A) WITH AGREED UPON STATEMENT OF FACTS WITH EXHIBITS 1 THROUGH 5 AND PROPOSED ORDER

Receipts

01/13/2025	Misc Fee Payment	$175.00	paid.

A TRUE COPY
ATTEST: _____
Clerk

STATE OF MAINE
KENNEBEC, ss

SUPERIOR COURT
CIVIL ACTION
DOCKET NO. AUGSC-CV-2025-00007

MAINE STATE CHAMBER OF COMMERCE and

BATH IRON WORKS CORPORATION,

Plaintiffs,

v.

STATE OF MAINE DEPARTMENT OF LABOR and

LAURA A. FORTMAN, in her official capacity as Commissioner of the State of Maine Department of Labor,

Defendants.

ORDER ON CONSENTED-TO MOTION TO REPORT TO THE LAW COURT PURSUANT TO TO M.R. APP. P. 24(a)

The Consented-to Motion to Report to the Law Court Pursuant to M.R. App. P. 24(a) (the "Motion") filed by Plaintiffs Maine State Chamber of Commerce and Bath Iron Works Corporation is hereby GRANTED.

Pursuant to Rule 24(a) of the Maine Rules of Appellate Procedure, this Court may report questions of law of sufficient importance or doubt to the Law Court when "(1) all parties appearing agree to the report; (2) there is agreement as to all facts material to the appeal; and (3) the decision thereon would, in at least one alternative, finally dispose of the action." M.R. App. P. 24(a).

This case satisfies the criteria of M.R. App. P. 24(a). First, the Parties agree that this matter is appropriate for report to the Law Court. M.R. App. P. 24(a)(1). Second, the Parties have submitted an Agreed Upon Statement of Facts, which contains all facts material to the resolution of the appeal. M.R. App. P. 24(a)(2). Third, the issues at the core of this dispute, which concern the validity of a portion of the rule adopted by the Maine Department of Labor ("MDOL") to

implement the state-wide paid family and medical leave ("PFML") program, are serious and important questions of law, the resolution of which, in at least one alternative, will finally dispose of the action. M.R. App. P. 24(a)(3).

Further, although Rule 24 operates as an exception to the final judgment rule and should not be lightly invoked, *see Payne v. Sec'y of State*, 2020 ME 110, ¶ 12, 237 A.3d 870, this Court has concluded that the case is appropriate for prompt report to the Law Court.

The Court has considered whether the questions reported are "of sufficient importance and doubt to outweigh the policy against piecemeal litigation." *York Register of Probate v. York County Probate Court*, 2004 ME 58, ¶ 11, 847 A.2d 395 (internal quotation marks omitted). The questions presented, as set forth below, are of substantial importance not only to the parties but also other members of the public. This case probes the validity of a portion of MDOL's rule implementing a major statewide program that (1) is in the process of being implemented, and (2) affects almost all employers statewide and a significant number of employees. This case will therefore affect not only most Maine businesses and employees, but also MDOL's regulatory efforts to implement a paid leave program that was a critical part of the last biennial budget. Moreover, the issues presented are novel questions not previously addressed in Maine law.

The Court has also considered whether the questions presented "might not have to be decided at all because of other possible dispositions." *Morris v. Sloan*, 1997 ME 179, ¶ 7, 698 A.2d 1038. There appear to be no preliminary factual determinations or other issues that would prevent the Law Court from reaching the legal questions presented.

Finally, the Court has considered whether a decision by the Law Court on the issue would, in at least one alternative, dispose of the action. *Swanson v. Roman Catholic Bishop*, 1997 ME 63, ¶ 6, 692 A.2d 441. It would. A determination that 12-702 C.M.R. ch. 1, § XIII(A)(4)(b) is

consistent with the governing statute, 26 M.R.S. § 850-F(8), and does not constitute a taking would end the case. This path to final disposition of the action is all that is necessary. *See id.* Moreover, it appears that a judgment on behalf of Plaintiffs determining that the MDOL rules are invalid in part and that premiums should be refunded to employers who offer a private plan alternative as allowed under the PFML would also effectively end the case. *See Avangrid Networks, Inc. v. Sec'y of State*, 2020 ME 109, ¶ 39, 237 A.3d 882.

Accordingly, the Court hereby reports the following questions of law to the Law Court pursuant to M.R. App. P. 24(a):

1. Have Plaintiffs proven, on the stipulated record, pursuant to 5 M.R.S. § 8058 that 12-702 C.M.R. ch.1, § XIII(A)(4)(b) conflicts with the Paid Family and Medical Leave Act, 26 M.R.S. §§ 850-A to 850-R (2024), or that 12-702 C.M.R. ch.1, § XIII(A)(4)(b) is arbitrary and capricious or otherwise not in accordance with law?

2. Have Plaintiffs proven, on the stipulated record, that 12-702 C.M.R. ch.1, § XIII(A)(4)(b) constitutes a cognizable claim of taking of private property for public use, without just compensation, in violation of article 1, section 21 of the Maine Constitution? DJM

3. Have Plaintiffs proven, on the stipulated record, that 12-702 C.M.R. ch.1, § XIII(A)(4)(b) constitutes a cognizable claim of taking of private property for public use, without just compensation, in violation of the Fifth Amendment of the United States Constitution, made applicable to the States through the Fourteenth Amendment?

Plaintiffs-Appellants Maine State Chamber of Commerce and Bath Iron Works Corporation shall pay the fee for filing of a notice of appeal promptly following entry of this Order.

The Clerk is directed to make the following entry in the civil docket pursuant to M.R. Civ. P. 79(a): "This Order is incorporated into the docket by reference at the specific direction of the Court." CONSENTED - TO MOTION TO REPORT TO THE LAW COURT IS GRANTED. DJM

DATED: 2/10/25

Daniel J. Mitchell
~~Justice Mitchell, Superior Court~~
DANIEL J. MITCHELL, JUSTICE
MAINE Superior Court

STATE OF MAINE
KENNEBEC, ss

SUPERIOR COURT
CIVIL ACTION
DOCKET NO.

MAINE STATE CHAMBER OF COMMERCE and

BATH IRON WORKS,

Plaintiffs,

v.

STATE OF MAINE DEPARTMENT OF LABOR and

LAURA A. FORTMAN, in her official capacity as Commissioner of the State of Maine Department of Labor

Defendants.

VERIFIED COMPLAINT

(Declaratory Relief Requested)

NOW COME Plaintiffs Maine State Chamber of Commerce ("MSCC") and Bath Iron Works Corporation (individually, "BIW," collectively with MSCC, "Plaintiffs"), by and through their undersigned attorneys, and complain against Defendants State of Maine Department of Labor (the "Department") and Laura A. Fortman, in her official capacity as Commissioner of the Department (individually, the "Commissioner," collectively with the Department, "DOL"), in connection with DOL's recently approved "Rules Governing the Maine Paid Family and Medical Leave Program," which appear at 12-702 C.M.R. ch. 1 (the "Rule"). The Rule harms Maine employers that will offer a private family and medical leave plan—like BIW and the many MSCC members of all sizes that will also offer a private plan—by requiring such employers to pay a non-refundable sum into a state-run program that their employees will not utilize or even be eligible to receive benefits from. Plaintiffs submit that the Rule contradicts the statute

enacting the Paid Family and Medical Leave program (the "PFML") and the intent of the State of Maine Legislature (the "Legislature") in enacting the PFML. Further, BIW asserts that the Rule results in a taking of BIW's property in violation of both the U.S. and Maine Constitutions. Plaintiffs complain as follows:

PARTIES

1. MSCC is a Maine non-profit organization. MSCC maintains its principal place of business at 128 State Street, Suite 101, Augusta, Maine. MSCC is a statewide membership organization advocating for Maine businesses on issues affecting those businesses and Maine's business climate. BIW is a member of MSCC.

2. BIW is a Maine corporation and maintains its principal place of business at 700 Washington Street, Bath, Maine. BIW is a full-service shipyard specializing in the design, building, and support of complex naval shipbuilding for the U.S. Navy.

3. The Department is a Maine governmental agency established through 26 M.R.S. § 1401-A(1) with its offices located at 45 Commerce Drive, Augusta, Maine. The Department is responsible for implementing the PFML, codified at 26 M.R.S. §§ 850-A to 850-R.

4. The Commissioner oversees the Department, including the PFML. The Department's website provides that the Commissioner is responsible for performing the routine technical rulemaking process. *See id.* § 850-Q ("Rules adopted pursuant to this subchapter are routine technical rules . . . ."); Department of Labor, *Legislation and Rulemaking*, https://www.maine.gov/labor/labor_laws/legislation/#:~:text=The%20Department%20has%20two%20paths,Legislature%20for%20review%20and%20approval. (last visited Jan. 12, 2025).

JURISDICTION, VENUE, AND PROCEDURE

5. Jurisdiction is appropriate in this Court pursuant to 4 M.R.S. § 105 (general civil jurisdiction in the Superior Court); 5 M.R.S. § 8058 (jurisdiction in the Superior Court for judicial review of rules); and 14 M.R.S. § 5953 (jurisdiction for declaratory relief).

6. Further, this Court has jurisdiction over this action pursuant to 5 M.R.S. §§ 11001-11008 and M.R. Civ. P. 80C.

7. Venue is appropriate pursuant to 14 M.R.S. § 505 and 5 M.R.S. § 11002(1), as DOL is a governmental agency of the State of Maine with its headquarters located in Kennebec County.

8. Pursuant to M.R. Civ. P. 57, "[t]he court may order a speedy hearing of an action for a declaratory judgment and may advance it on the calendar."

FACTS

A. MSCC

9. MSCC is a statewide non-profit organization serving more than 5,000 members. It was founded in 1889 and is Maine's largest business association.

10. MSCC serves as a voice for hundreds of employers of all sizes and sectors across Maine, and it is dedicated to empowering Maine's business community by collaboratively advancing a proactive agenda for economic growth and prosperity in Maine.

11. MSCC's advocacy team works with the Maine Legislature and other regulatory agencies to advocate and foster positive outcomes for its members—Maine businesses—on numerous issues, including but not limited to workplace concerns, healthcare, employee benefits, workers' compensation, tax policies, voter education, business attraction efforts, and energy and environmental policies.

12. Advocating on behalf of and protecting its members' positions on issues such as employee benefit policy is germane to MSCC's purpose.

13. As set forth in more detail below, MSCC engaged in the legislative and rulemaking process in connection with the PFML with the goal of helping Maine develop a program that supports employees while minimizing unintended consequences for employers.

14. Many of MSCC's members are governed by the PFML. Of these, certain employers—including BIW, as described below—offer various benefits packages to their employees. These members' ability to continue directly supporting their employees through such benefits will be directly impacted by the Rule. As described further below, MSCC's members that intend to offer a private plan substitution under the PFML stand to be financially harmed by the Rule.

B. BIW

15. Shipbuilding has long been a way of life along the Kennebec River, with BIW being initially incorporated and established on the west bank of the river in 1884.

16. BIW's current mission is to design, build, and support the highest quality surface combatants (a type of naval warship designed for warfare on the surface of the water) for the U.S. Navy. BIW has been awarded hundreds of federal shipbuilding contracts since its incorporation, and the U.S. Navy has invested funds to support BIW's workforce initiatives because shipbuilding capacity has been deemed critical to the national interest.

17. BIW's impact is not just on the federal level; BIW is an economic engine in Maine, working collaboratively with the State of Maine for the mutual benefit of Maine's economic prosperity. It is the largest manufacturer and one of the largest private-sector

employers in the State. *See* General Dynamics Bath Iron Works, *Impact on Maine's Economy*, https://gdbiw.com/who-we-are/impact-on-maines-economy/ (last visited Jan. 11, 2025).

18. BIW employs more than 6,700 employees—including but not limited to welders, electricians, pipefitters, ship-lifters, designers, naval architects, engineers, ship operators, managers, and other business professionals. BIW-driven business activity accounts for a total of more than 14,000 jobs in Maine.

19. BIW views its employees as its strength and most valuable strategic partners.

20. As of 2024, BIW paid its employees roughly $499 million in wages, as defined by the PFML. *See* 26 M.R.S. § 850-A(31).

21. BIW has acknowledged that transportation, housing, and childcare challenges negatively affect its employees and constrain BIW's growth. In response, BIW has supported the development of new housing and transportation options, and it has also expanded childcare capacity in the greater Bath area. BIW recently partnered with its local YMCA to add over one hundred local daycare slots to expand childcare for mid-coast families.

22. BIW is mindful of its employees' needs and offers a generous benefits package, including health, dental, and vision insurance; paid holidays; paid time off; and long- and short-term disability benefits.

23. BIW's ability to continue directly supporting its employees through initiatives and benefits like those articulated above will be directly impacted by the Rule promulgated by DOL in connection with the PFML. As described further below, because BIW intends to offer a private plan substitution under the PFML, BIW stands to be financially harmed by the Rule.

C. The PFML

24. In July 2023, the Maine Legislature enacted, and Governor Janet Mills signed into law, a biennial State budget that created the PFML. The PFML, codified at 26 M.R.S. §§ 850-A to 850-R, applies to most employers and employees in Maine, including BIW and other members of MSCC.

25. The PFML allows "covered individual[s]" to take up to twelve weeks of leave in a benefit year for certain qualifying reasons. *See id.* § 850-B. During the leave, the PFML will pay the covered individual based on a calculation set forth in section 850-C.

26. In order to make these payments, the PFML established "The Paid Family and Medical Leave Insurance Fund" (the "Fund"). *Id.* § 850-E(1). The Fund consists of, among other things, "[c]ontributions collected pursuant to section 850-F together with any interest earned thereon." *Id.* § 850-E(2)(A). The Fund will accumulate contributions, *i.e.*, premiums, for a period of time, with the payment of benefits being offered to "covered individuals" beginning on May 1, 2026, unless temporarily delayed due to solvency. *See id.* § 850-P.

27. The PFML provides that, "[b]eginning January 1, 2025, for each employee, an employer shall remit employer contribution reports and premiums in the form and manner determined by [DOL]. Employer contribution reports and premiums must be remitted quarterly." *Id.* § 850-F(2); *see also id.* § 850-A(1), (11).

28. At least until 2028, the premium amount "may not be more than a combined rate of 1.0% of wages." *Id.* § 850-F(3)(A). "An employer with 15 or more employees"—such as BIW—"may deduct up to 50% of the premium required for an employee by subsection 3 from that employee's wages and shall remit 100% of the combined premium contribution required by subsection 3." *Id.* § 850-F(5)(A).

29. The PFML contemplates that employers may choose to provide to their employees a private plan that confers substantially equivalent rights, protections, and benefits as those provided by the PFML. *See id.* § 850-H(1).

30. To accommodate private plans and to ensure that employers and employees will not pay double premiums because the employer offers a private plan (*i.e.*, paying for both the state and private plan), the PFML provides that "*[a]n employer with an approved private plan under section 850-H is not required to remit premiums under this section to the fund.*" *Id.* § 850-F(8) (emphasis added).

31. Importantly, if an employer provides an approved private plan, their employees lose their status as "covered individual[s]" under the PFML. *See id.* § 850-A(9) (defining a "[c]overed individual" as someone who earned "at least 6 times the state average weekly wage in wages *subject to premiums* under this subchapter during the individual's base period" (emphasis added)). Consequently, employees of employers with approved private plans cannot utilize or benefit from the rights, protections, and benefits provided by PFML.

32. Pursuant to sections 850-H and 850-F(8), certain of MSCC's members, including BIW, intend to provide their employees with private plans that are the substantial equivalent of the PFML.

D. The Rule

33. The PFML delegates rulemaking responsibilities to DOL. *See id.* § 850-Q.

34. DOL engaged in the rulemaking process in connection with the PFML.

35. DOL published a proposed draft of the Rule on or about May 20, 2024.

36. MSCC actively participated in the rulemaking process.

37. Specifically, MSCC hosted a roundtable discussion with businesses on June 6, 2024, and its President and CEO then provided testimony at a public hearing before DOL on June 10, 2024. MSCC also submitted written comments regarding this proposed draft on July 8, 2024.

38. MSCC engaged in these advocacy activities on behalf of its members with the goal of making the PFML more workable for its members and their employees, including its members who intend to offer a plan that is the substantial equivalent of the PFML.

39. DOL issued the Rule on or about December 4, 2024. The Rule appears at 12-702 C.M.R. ch. 1.

40. The Rule establishes the timing of DOL's collection of premiums. Specifically, the Rule provides: "[t]he employer's premium amount and contribution report must be remitted quarterly on or before the last day of the month following the close of the quarter for which premiums have accrued." 12-702 C.M.R. ch. 1, § X(A). The effect of this provision is that the first round of reports and premium payments will be due on April 30, 2025.

41. With respect to the substitution of private plans, the Rule provides that "[a]n employer that has been approved for a private plan substitution is exempt from the requirements to remit premiums as specified in Section XIII of this rule." *Id.* § X(J). In operation, however, the Rule does not exempt employers offering an approved private plan from remitting premiums.

42. Although premiums will be required for the quarter beginning January 1, 2025, *see* 26 M.R.S. § 850-F-(2), the Rule does not allow employers to apply for substitution of private plans, and therefore achieve exemption from premiums because of the administration of a private plan, until *after* April 1, 2025, *see* 12-702 C.M.R. ch. 1, § XIII(A)(2). Such applications "may be accepted on a rolling basis." *Id.*

43. The Rule is silent on how long DOL can take to review the application, and it does not establish any deadline by which DOL must take action on an application. The Rule thus allows an indefinite period of time for DOL to process an employer's application for exemption from premiums because of the administration of a substantially equivalent private plan.

44. The Rule requires employers to pay premiums through and until the date DOL grants their applications for substitution. *See id.* § XIII(A)(4); *see also id.* § X(J) ("If an employer has not been approved for a private plan substitution, the employer is responsible for remitting premiums to the Fund.").

45. The Rule establishes that, if the application for substitution is granted, the exemption from the obligation to pay premiums begins on the "first day of the quarter in which the substitution is approved." *Id.* § XIII(A)(4). However, "if the application for substitution is submitted *less than 30 days* prior to the end of a quarter, . . . the exemption is effective on the first day of [the] quarter following when the application for substitution was submitted, assuming it is an approval." *Id.*

46. Further, and problematically, "premiums owed prior to the effective date of exemption must be remitted and are *non-refundable*." *Id.* § XIII(A)(4)(b) (emphasis added).

47. Because the Rule prohibits employers from applying for exemption until April 1, 2025—while simultaneously requiring that applications be submitted at least thirty days before the end of the quarter for the exemption to begin on the quarter in which the substitution is granted—it is impossible for employers, like BIW and other members of MSCC, to obtain approval for the first quarter.

48. Employers who intend to substitute private plans for paying premiums to the Fund will be required to pay—at a *minimum* due to the uncertainty and lack of standards regarding the

length of time DOL can take to review applications—one quarter's worth of premiums into the Fund.

49. Not only will these employers be required to remit at least one quarter's worth of premiums into the Fund, but they also will not be able to obtain a refund for anything paid into the Fund on behalf of their employees—even if they provide private plans that are at least the substantial equivalent of the state plan throughout the entire period.

50. Thus, the Rule requires that employers offering an approved private plan, like BIW and other members of MSCC, will need to make an irrevocable payment of at least one quarter's worth of premiums into the Fund, notwithstanding the statutory language establishing the PFML and the fact that such employers' employees will never utilize or benefit from the PFML. *See* 26 M.R.S. § 850-A(9).

51. Should an employer fail to remit premiums (in whole or in part) and file the contribution report on or before the last day of the month following the close of the quarter for which premiums have accrued, the Rule imposes "a penalty of 1.0 percent of the employer's total payroll for the quarter," *i.e.*, a *100%* penalty. 12-702 C.M.R. ch. 1, § XI(A).

52. As noted above, because BIW intends to provide its employees with a private plan that is the substantial equivalent of the state plan, BIW—like other MSCC members—intends to apply for the private-plan exemption.

53. BIW and other MSCC members will nevertheless have to pay non-refundable premiums. For example, in order to comply with the Rule and avoid a 100% penalty, BIW will pay roughly $620,000 in non-refundable premiums into the Fund by April 30, 2025, which represents one-half of the 1% worth of premiums BIW is required to remit on behalf of its employees by that date under the PFML. *See* 26 M.R.S. § 850-F(5)(A).

54. Beginning on January 1, 2025, and on an ongoing basis, BIW's employees have been remitting the other one-half of the 1% worth of premiums BIW is required to remit on behalf of its employees by April 30, amounting to these employees contributing roughly $620,000 into a program they will never utilize or benefit from. *See id.*

55. BIW stands to be harmed by the Rule by making a substantial, non-refundable payment into a state program, even though BIW will be offering a private plan to its employees pursuant to 26 M.R.S. §§ 850-F(8), 850-H, and its employees will never utilize or benefit from the PFML. The same is true of other similarly situated MSCC members. MSCC raised these very concerns to DOL in connection with its advocacy efforts. Specifically, MSCC noted early in the rulemaking process that "the utilization of private plans for compliance, a major discussion point during the legislative process and integral to other state plans, is subverted by the rules that will cause enormous financial hardship in a matter of months on businesses and employees alike." *See* Maine State Chamber of Commerce, Comment to the Proposed Rules Relating to the PFML (July 8, 2024).

COUNT I

(Declaratory Judgments Act – Regulation Invalid Pursuant to 5 M.R.S. § 8058)

(Brought on behalf of MSCC and BIW)

56. Plaintiffs repeat and incorporate by reference the preceding paragraphs as if fully set forth herein.

57. Plaintiffs bring this Count pursuant to 5 M.R.S. § 8058 to timely challenge DOL's approval of the Rule because the Rule conflicts with the PFML and reflects an arbitrary and capricious decision by DOL.

58. Title 5 M.R.S. § 8058 sets the standard by which courts evaluate whether an agency's rulemaking was appropriate, *i.e.*, whether "the rule is arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law." *Id.* "Otherwise not in accordance with law" includes challenges arguing that the rule contradicts the relevant statutory scheme. *See Bocko v. Univ. of Me. Sys.*, 2024 ME 8, ¶ 27, 308 A.3d 203.

59. The Rule plainly conflicts with the PFML, and the Rule is arbitrary and capricious.

60. The PFML expressly and intentionally exempted employers, like BIW and other members of MSCC, with an approved private plan from the requirement to remit premiums into the Fund. *See* 26 M.R.S. § 850-F(8).

61. The Rule, however, bars employers, like BIW and other members of MSCC, from applying for a private plan substitution until April 1, 2025. 12-702 C.M.R. ch. 1, § XIII(A)(2).

62. Further, if the application for substitution is "submitted less than 30 days prior to the end of a quarter, . . . the exemption is effective on the first day of [the] quarter *following* when the application for substitution was submitted." *Id.* § XIII(A)(4) (emphasis added).

63. Because the Rule forbids employers, like BIW and other members of MSCC, from applying for substitution until on or after April 1, and the quarter ends on March 31, it is *impossible* for employers, including BIW and other members of MSCC, to apply at least thirty days before the end of the quarter.

64. In addition, the Rule provides that "premiums owed prior to the effective date of exemption must be remitted and are *non-refundable*." *Id.* § XIII(A)(4)(b) (emphasis added).

65. Thus, not only does the Rule preclude employers, like BIW and other members of MSCC, from qualifying for exemption from the obligation to pay premiums into the Fund

(regardless of whether they offer a substantially equivalent private plan to their employees) for the first quarter, but it also precludes them from receiving a refund of those premiums—even though their employees will never utilize or benefit from the PFML, and even though the PFML expressly provides that employers with qualifying private plans are *not* required to remit premiums into the Fund.

66. The portion of the Rule providing that any premiums paid into the Fund prior to the effective date of the exemption are "non-refundable" directly conflicts with the Legislature's clear mandate that an employer with an approved private plan "is not required to remit premiums under this section to the fund." 26 M.R.S. § 850-F(8).

67. Further, the Rule reflects an arbitrary and capricious decision by DOL to impose the burdens associated with financing the Fund on employers, like BIW and other members of MSCC, who will offer private plans and on those employers' employees.

68. This Court should declare that 12-702 C.M.R. ch. 1, § XIII(A)(4)(b) is null and void on the basis that it violates the governing statutory provision and thwarts the Legislature's intent in establishing the PFML.

COUNT II

(M.R. Civ. P. 80C – Regulation Invalid)

(Brought on behalf of MSCC and BIW)

69. Plaintiffs repeat and incorporate by reference the preceding paragraphs as if fully set forth herein.

70. Plaintiffs bring this Count pursuant to 5 M.R.S. §§ 11001-11008 and M.R. Civ. P. 80C to timely challenge DOL's approval of the Rule because the Rule conflicts with the PFML and reflects an arbitrary and capricious decision by DOL.

71. Title 5 M.R.S. § 11007 and M.R. Civ. P. 80C permit judicial review of an agency decision, including whether the decision was "[i]n violation of constitutional or statutory provisions" and whether the decision was "[a]rbitrary or capricious or characterized by abuse of discretion." 5 M.R.S. § 11007(4)(C); *see Doane v. Dep't of Health & Hum. Servs.*, 2021 ME 28, ¶ 15, 250 A.3d 1101.

72. DOL committed an error of law in approving the Rule, and the Rule is arbitrary and capricious.

73. The PFML expressly and intentionally exempts employers, like BIW and other members of MSCC, with an approved private plan from the requirement to remit premiums into the Fund. *See* 26 M.R.S. § 850-F(8).

74. The Rule, however, bars employers, like BIW and other members of MSCC, from applying for an exemption until April 1, 2025. 12-702 C.M.R. ch. 1, § XIII(A)(2).

75. Further, if the application for substitution is "submitted less than 30 days prior to the end of a quarter, . . . the exemption is effective on the first day of [the] quarter *following* when the application for substitution was submitted." *Id.* § XIII(A)(4) (emphasis added).

76. Because the Rule forbids employers, like BIW and other members of MSCC, from applying for substitution until on or after April 1, and the quarter ends on March 31, it is *impossible* for employers, including BIW and other members of MSCC, to apply at least thirty days before the end of the quarter.

77. In addition, the Rule provides that "premiums owed prior to the effective date of exemption must be remitted and are *non-refundable*." *Id.* § XIII(A)(4)(b) (emphasis added).

78. Thus, not only are employers, like BIW and other members of MSCC, precluded from qualifying for exemption from the obligation to pay premiums into the Fund (regardless of

whether they offer a substantially equivalent private plan to their employees) for the first quarter, but they also are precluded from receiving a refund of those premiums—even though their employees will never utilize or benefit from the PFML, and even though the PFML expressly provides that employers with qualifying private plans are *not* required to remit premiums into the Fund.

79. The portion of the Rule providing that any premiums paid into the Fund prior to the effective date of the exemption are "non-refundable" directly conflicts with the Legislature's clear mandate that an employer with an approved private plan "is not required to remit premiums under this section to the fund." 26 M.R.S. § 850-F(8).

80. Further, the Rule reflects an arbitrary and capricious decision by DOL to impose the burdens associated with financing the Fund on employers, like BIW and other members of MSCC, who will offer private plans and on those employers' employees.

81. This Court should enter judgment that 12-702 C.M.R. ch. 1, § XIII(A)(4)(b) is null and void on the basis that it violates the governing statutory provision and thwarts the Legislature's intent in establishing the PFML.

COUNT III

(42 U.S.C. § 1983 – Takings Claim in Violation of the Fifth Amendment to the U.S. Constitution)

(Brought on behalf of BIW)

82. BIW repeats and incorporates by reference the preceding paragraphs as if fully set forth herein.

83. The Fifth Amendment to the U.S. Constitution prohibits the government from taking private property for public use without just compensation. U.S. Const. amend. V ("[N]or shall private property be taken for public use, without just compensation.").

84. The Fourteenth Amendment to the U.S. Constitution makes the Fifth Amendment applicable to the states. *See Dolan v. City of Tigard*, 512 U.S. 374, 383 (1994).

85. The Fifth Amendment, as applicable here through the Fourteenth Amendment, provides property owners with a self-executing right to compensation for a taking by virtue of governmental action.

86. The Rule reflects DOL's direct exertion of a power forbidden by the Fifth Amendment.

87. DOL's collection and retention of premiums in excess of the premiums authorized pursuant to the governing statute, and for which no benefit will be received by the affected employers, constitutes a taking. As applied to BIW, in failing to refund the premiums paid between January 1, 2025, and the effective date of DOL's decision to approve BIW's substitution of a private plan, DOL will unconstitutionally deprive BIW of its private property in violation of the Fifth Amendment.

88. BIW's loss of property is caused by, and is a direct and probable result of, the Rule.

89. Because the Rule, as applied to BIW, results in a taking of BIW's property for public use and without just compensation in violation of the Fifth Amendment, BIW seeks just compensation from DOL.

COUNT IV

(Inverse Condemnation Claim – Article I, Section 21 of the Maine Constitution)

(Brought on behalf of BIW)

90. BIW repeats and incorporates by reference the preceding paragraphs as if fully set forth herein.

91. Article I, section 21 of the Maine Constitution provides, "Private property shall not be taken for public uses without just compensation; nor unless the public exigencies require it."

92. Article I, section 21 of the Maine Constitution provides property owners with a self-executing right to damages for a taking by virtue of governmental action.

93. The Rule reflects the use of a power exceeding DOL's authority and constitutes an unconstitutional taking.

94. DOL's collection and retention of premiums in excess of the premiums authorized pursuant to the governing statute, and for which no benefit will be received by the affected employers, constitutes a taking. As applied to BIW, in failing to refund the premiums paid between January 1, 2025, and the effective date of DOL's decision to approve BIW's substitution of a private plan, DOL will unconstitutionally deprive BIW of its private property in violation of article I, section 21 of the Maine Constitution.

95. BIW's loss of property is caused by, and is a direct and probable result of, the Rule.

96. Because the Rule, as applied to BIW, results in a taking of BIW's property for public use, under circumstances failing to qualify as a public exigency, and without just compensation in violation of article I, section 21, BIW seeks just compensation from DOL.

WHEREFORE, Plaintiffs request the following relief:

a. A judgment declaring that DOL committed an error of law and acted arbitrarily and capriciously in approving the section of the Rule stating that premiums paid into the Fund prior to a private-plan exemption taking effect are non-refundable;

b. A judgment determining that the application of the Rule to BIW results in a taking of BIW's property under the Fifth Amendment of the United

States Constitution, requiring just compensation, and awarding BIW just compensation in an amount to be determined at trial;

c. A judgment determining that the application of the Rule to BIW results in a taking of BIW's property under article I, section 21 of the Maine Constitution, requiring just compensation, and awarding BIW just compensation in an amount to be determined at trial;

d. An award of costs and attorney's fees pursuant to 42 U.S.C. §§ 1988, 1983; and

e. All other and further relief as this Court deems just and appropriate.

Dated at Portland, Maine this 13th day of January, 2025

Sara A. Murphy, Bar No. 5423
James R. Erwin, Bar No. 1856
Joshua D. Dunlap, Bar No. 4477
Katherine E. Cleary, Bar No. 10299
Pierce Atwood LLP
Merrill's Wharf, 254 Commercial Street
Portland, ME 04101
Tel: 207-791-1100
jerwin@pierceatwood.com
jdunlap@pierceatwood.com
smurphy@pierceatwood.com
kcleary@pierceatwood.com

Attorneys for Plaintiffs Maine State Chamber of Commerce and Bath Iron Works Corporation

VERIFICATION OF MAINE STATE CHAMBER OF COMMERCE CORPORATION

I, Patrick C. Woodcock, as the President, CEO, and authorized agent of Maine State Chamber of Commerce, declare under penalty of perjury that the factual allegations concerning Maine State Chamber of Commerce in the foregoing Verified Complaint are true and correct, based on my personal knowledge. Such personal knowledge includes information from records of the regularly conducted activities of Maine State Chamber of Commerce made at or near the time of such activities by, or from information transmitted by, persons with knowledge, kept in the regular course of such activities, and of which it is the regular practice of Maine State Chamber of Commerce to make such records.

Executed on this 13 day of January, 2025

Maine State Chamber of Commerce

By: Patrick C. Woodcock
Its duly authorized representative

STATE OF MAINE
Cumberland, ss

Personally appeared before me the above-named Patrick C. Woodcock, as the duly authorized representative of Maine State Chamber of Commerce, and made oath that the statements made and certified by him herein are true.

Dated: 1/13/2025

Notary Public
My Commission Expires:

DENISE M. PLOURDE
Notary Public, Maine
My Commission Expires April 1, 2028

VERIFICATION OF BATH IRON WORKS CORPORATION

I, Raymond W. Steen, as the authorized agent of Bath Iron Works Corporation, declare under penalty of perjury that the factual allegations concerning Bath Iron Works Corporation in the foregoing Verified Complaint are true and correct, based on my personal knowledge. Such personal knowledge includes information from records of the regularly conducted activities of Bath Iron Works Corporation made at or near the time of such activities by, or from information transmitted by, persons with knowledge, kept in the regular course of such activities, and of which it is the regular practice of Bath Iron Works Corporation to make such records.

Executed on this 13th day of January, 2025.

Bath Iron Works Corporation

By: Raymond W. Steen
Its duly authorized representative

STATE OF MAINE
Sagadahoc, ss

Personally appeared before me the above-named Raymond W. Steen, as the duly authorized representative of Bath Iron Works Corporation and made oath that the statements made and certified by Raymond W. Steen herein are true.

Dated: 01/13/2025

Notary Public
My Commission Expires:

SUSAN SPENCER PLUMMER
NOTARY
PUBLIC
EXP. JANUARY 4, 2031
STATE OF MAINE

STATE OF MAINE
KENNEBEC, ss

SUPERIOR COURT
CIVIL ACTION
DOCKET NO. AUGSC-CV-2025-00007

MAINE STATE CHAMBER OF COMMERCE and BATH IRON WORKS CORPORATION, Plaintiffs, v. STATE OF MAINE DEPARTMENT OF LABOR and LAURA A. FORTMAN, in her official capacity as Commissioner of the State of Maine Department of Labor, Defendants.	)	**CONSENTED-TO MOTION TO REPORT TO THE LAW COURT PURSUANT TO M.R. APP. P. 24(a) WITH INCORPORATED MEMORANDUM OF LAW**

Pursuant to Rule 24(a) of the Maine Rules of Appellate Procedure, Plaintiffs Maine State Chamber of Commerce (the "Chamber") and Bath Iron Works Corporation ("BIW"), with the consent of Defendants State of Maine Department of Labor ("DOL") and Laura A. Fortman (the "Commissioner"), in her official capacity as Commissioner of the State of Maine Department of Labor, hereby move this Court to report this action to the Law Court. This case presents urgent and significant questions of law relating to the lawfulness of 12-702 C.M.R. ch. 1, § XIII(A)(4)(b), which is part of the rules promulgated by DOL to govern the recently adopted Paid Family and Medical Leave ("PFML") program. Section XIII(A)(4)(b) requires employers who choose to provide paid family and medical leave benefits via a private plan that is the substantial equivalent of the state plan to pay non-refundable premiums into the state-run program. Plaintiffs submit that the rule contradicts the statute enacting the PFML program; specifically, Plaintiffs argue that the rule conflicts with 26 M.R.S. § 850-F(8). Plaintiffs also argue that section XIII(A)(4)(b) effects an

unlawful taking. Defendants contest Plaintiffs' contentions. The question raised regarding the lawfulness of the rule affects numerous employers across the State of Maine, including BIW and other members of the Chamber, as well as employees across the State remitting wages toward their employer's premium payments. Moreover, the urgent and significant questions raised by the rule are purely questions of law, making this case especially well-suited to a Rule 24(a) report. Accordingly, in conjunction with the factual record agreed to by the Parties and filed herewith, it is appropriate to report the questions identified herein to the Law Court pursuant to M.R. App. P. 24(a).

BACKGROUND

In July 2023, the Maine Legislature enacted, and Governor Janet Mills signed, a biennial State budget that created the PFML. The PFML, codified at 26 M.R.S. §§ 850-A to 850-R, applies to most employers and employees in Maine, including BIW and other members of the Chamber. Generally speaking, the PFML allows "covered individual[s]" to take up to twelve weeks of leave in a benefit year for certain qualifying reasons. *See id.*§ 850-B. During the leave, the PFML will pay the covered individual based on a prescribed calculation. *See id.* § 850-C. In order to make these payments, the PFML established "The Paid Family and Medical Leave Insurance Fund" (the "Fund"). *Id.* § 850-E(1). The Fund consists primarily of contributions collected from employers and employees. *Id.* § 850-E(2)(A); *id.* § 850-F(2)-(3), (5). The PFML also contemplates that employers may choose to provide their employees a private plan that confers substantially equivalent rights, protections, and benefits as those provided by the PFML. *Id.* § 850-H(1). As to these employers, the PFML provides that "[a]n employer with an approved private plan under section 850-H is not required to remit premiums under this section to the fund." *Id.* § 850-F(8).

DOL promulgated rules implementing the PFML on or about December 4, 2024 (the "Rule"). The Rule establishes that employers must begin remitting premiums to the Fund by April 30, 2025. 12-702 C.M.R. ch. 1, § X(A). The Rule also establishes that employers may not apply for substitution of private plans, and therefore achieve exemption from premium payments because of the administration of a private plan, until after April 1, 2025. *Id.* § XIII(A)(2). The Rule further requires employers to pay premiums through and until the date DOL grants their applications for substitution. *See id.* § XIII(A)(4). For applications that are granted, the exemption from the obligation to pay premiums begins on the "first day of the quarter in which the substitution is approved," except when an application for substitution is submitted less than 30 days prior to the end of a quarter; in that circumstance, "the exemption is effective on the first day of [the] quarter following when the application for substitution was submitted, assuming it is an approval." *Id.*

Because the Rule prohibits employers from applying for an exemption until April 1, 2025, and further requires that applications be submitted at least thirty days before the end of the quarter for the exemption to begin on the quarter in which the substitution is granted, all employers covered under the PFML, including BIW and other members of the Chamber, must pay at least one quarter of premiums into the Fund. The Rule precludes employers who offer a substitute private plan from obtaining any refund of those premiums, providing: "premiums owed prior to the effective date of the exemption must be remitted and are non-refundable." *Id.* § XIII(A)(4)(b).

Employers who will provide substitute private plans—like BIW and other MSCC members—will therefore be required to pay at least one quarter's worth of premiums into the Fund. They will not be able to obtain a refund for anything paid into the Fund on behalf of their employees. Plaintiffs contend that the Rule therefore violates section 850(F)(8) of the PFML,

which expressly exempts such employers from having to remit premiums into the Fund. BIW and other MSCC members will imminently be making payments into the Fund, and employees have already been remitting monies to cover the employees' share of the payments.

Because Plaintiffs allege harm from these nonrefundable premium payments, Plaintiffs have brought this action to challenge the validity of section XIII(A)(4)(b) of the Rule. Specifically, Plaintiffs claim that section XIII(A)(4)(b) conflicts with 26 M.R.S. § 850-F(8), and is therefore invalid; and further, that—to the extent DOL is not required to refund premium payments—section XIII(A)(4)(b) constitutes an unlawful taking under the Fifth and Fourteenth Amendments of the U.S. Constitution and article 1, section 21 of the Maine Constitution. Defendants contest Plaintiffs' legal allegations. The Parties agree that there is an urgent need for the Law Court to decide finally the questions reported—which affect a new major state program and most Maine employers and employees.

ARGUMENT

Pursuant to Rule 24(a) of the Maine Rules of Appellate Procedure, this Court may report questions of law of sufficient importance or doubt to the Law Court when "(1) all parties appearing agree to the report; (2) there is agreement as to all facts material to the appeal; and (3) the decision thereon would, in at least one alternative, finally dispose of the action." M.R. App. P. 24(a). Each criterion is satisfied here.

First, the Parties agree that this matter is appropriate for report to the Law Court. M.R. App. P. 24(a)(1). Further, the Parties also submit herewith an Agreed Upon Statement of Facts, which contains all facts material to the resolution of the appeal, with supporting exhibits. Attachment A (Agreed Upon Statement of Facts); M.R. App. P. 24(a)(2); *see Delogu v. City of Portland*, 2004 ME 18, ¶ 2, 843 A.2d 33 ("[A] report 'brings up to us the entire action and our

duty is to determine the whole case, as if we were sitting at *nisi prius*, on the basis of the stipulated facts and the reasonable inferences flowing therefrom.'" (quoting *Langer v. United States Fid. & Guar. Co.*, 552 A.2d 20, 20 (Me. 1988))). Finally, the issues at the core of this dispute, which concern the validity of a portion of the Rule adopted by DOL to implement the state-wide PFML program, are serious and important questions of law, the resolution of which, in at least one alternative, will finally dispose of the action. M.R. App. P. 24(a)(3); *see Delogu*, 2004 ME 18, ¶ 3, 843 A.2d 33; *Swanson v. Roman Catholic Bishop*, 1997 ME 63, ¶ 6, 692 A.2d 441; *Alexander*, Maine Appellate Practice § 24.2 (6th ed. 2022).

In determining whether to accept reports pursuant to Rule 24(a), the Law Court considers several factors. *See Liberty Ins. Underwriters, Inc. v. Estate of Faulkner*, 2008 ME 149, ¶¶ 7-9, 957 A.2d 94. Each of those factors is satisfied here.

First, the Law Court considers whether the questions reported are "of sufficient importance and doubt to outweigh the policy against piecemeal litigation." *York Register of Probate v. York County Probate Court*, 2004 ME 58, ¶ 11, 847 A.2d 395 (internal quotation marks omitted). That is, the issues decided must be important "not only to the parties but also to other members of the public." *State v. Placzek*, 380 A.2d 1010, 1014 (Me. 1977).[1] This criterion is plainly apparent from the agreed-upon record. This case probes the validity of a portion of DOL's Rule implementing a major statewide program that (1) is in the process of being implemented, and (2) affects almost all employers statewide and a significant number of employees. The impact of the Law Court's decision on the legal questions presented will reverberate across the State—directly affecting not only most Maine businesses and employees, but also DOL's regulatory efforts to

[1] Cases seeking a report to the Law Court filed on or before December 31, 2000, were brought pursuant to Maine Rule of Civil Procedure 72. Civil Rule 72 was replaced by Maine Rule of Appellate Procedure 24.

implement a paid leave program that was a critical piece of the last biennial budget.[2] A report to the Law Court is particularly appropriate where, as here, the urgent and compelling need for an immediate final decision from the State's highest court is unquestioned. The longer the Parties, and Maine employers and employees generally, have to navigate the uncertain implementation of the PFML, the greater the upheaval to Maine citizens. *See Placzek*, 380 A.2d at 1014 n.9 ("For the Law Court to take the case directly on a properly prepared record results in the expenditure of the least judicial resources in its final disposition."). Further, the issues presented are novel questions under Maine law.

Second, the Law Court considers whether the question raised on report "might not have to be decided at all because of other possible dispositions." *Morris v. Sloan*, 1997 ME 179, ¶ 7, 698 A.2d 1038. Here, there are no preliminary factual determinations or other issues that would prevent the Law Court from ultimately reaching the legal questions presented. *See, e.g.*, *Littlebrook Airpark Condo. Ass'n v. Sweet Peas, LLC*, 2013 ME 89, ¶ 12, 81 A.3d 348; *Sirois v. Winslow*, 585 A.2d 183, 185 (Me. 1991); *Placzek*, 380 A.2d at 1013.

Finally, the Law Court considers whether a decision on the issue would, in at least one alternative, dispose of the action. *Swanson*, 1997 ME 63, ¶ 6, 692 A.2d 441. As an initial matter, a determination that the 12-702 C.M.R. ch. 1, § XIII(A)(4)(b) is consistent with the governing statute, 26 M.R.S. § 850-F(8), and does not constitute a taking would end the case. This path to final disposition of the action is all that is necessary. *See id.* (stating that it is sufficient that there be one possible avenue for decision that would dispose of the action). Alternatively, a determination that the Rule is invalid and that the premiums collected from employers offering

[2] The fact that one of the claims asserted relates to the constitutional validity of the regulations also weighs in favor of a report under Appellate Rule 24. *See, e.g., Thermos Co. v Spence*, 1999 ME 129, ¶ 5, 735 A.2d 484; *Swanson*, 1997 ME 63, ¶ 6, 692 A.2d 441.

private plans were unlawful and should be returned would also effectively end the case. *See Avangrid Networks, Inc. v. Sec'y of State*, 2020 ME 109, ¶ 39, 237 A.3d 882 (stating that the State would "comply with the law once it is declared," which negated the need for any injunctive relief since there was no evidence "suggesting an unwillingness on the part of the [State] to accept a judicial determination" of the question presented (quoting *Littlefield v. Town of Lyman*, 447 A.2d 1231, 1235 (Me. 1982)).

In sum, given the stipulated factual record and the significant purely legal issues presented, a report to the Law Court is consistent with the Law Court's "basic function as an appellate court" and would not "improperly place [the Law Court] in the role of an advisory board due to the lack of a final trial court judgment to review." *Maine Senate v. Sec'y of State*, 2018 ME 52, ¶ 14, 183 A.3d 749 (internal quotation marks omitted). Accordingly, the criteria of M.R. App. P. 24(a) are satisfied, and the Law Court is likely to accept the report for review.

CONCLUSION

This case requires an expeditious determination from the Law Court on important legal questions, two of constitutional concern, related to the validity of a portion of DOL's Rule implementing the PFML program; all Parties appearing agree to a report to the Law Court pursuant to M.R. App. P. 24(a); and all Parties agree upon all of the material facts pertinent to the report, as stated in the Agreed Upon Statement of Facts filed herewith.

Having satisfied the criteria of M.R. App. P. 24(a), Plaintiffs—with the consent of Defendants—move for this Court to report this matter to the Law Court without further delay for resolution of the following questions of law:

1. Have Plaintiffs proven, on the stipulated record, pursuant to 5 M.R.S. § 8058 that 12-702 C.M.R. ch.1, § XIII(A)(4)(b) conflicts with the Paid Family and Medical

Leave Act, 26 M.R.S. §§ 850-A to 850-R (2024), or that 12-702 C.M.R. ch.1, § XIII(A)(4)(b) is arbitrary and capricious or otherwise not in accordance with law?

2. Have Plaintiffs proven, on the stipulated record, that 12-702 C.M.R. ch.1, § XIII(A)(4)(b) constitutes a cognizable claim of taking of private property use, without just compensation, in violation of article 1, section 21 of the Maine Constitution?

3. Have Plaintiffs proven, on the stipulated record, that 12-702 C.M.R. ch.1, § XIII(A)(4)(b) constitutes a cognizable claim of taking of private property for public use, without just compensation, in violation of the Fifth Amendment of the United States Constitution, made applicable to the States through the Fourteenth Amendment?

Dated this 5th day of February, 2025

Sara A. Murphy, Bar No. 5423
James R. Erwin, Bar No. 1856
Joshua D. Dunlap, Bar No. 4477
Katherine E. Cleary, Bar No. 10299
PIERCE ATWOOD LLP
Merrill's Wharf
254 Commercial Street
Portland, ME 04101
Tel: (207) 791-1100
smurphy@pierceatwood.com
jerwin@pierceatwood.com
jdunlap@pierceatwood.com
kcleary@pierceatwood.com

Attorneys for Plaintiffs Maine State Chamber of Commerce and Bath Iron Works Corporation

NOTICE

Matters in opposition to this Motion pursuant to M.R. Civ. P. 7(c) must be filed not later than 21 days after the filing of this motion unless another time is provided by the Maine Rules of Civil Procedure or by the Court. Failure to file timely opposition will be deemed a waiver of all objections to the motion, which may be granted without further notice or hearing.

ATTACHMENT A

STATE OF MAINE KENNEBEC, ss	SUPERIOR COURT CIVIL ACTION DOCKET NO. AUGSC-CV-2025-00007
MAINE STATE CHAMBER OF COMMERCE and BATH IRON WORKS CORPORATION, Plaintiffs, v. STATE OF MAINE DEPARTMENT OF LABOR and LAURA A. FORTMAN, in her official capacity as Commissioner of the State of Maine Department of Labor Defendants.	**AGREED UPON STATEMENT OF FACTS PURSUANT TO M.R. APP. P. 24(a)**

The parties agree that the following statements are true, may be accepted as facts, and comprise part of the stipulated record for purposes of a Report to the Law Court pursuant to M.R. App. P. 24(a).

1. Plaintiff Maine State Chamber of Commerce ("MSCC" or "the Chamber") is a Maine non-profit organization with its principal place of business in Augusta, Maine. MSCC is a statewide membership organization advocating for Maine businesses on issues affecting those businesses and Maine's business climate.

2. Plaintiff Bath Iron Works Corporation ("BIW") is a Maine corporation with a principal place of business in Bath, Maine. BIW is a full-service shipyard specializing in the design, building, and support of complex naval shipbuilding for the U.S. Navy. BIW is a member of MSCC.

3. The Maine Department of Labor ("MDOL" or "the Department") is an arm of the State of Maine, a sovereign state, established through 26 M.R.S. § 1401-A(1), with offices located in Augusta, Maine.

4. Laura A. Fortman is the Commissioner of Labor, within the meaning of 26 M.R.S. § 1401-A(2), and oversees the Department.

5. The Paid Family and Medical Leave Act ("PFML Act" or "Act"), codified at 26 M.R.S. §§ 850-A to 850-R, was enacted by the Maine Legislature, and signed by Governor Mills, in 2023. The PFML program is administered by the Department. 26 M.R.S. § 850-B. The Act applies to BIW and other members of MSCC.

6. The Act directs the Department to adopt routine technical rules as necessary to implement the Act by January 1, 2025. 26 M.R.S. § 850-Q.

7. The Department consulted with states and districts which had already implemented or were in the process of implementing paid family medical leave programs. The Department sought from other states, among other things, their experience in allowing employers to submit a "declaration of intent," indicating that the company would eventually obtain a private plan substitution. The Department learned that Oregon, for instance, received approximately 3100 declarations of intent, but 467 of those employers did not ever obtain a private plan. Connecticut reported administrative issues in verifying whether employers eventually obtained a private plan. Massachusetts informed the Department that it experienced employers with a private plan returning to the state plan at the first opportunity, thus avoiding paying premiums during the lead-up period.

8. The Department also communicated with a trade association for the life insurance industry. From those communications, it was the Department's understanding, at the time that it

issued the final Rule, that insurance companies were waiting for the final Rules and the requirements for "substantial equivalence" before writing policies for private plans for employers in Maine to substitute for the state plan under Maine PFML. It was the Department's understanding that it would take insurance companies 3 to 4 months after the final rules were issued to write such plans and to have them available on the market. It was also the Department's understanding from another state that insurance companies could issue substitute paid family leave policies, and commit employers to buying such policies, a year in advance of the effective date of the policy.

9. On May 20, 2024, the Department issued a draft rule, proposed Chapter 1, Rules Governing the Maine Paid Family and Medical Leave Program ("first proposed rule"). A rulemaking hearing was held on June 10, 2024, and comments on the first proposed rule were accepted through July 8, 2024. Ex. 2.

10. After reviewing and considering public comments, on August 28, 2024, the Department issued a second version of the draft rule, inviting another round of comments on those amendments to the first proposed rule, in accordance with 5 M.R.S. § 8052(5)(B) ("second proposed rule"). The Department held another rulemaking hearing on September 17, 2024, and received additional public comments until September 30, 2024. Ex. 2.

11. The Chamber engaged in the rulemaking process, including testifying at the public hearing on June 10, 2024, and the Chamber's summary of that testimony is Ex. 3. The Chamber offered written public comments on the first proposed rule and the second proposed rule. Ex. 4 and 5.

12. Private insurance companies needed to wait for the final MDOL Rule, including in particular the Rule's requirements for "substantial equivalence," before writing policies for private

plans for employers in Maine to substitute for the state plan under PFML, and submitting those plans to the Maine Bureau of Insurance ("BOI") for review and approval for substantial equivalence as set forth in the PFML and the Rule.

13. Accordingly, as of the date that the Rule was finalized, December 4, 2024, *see* Ex. 1, no private plans were or could have been available that met the requirements for "substantial equivalence" as defined by the Rule.

14. At present, insurance companies may submit PFML proposed private plans to BOI for approval as a certified substantially equivalent plan in accordance with a checklist prepared by MDOL and BOI that was finalized on December 18, 2024. As of the date of this Agreed Upon Statement of Facts, fourteen (14) insurance companies have submitted proposed private plans to the BOI for review.

15. Private plans are expected to be approved by MDOL, with BOI input, by April 1, 2025 (if not earlier), when employers may begin applying for substitution under the Rule and PFML.

16. As of the date of the filing of the Complaint, BIW had not purchased or contracted for a private plan to substitute for the Maine PFML public plan because no private plan had yet been approved by MDOL, with BOI input, and MDOL will not accept applications for private plan substitutions until after April 1, 2025. However, BIW and other members of MSCC will offer a private plan substitution under the PFML as soon as practicable after the Rule allows.

17. MDOL anticipates that review and approval of applications for private plan substitutions that involve a private plan that has already been certified by MDOL will be fairly streamlined.

18. Section XIII(A)(4) of the Rule provides that an employer is exempt from the obligations of premiums from the first day of the quarter in which the substitution is approved, as long as the application for substitution is submitted to the Department at least 30 days prior to the end of the quarter. This provision is based upon the Department's expectation that, in most circumstances, it will be able to approve applications within 30 days if the applications involve plans that have already been certified by MDOL.

19. Until the Department processes employers' applications for substitution of a private plan, employers like BIW and other members of MSCC that will offer a private plan substitution are required under the Rule to pay nonrefundable premiums into the Fund.

20. BIW will pay nonrefundable premiums due under the Rule by April 30, 2025, which BIW estimates will be approximately $620,000.

21. Beginning as of January 1, 2025, and on an ongoing basis, BIW's employees have been remitting monies toward premium payments, and BIW estimates that its employees will pay approximately $620,000 in premiums into the Fund by April 30, 2025.

22. Other members of MSCC will pay nonrefundable premiums into the Fund by April 30, 2025.

23. Beginning as of January 1, 2025, and on an ongoing basis, other members of MSCC's employees have been remitting monies toward premium payments, due to be paid into the Fund by those MSCC employers by April 30, 2025.

Dated this 5th day of February, 2025

/s/ *Sara A. Murphy*
Sara A. Murphy, Bar No. 5423
James R. Erwin, Bar No. 1856
Joshua D. Dunlap, Bar No. 4477
Katherine E. Cleary, Bar No. 10299
Pierce Atwood LLP
Merrill's Wharf, 254 Commercial Street
Portland, ME 04101
Tel: 207-791-1100
smurphy@pierceatwood.com
jerwin@pierceatwood.com
jdunlap@pierceatwood.com
kcleary@pierceatwood.com

Attorneys for Plaintiffs Maine State Chamber of Commerce and Bath Iron Works Corporation

AARON FREY
Attorney General

/s/ *Nancy Macirowski*
Nancy Macirowski, Bar No. 8987
Anne Macri, Bar No. 4226
Assistant Attorney General
6 State House Station
Augusta, Maine 04333-0006
(207) 626-8800
nancy.macirowski@maine.gov
anne.macri@maine.gov

Attorneys for State of Maine Department of Labor (MDOL) and Laura Fortman in her official capacity as Commissioner of MDOL

EXHIBIT 1

12: Department of Labor

702: Maine Paid Family and Medical Leave Program

Chapter 1: Rules governing the Maine Paid Family and Medical Leave Program

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Summary: The purpose of this chapter is to provide definitions and procedures for implementing the Paid Family and Medical Leave Program pursuant to 26 M.R.S. chapter 7, subchapter 6-C.

I. Definitions

A. Meaning of Terms. The following definitions are provided to clarify or to add to those codified in Title 26 § 850-A. Unless the context otherwise requires, terms used in regulations, interpretations, forms, and other official pronouncements issued by the Department shall be construed in the sense in which they are defined in the law, or in this or other regulations of the Department.

1. "Act" means the Act authorizing Paid Family and Medical Leave, 26 M.R.S. §§ 850-A - 850R.

2. "Administrator" has the same meaning as § 26 M.R.S. 850-A (1).

3. "Applicant" means an individual who is applying to obtain benefits under this rule.

4. "Authority" means the Paid Family and Medical Leave Benefits Authority established in 26 M.R.S. § 850-O.

5. "Business day" means any day that is not a Saturday, Sunday or a state holiday.

6. "Calendar week" means a period of seven consecutive calendar days, beginning on a Sunday.

7. "Continuous leave" means leave occurring in blocks for consecutive days or weeks.

8. "Department" means the Maine Department of Labor.

9. "Days" means calendar days, unless otherwise specified inthe Act, or in this rule.

10. "Employer" has the same meaning as 26 M.R.S. § 850-A (14). Additionally, "Employer" for the purpose of these rules, in the case of an employee leasing contractual arrangement described in 32 M.R.S. Ch. 125, means the client company as described in 32 M.R.S. Ch 125 §14051(1), and any reference to Federal Employer Identification Number (FEIN) means the FEIN of the client company.

11. "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).

12. “Family member” has the same meaning as 26 M.R.S. § 850-A(19).

13. “Good cause” includes, but is not limited to, the following:

A. A serious health condition that results in an unanticipated and prolonged period of incapacity and that prevents an individual from timely filing an application for benefits or a request to appeal;

B. A demonstrated inability to reasonably access a means to file an application or to request an appeal in a timely manner, such as an inability to file an application or request to appeal due to a natural disaster or a significant and prolonged closure of the Department’s offices;

C. A serious health condition of a family member that requires the unanticipated and prolonged presence of the individual filing an application or request to appeal and that prevents the individual from timely filing an application for benefits or a request to appeal;

D. Physical, intellectual, linguistic or other limitations including limited understanding of English that prevents the timely filing of an application or request to appeal; or

E. Circumstances beyond the control of the individual filing the application or requesting the appeal that made it impossible to timely file the application or request to appeal despite making a reasonable effort to do so.

14. “Health care provider” has the same meaning as 26 M.R.S. § 850-A (21) and includes but is not limited to all providers identified in 29 C.F.R § 825.125 (eff. Feb 6, 2013.)

15. “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).

16. “Independent contractor” has the same meaning as 26 M.R.S. § 1043 (11) (E).

17. “Medical leave” means leave requested by an employee for the reasons set forth in 26 M.R.S. § 850-A (22).

18. “Program” means the Maine Paid Family and Medical Leave Program.

19. “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.

20. “Safe leave” means leave requested by an employee for the reasons set forth in 26 M.R.S. § 850-A (26)

21. “Scheduled workweek” means the number of hours an employee is scheduled to work in a particular week. 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.

22. “State average weekly wage” has the same meaning as 26 M.R.S. § 850-A (30). For the purposes of this rule, the state average weekly wage amount is updated annually on July 1st.

23. “Tier 1 wages” means the amount of the covered individual’s reported gross weekly wage reported to the Administrator that is equal to or less than fifty percent (50%) of the state average weekly wage.

24. “Tier 1 benefits” means the percentage of the wage replacement a covered individual is entitled to earn on wages up to fifty percent (50%) of the state average weekly wage.

25. “Tier 2 wages” means the amount of the covered individual’s reported gross weekly wage reported to the Administrator that is more than 50 percent (50%) of the state average weekly wage.

26. “Tier 2 benefits” means the percentage of the wage replacement a covered individual is entitled to earn on wages that are more than 50 percent (50%) of the state average weekly wage as defined in this rule.

27. “Waiting period” means the period in which medical leave benefits are not payable for approved leave under this Act beginning for the first 7 calendar days at the start of leave.

28. “Wages” 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). “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).

29. “Wages for self-employed individuals” has the same meaning as income as defined in 26 U.S.C.§ 1402(b) (eff. Mar. 23, 2018)

30. “Weekly Benefit Amount” means the amount of wage replacement as calculated in 26 M.R.S. § 850-C (2) payable to a covered individual on a weekly basis while the covered individual is on family leave or medical leave, including prorated amounts for partial weeks of leave.

II. Coverage

A. Covered employees are:

1. Employees who earn wages paid in the State.

a. "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). "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).

2. Individuals who elect coverage as set forth in the Act and in this rule.

B. The following types of employment are not covered by this Act:

1. Any employee subject to the Railroad Unemployment Insurance Act, 45 U.S.C. §§ 351 – 369, (eff. Nov. 10, 1988).

2. Incarcerated persons earning wages in a Maine correctional facility established in 34-A M.R.S. § 1001 (6) or a detention facility established in 34-A M.R.S. § 1001 (8-A).

3. Students that are earning wages as part of the federal Work-study Program and are enrolled in any University of Maine system established in 20-A M.R.S. § 10901, a community college established in 20-A M.R.S. § 12714, or any other public or private higher educational institution in the State of Maine.

4. Individuals who volunteer for an employer or governmental entity if the volunteer:

a. Performs hours of service for the employer or governmental entity for civic, charitable or humanitarian reasons, without promise, expectation or receipt of compensation for services rendered. Although a volunteer may receive no compensation, a volunteer may be paid expenses, reasonable benefits or a nominal fee to perform such services;
b. Offers services freely and without pressure or coercion, direct or implied, from an employer; and

c. Is not otherwise employed by the same employer or governmental entity to perform the same type of services as those for which the individual proposes to volunteer.

5. Employees of the federal government, including employees of the United States Postal Service.

III. Use and types of Leave

A. A covered individual may take the following types of leave:

1. Continuous leave

2. Intermittent leave

3. Reduced Schedule leave

B. Use of Intermittent and Reduced Schedule leave.

1. Covered individuals may take up to 12 weeks of approved leave on either a continuous, intermittent or reduced schedule. Partial weeks or partial days of leave will be prorated against the employee's scheduled workweek.

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.

3. 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.

4. 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.

5. 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.

IV. Eligibility

A. To receive benefits, a covered individual must:

1. Be a covered employee as defined in Section II;

2. Have earned wages paid in the State at least 6 times the state average weekly wage during the first 4 of the last 5 completed calendar quarters immediately preceding the first day of an individual's benefit year. For the purposes of these calculations, the state average weekly wage is that which was published effective on the July 1 immediately preceding the date of application for benefits or of the start of the leave, whichever is earlier.

3. 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;

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;

5. Have not been declared ineligible pursuant to Section IX of this rule; and

6. Satisfy one of the qualifying reasons under the Act.

B. The following provisions apply regarding the eligibility to take leave:

1. A covered individual may take family leave immediately following medical leave if the medical leave is taken during pregnancy or recovery from childbirth and supported by documentation by a health care provider. If the covered individual is eligible as of the

start of the medical leave for pregnancy and recovery from childbirth, that eligibility status shall be retained for the purposes of family leave for bonding with a child immediately following the medical leave, regardless of the covered individual's eligibility data as of the first day of the family leave. The combined medical leave and family leave may not exceed the 12-week maximum of family and medical leave within a benefit year.

2. The 12 weeks of aggregate leave taken under this Act will be reduced by any leave taken under 29 U.S.C. § 2611 (eff. Dec. 20 ,2019) or leave under 26 M.R.S. § 844 that was not taken concurrently with leave under this Act in the 12 month period preceding the start of leave.

3. 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.

V. Notice and Undue Hardship

A. An employee must give reasonable notice to the employee's employer of the employee's intent to use leave. Thirty days written notice to the employer shall be presumed to constitute reasonable notice, unless an employer determines otherwise in accordance with subsection (V)(D). In the case of an 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. If the employee is incapacitated, notice may be provided by a family member or health care provider on behalf of the employee.

B. The employee's notice shall include the following information:

1. The reason for the leave being requested (e.g. family, medical, safe leave, qualifying exigency);

2. The type of leave needed (e.g. continuous, reduced schedule, or intermittent leave);

3. Actual or anticipated timing and duration of leave;

4. Any other relevant information regarding the employee's need to take leave. 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. This notice must be in writing, which can include a standard form, letter, email, or text message provided to the employer.

C. If the employee and employer agree to a schedule of leave, the employer may waive the 10-day review of undue hardship on a form and manner provided by the department at the time of the employee's application of leave.

D. The employer may reasonably determine that the timing or duration of the leave creates an undue hardship. "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 that cannot be overcome with the amount of notice given. 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 and/or duration 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.

4. If medical leave is requested, the employer's proposed schedule must be sufficient to accommodate the healthcare needs of the employee in the judgment of the employee's healthcare provider.

VI. Process for Application and Approval of Benefits

A. To request paid family and medical leave benefits, an applicant shall submit an application for benefits in a manner approved by the Department. An application may be submitted online. The applicant must submit all information and documentation requested by the Administrator that is reasonably necessary to determine eligibility for leave. Requested information and documentation may include, as applicable to the type of leave requested:

1. Proof of personal identity;

2. Identifying information about all employers participating in the Fund from which the applicant is seeking leave;

3. Proof of identity of family member if the applicant is applying for paid family leave;

4. 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.

5. Reason for leave;

6. Proposed scheduling of leave, including the first day of missed work and the expected duration of leave;

7. A waiver signed by the employer that the proposed schedule of leave is not an undue hardship, if applicable;

8. Documentation, to include the anticipated duration of leave, from a health care provider of the applicant's own serious health condition if seeking medical leave;

9. Documentation, to include the anticipated duration of leave, from a health care provider of the family member's serious health condition if seeking family leave; and

10. Other information and documentation reasonably requested by the Administrator.

B. The application will contain an Authorization Statement, which, if signed by the applicant or, in the case of applications for leave to care for a family member with a serious health condition, the applicant's family member, authorizes the Administrator to obtain medical information from the relevant health care provider as part of the verification process to obtain paid family or medical leave benefits. Applicants and their family members are not obligated to sign the Authorization Statement; however, if they decline to do so, the applicant is responsible for providing all required medical information from the relevant health care provider, and processing of the application may be delayed by any delay or failure to provide such information.

C. An application for safe leave must include a signed statement that the applicant meets the requirements for safe leave set forth in the Act.

D. A completed application must include a signed statement attesting that the information provided in support of the application for paid family or medical leave benefits is true and correct to the best of the applicant's knowledge.

E. 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. The Administrator may deny an application for

incomplete information only if such information is reasonably necessary to determine whether the applicant is eligible for benefits under the Act, and the extent and timing of such benefits.

F. 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.

G. The 90-day application deadline may be waived if the Administrator finds good cause exists. Good cause for the late submission of an application is at the discretion of the Administrator

H. The Administrator shall notify the employer in writing of an applicant's claim to obtain paid family or medical leave within 5 business days after a claim was filed. If there is an agreement as to the scheduling of leave, as mentioned in Section V B(5), the application will be processed immediately. If there is no agreement as to the scheduling of leave, as mentioned in Section V B(5), the application will go through an employer review as follows. Within 10 business days, the employer must submit any additional facts or information regarding the applicant's eligibility it wishes the Administrator to consider, and if the employer has determined that the proposed scheduling of the leave constitutes an undue hardship, the employer must also provide documentation supporting its determination pursuant to section V. Failure to claim an undue hardship during this time period shall be deemed a determination that the proposed schedule does not constitute an undue hardship. The Administrator shall review all determinations of undue hardship pursuant to section V. If the Administrator finds that the employer's determination is reasonable and the application would otherwise be approved, the Administrator shall impose a reasonable schedule provided by the employer. The employee shall be notified in writing by Administrator of the finding of undue hardship and the new provided schedule. 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 from the date the decision is issued.

VII. Review of claims for benefits

A. The Administrator shall review a complete application and issue a determination to the covered individual. The review of the claim shall begin no later than the close of the 10 business days within which the employer is required to provide information to the Administrator. During those 10 business days, the Administrator will not begin the review if the employer has not yet provided requested information.

B. If an applicant is not approved to obtain benefits, the Administrator shall notify the applicant and the employer and state the reason or reasons for the denial in the notification. The Administrator's notice shall also inform the applicant that they are entitled to request a reconsideration of the Administrator's decision by notifying the Administrator-in writing within 15 business days from the date the notification is issued.

C. If the applicant is approved to obtain benefits, the Administrator shall notify the applicant and the employer as to the benefit amount, the amount of time for which the applicant has been approved to take paid family or medical leave, and the qualifying reason, along with information on when benefits will be paid, and contact information of the Administrator. The Administrator shall also inform the applicant that they are entitled to request a reconsideration of the decision if they do so in writing within 15 business days from the date the notification is issued.

D. If the applicant requests reconsideration, the Administrator shall review the request and the applicant's original application, using a separate reviewer from the initial consideration. The Administrator shall notify the employer of the applicant's request for reconsideration. The Administrator shall notify the applicant and employer in writing of the outcome of the reconsideration request. If reconsideration results in denial of benefits, the Administrator shall state the reason for the denial. If the applicant is aggrieved by the result of the reconsideration, the applicant may appeal the reconsideration decision pursuant to Section XV within 15 business days from the date the decision is issued. An applicant is not aggrieved if all requested benefits were approved.

E. If an applicant's claim is approved, the employer(s) from which they are taking leave will receive notification of the claim approval along with the approved timeframe of leave within 5 business days of the approval date.

F. All notifications from the Administrator to applicants and employers will be in writing, which may include email or electronic portal notifications.

VIII. Benefits

A. Calculation of Benefits:

1. The Weekly Benefit Amount paid to a covered individual is calculated based on a tiered wage system. The calculation of benefits will be determined by the Administrator using the applicant's Average Weekly Wage, as calculated based on the applicable earnings data reported to the Administrator by the employer or employers, or by the individual if the applicant is self-employed.

2. The Weekly Benefit Amount shall be calculated as follows:

    a. Tier 1 wages and benefit: the State Average Weekly Wage shall be multiplied by 50% and rounded up to the nearest whole dollar. This shall be the Tier 1 Wage Cap. The portion of the individual's average weekly wage that is less than or equal to the Tier 1 Wage Cap is multiplied by 90% and rounded up to the nearest whole dollar. This shall be the Tier 1 Benefit Amount. If the covered individual's average weekly wage does not exceed the Tier 1 Wage Cap, no additional calculation under Tier 2 is required.

    b. Tier 2 wages and benefit: the portion of the covered individual's average weekly wage that exceeds the Tier 1 Wage Cap shall be multiplied by 66%

and rounded up to the nearest whole dollar. This shall be the Tier 2 Benefit Amount.

c. Weekly Benefit Amount: The Tier 1 Benefit Amount and the Tier 2 Benefit Amount shall be combined to equal the Calculated Weekly Benefit Amount. If the Calculated Weekly Benefit Amount exceeds the Maximum Weekly Benefit Amount, the Weekly Benefit Amount shall be the Maximum Weekly Benefit Amount; otherwise the Calculated Weekly Benefit Amount shall be the Weekly Benefit Amount.

d. For the purposes of these calculations, the state average weekly wage is that which was published effective on the July 1 immediately preceding the date of application for benefits or of the start of the leave, whichever is earlier.

3. The Average Weekly Wage is calculated by dividing the reported wages for the applicant in their base period by 52. Once the Weekly Benefit Amount is established for a claim it will remain consistent through the life of the claim, subject to the subsection C below.

B. Payment of Benefits:

1. Approved benefits shall be paid to the covered individual by direct deposit into a checking or saving account in a financial institution in the United States. Alternatively, if the covered individual wishes to receive their approved Weekly Benefit Amount in the form of a debit card, the covered individual may request this on their application to obtain benefits.

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.

C. Reduction and Proration 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. The covered individual's prorated benefit amount shall be calculated separately for each week in which the covered individual reports use of leave equaling less than a full scheduled workweek.

2. **Reduction of Benefits.** For any week in which a covered individual is on family leave or medical leave, the covered individual's Weekly Benefit Amount must be reduced by the amount of wage replacement that the covered individual receives from a government program or law, including but not limited to unemployment insurance, workers compensation, other than for compensation received under 39-A M.R.S. § 213 for an

injury that occurred prior to the family leave or medical leave claim, and other state or federal temporary or permanent disability benefits laws, or from an employer's permanent disability program or policy for the same week.

3. The covered individual's Weekly Benefit Amount is not subject to reduction by any of the following:

a. Any benefit received from SNAP, TANF, HEAP or similar programs;

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; and

e. Supplemental payments received from an employer's short term disability program or policy. to the extent that the payments combined with the PFML benefits do not exceed the individual's typical weekly wage.

IX. Fraud and Ineligibility

A. Definitions:

1. "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.

2. "Material fact" means a fact the truth or falsity of which would have a determinative effect on the approval or denial of a claim.

B. The Department shall investigate complaints or reports of suspected PFML fraud. The Department may also conduct random audits and reviews of submitted claims. A finding of PFML fraud shall be made based on a preponderance of the evidence. The following procedures may be followed in investigations of suspected PFML fraud:

1. Obtaining documentary evidence. Prior to interviewing an individual, the Department shall obtain all available documentation. An individual shall provide any requested documents within 21 days of receiving a request from the Department.
2. The Department may interview a covered individual after providing notice no less than ten (10) business days in advance. The notice of interview will be provided in

writing. The interview may be conducted in person or by phone at the discretion of the Department.

3. The Department shall make a finding of PFML fraud or, if fraud is not determined, dismiss the complaint, and shall notify the covered individual as to the outcome of the investigation. If the Department finds that the covered individual has committed PFML fraud, the covered individual's benefits, if currently active, shall immediately be suspended, and the covered individual shall be designated as ineligible pursuant to 26 M.R.S. § 850-D(5).

C. If the Department determines that PFML fraud has occurred that affected a covered individual but for which the covered individual was not responsible, such as identity theft by a third party, any weeks fraudulently used will not be charged against the covered individual's maximum leave benefits.

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.

E. The Department shall notify the covered individual if it demands repayment of the amount due. The covered individual may request a waiver of repayment by notifying the Department, in writing, within 30 days after the notice of the repayment. The covered individual's request shall state the reasons for requesting a waiver of repayment. The Department shall have the discretion to waive repayment in whole or in part if recovery would be against equity and good conscience.

F. A covered individual may appeal a finding of PFML fraud, a demand for repayment, or a denial of a waiver request consistent with the procedures in Section XV of this rule within 15 business days from the date the decision is issued. A request for waiver of repayment does not constitute a request to appeal the demand for repayment unless a request to appeal is specifically included. Any repayment shall be tolled during the pendency of an appeal or a request for waiver. However, absent a showing that it would be against equity and good conscience, the covered individual's designation of ineligibility and immediate termination of current benefits shall not be tolled during the pendency of an appeal.

X: Premiums

A. The employer's premium amount and contribution report must be remitted quarterly on or before the last day of the month following the close of the quarter for which premiums have accrued. The contribution report must be on a form and in a manner approved by the Department, and all employers covered under this Act must register online for the program. Payment for premiums will be considered timely if postmarked or received electronically on or before the due date. If the due date falls on a Saturday, Sunday, or legal holiday, payment will be considered timely if postmarked on the next business day that is not a Saturday, Sunday, or legal holiday. Premium payments and

contribution reports may be remitted by an employee leasing company or authorized third party administrator on behalf of the employer.

B. For the purposes of determining when withholding for premiums begin, withholdings will begin on wages for the first pay period with a payment date in January 2025.

C. For the purposes of reporting wages on contribution reports, amounts will be reported to the nearest cent. For the purposes of calculating premiums owed, amounts will be rounded to the nearest whole dollar.

D. Premiums are required up to the contribution and benefit 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. If the remitting of premiums for an employee results in an overpayment, a covered employee may seek a refund from the Department pursuant to a process set forth by the Department. A request for a refund may require documentation, such as a W-2 form(s) or another statement summarizing earnings and deductions.

E. An employer may seek a refund of a premium overpayment on behalf of covered employees employed by the employer and on behalf of the employer. If an overpayment of premiums is made by the employer, the employer may retain any portion of premiums made by the employer but also must return to its employees any portion of the reimbursed amount that it collected from its employees.

F. A self-employed individual that has elected coverage to obtain benefits must remit to the Department fifty percent (50%) of the premium on the self-individual's income to the Department. The premium amount will be determined on the self-employed individual's net income from the prior tax year divided by four for quarterly income. Premiums will be due on the last day of the month following the close of the quarter.

G. A tribal government that has elected coverage to obtain benefits on behalf of their employees must remit to the Department the premiums at the rate of non-tribal government employers to the Department on or before the last day of the month following the close of the quarter.

H. 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. On October 1, 2024, and October 1 of each year thereafter, the employer shall calculate its size for the purpose of determining premium liability for calendar year 2025 and each calendar year thereafter.

I. 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'-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' wages. An employer's determination as to whether or not to deduct premiums from employees' wages must apply to all employees, except as required for employees of separate collective bargaining agreements with the same employer. If an employer changes that determination, the employer must provide notice to all employees in writing at least seven (7) days prior to the employees' first affected paycheck.

J. An employer that has been approved for a private plan substitution is exempt from the requirements to remit premiums as specified in Section XIII of this rule. If an employer has not been approved for a private plan substitution, the employer is responsible for remitting premiums to the Fund.

K. Employers who deduct the employee share of the premium from wages must make the deductions from employees' regularly scheduled paychecks, except that an employee and employer may mutually agree to less frequent deductions as long as the agreement is voluntary and memorialized in writing. Deductions may not be made less frequently than quarterly, even if the employer and employee agree. Employers shall include in the employee's pay statement that a premium deduction for Paid Family and Medical Leave has been deducted from the employee's wages.

L. If an employer fails to deduct the required employee share of the premium from wages paid during a pay period, the employer is considered to have elected to pay that portion of the employee share. The employer shall not deduct this amount from a future paycheck of the employee for a different pay period. However, where there is a lack of sufficient employee net wages to cover the employee share of premiums for a pay period, the employer may deduct the uncollected portion of the employee share from one or more paychecks for future pay periods.

XI: Failure to Remit Premiums and Contribution Reports

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 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.

B. The Department will notify employers of any delinquent contribution reports no later than 15 days after premiums were due. If the employer fails to remit the delinquent payments or contribution reports on the due date established in the notice, an assessment will be imposed.

C. If an assessment is imposed for failure to pay, the employer may seek an appeal pursuant to Section XV of this rule.

D. A self-employed individual who elects coverage to obtain paid family or medical leave benefits and fails to submit premiums for at least two consecutive quarters as required in this rule may be disqualified from family leave benefits and medical leave benefits by the Department. Prior to disqualification, the Department shall notify the self-employed individual that premiums

have not been paid in full for at least two consecutive quarters. If the self-employed individual has failed to remit premiums to the Department after 30 days, the self-employed individual will be disqualified. The self-employed individual may appeal a disqualification pursuant to Section XV of this rule.

E. If the self-employed individual has demonstrated successful payments of the delinquent premiums and additional premiums equivalent to the number of quarters the self-employed individual failed or refused to remit premiums, the Department in writing must notify the self-employed individual of their reinstatement to obtain coverage for paid family or medical leave benefits.

Section XII: Elective Coverage

A. Elective coverage is available to self-employed individuals and tribal governments under the following conditions:

1. Electing coverage:
    a. A self-employed individual who is a resident of the State of Maine may elect to obtain coverage for paid family or medical leave benefits for themselves by filing a notice of election form provided by the Department and providing a copy of their tax return for the previous year.
    b. A tribal government may elect to obtain coverage for paid family and medical leave benefits as an employer for the tribal government's employees by filing a notice of election form provided by the Department.
    c. Elective coverage must be for an initial period of not less than three years, renewable after the initial period in one-year increments.

2. Effect of electing coverage:
    a. Approved elective coverage becomes effective on the first day of the first quarter following the approval of the self-employed individual or tribal government's election.
    b. A self-employed individual who has elected for coverage may apply for benefits on the same basis as any other applicant, pursuant to section VI of this rule.
    c. A tribal government that has elected for coverage shall be treated for the period of coverage as an employer in the meaning of the Act and these rules.

3. Wages:

    a. For self-employed individuals electing coverage, wages are based on net earnings from all self-employment, including but not limited to, income reported to Maine on the personal income tax return from a prior tax year or as filed with the Maine Revenue Services. Applicable tax returns must be submitted annually to the Department by June 1.

b. A self-employed individual's reported wages must meet the minimum threshold for covered individuals in order to be eligible for PFML benefits. For tribal governments that have elected coverage, quarterly contribution reports must be submitted to the Department consistent with section X of this rule.

4. Withdrawing or renewing coverage:

    a. A self-employed individual or tribal government may withdraw from coverage on a form provided by the Department within 30 days following the end of the coverage period. The Department shall notify all elective coverage employers and individuals of the end date of their coverage period no later than 60 days before the end date. If the self-employed individual or tribal government does not withdraw during the specified period, their coverage renews for an additional one-year period.

    b. A self-employed individual may also withdraw from coverage within 30 days if they are no longer a self-employed individual.

    c. The effective date of any withdrawal under this section is 30 days after the filing of notice of withdrawal or the date of the Department's notification of approval of withdrawal, whichever is later.

    d. A self-employed individual or tribal government that has been covered but whose coverage has not been renewed may elect coverage again, beginning with an initial three-year period of coverage.

XIII: Substitution of Private Plans

A. 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. Substitutions are made in accordance with the employer's Federal Employer Identification Number (FEIN) and must provide coverage for all employees within that employer's FEIN. 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. Beginning April 1, 2025, the application fee is $250 for review of the application, and an additional $250 administrative reimbursement fee if the application is approved for the substitution. The application fees may be increased by

the Department on January 1, 2026 or thereafter, based upon inflation or based upon a redetermination by the Department that the current application fees do not cover the actual cost for administering private plans. Any such increase in the application fees shall be posted on the Department's website.

3. An approved substitution is valid for a period of three years.

4. The exemption from the obligation of premiums begins 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 quarter following when the application for substitution was submitted, assuming it is an approval.

    a. 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 the approval of the substitution and failure to do so may result in a revocation of substitution.
    b. The employer is responsible for premiums provided under the Act and this rule until the effective date of exemption and premiums owed prior to the effective date of exemption must be remitted and are non-refundable.
    c. 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.
    d. 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.
    e. 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.

5. 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 significant direct negative business impact. Significant direct negative business impact includes, but is not limited to, evidence of an unanticipated and unreasonable 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.

6. 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.

7. Following approval for substitution, the Department may conduct audits and/or investigate employee complaints to determine whether, in operation, the substituted plan provides the rights, benefits, and protections that are substantially equivalent to those provided in the Act. Failure to demonstrate adequacy of performance may lead to revocation of a private plan substitution in this rule.

8. If the employer's approved plan is canceled due to nonpayment of premium, the employer's approved substitution will be revoked. If an employer's substitution is revoked for any reason, the employer will be responsible for premiums, beginning with the first quarter following revocation. The employer is prohibited from seeking another substitution for a period of three years from the date of the revocation unless the Department allows a lesser period of time.

9. The Department shall notify employers in writing of the end date of their approved substitution sixty (60) days prior to the end date. Employers must submit an application for renewal thirty (30) days prior to the end date of their approved substitution. If the employer fails to apply to renew or if the renewal is denied, the employer must remit both the employer and employee contributions to the Fund calculated from the date of the prior exemption expiration, and the employer may not deduct the employees' portion from payroll.

10. An employer with an approved substitution must collect and submit all data required under 26 M.R.S. § 850-E (6) to the Department. The employer must submit this data no later than July 31 each year. Data reports prepared for fully insured private plans by insurance companies offering such plans to several employers may meet the requirement of this paragraph. Failure to submit data reports may result in revocation of the substitution.

11. 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. Failure to file contribution reports may result in revocation of the substitution.

12. An employer with an approved substitution must provide appropriate tax forms for benefits to employees taking leave based on guidance from the Internal Revenue Service and Maine Revenue Services around the taxability of such benefits.

13. An employer may appeal a denial of substitution, a denial of cancellation, a revocation, or the issuance of any penalty for violation pursuant to section XV of this

rule within 15 business days from the date the decision of denial or revocation is issued.

B. Fully-Insured Private Plans

1. An insurer licensed in accordance with Title 24-A may offer fully-insured insurance plans that are substantially equivalent to the requirements of 26 M.R.S. 850-H and this Rule. The fully-insured plan must comply with all requirements of the Maine Insurance Code. An issuer shall not deliver or issue for delivery a policy or certificate to a resident of this State unless the policy form or certificate form has been filed with and approved by the Superintendent of Insurance in accordance with filing requirements and procedures prescribed by the Maine Insurance Code and applicable rules.

2. Policy cancellation and nonrenewal is subject to the requirements of the Maine Insurance Code and applicable rules. The employer shall notify the Department of the cancellation or nonrenewal at least 10 days before the termination takes effect.

3. An insurer may cease offering a fully-insured plan if:

a. Notice of the decision to cease offering such plans is filed with the Bureau of Insurance at least three (3) months prior to the cessation unless a shorter notice period is approved by the Superintendent of Insurance; and

b. If existing contracts are nonrenewed, notice must be provided to the policyholder six (6) months prior to nonrenewal.

4. An insurer that discontinues the availability of a policy form or certificate form issued pursuant to this rule shall not file for approval of a policy form or certificate form for a fully-insured plan for a period of five (5) years after the insurer provides notice to the Superintendent of Insurance of the discontinuance. The period of discontinuance may be reduced if the Superintendent of Insurance determines that a shorter period is appropriate.

5. An insurer may request certification of a proposed plan as substantially equivalent pursuant to 26 M.R.S. § 850-H by providing a copy of the proposed plan documents to the Department along with an application form and fee as determined by the Department. The Department may delegate to the Maine Bureau of Insurance (BOI) authority to review and approve plan applications for compliance with the Maine Insurance Code and for compliance with a Paid Family Medical Leave eligibility checklist jointly developed by the Department and the BOI. If after BOI review, the Department determines the insurer’s proposed plan is substantially equivalent, the Department shall issue a certificate of eligibility.

C. Self-Insured Private Plans

1. An employer may request certification of a self-insured, employer provided plan as substantially equivalent pursuant to 26 M.R.S. § 850-H by providing a copy of the proposed plan documents to the Department along with an application form and fee as determined by the Department. The Department may use the checklist jointly developed with the assistance of the BOI to determine eligibility. If the Department deems that the self-insured plan is substantially equivalent the Department shall issue a certificate of eligibility.

2. An employer proposing to substitute a self-insured plan may apply for both certification and substitution simultaneously.

3. The employer must also furnish to the Department a bond, in an amount determined by the Department, with a surety company authorized to transact business in Maine. The employer must submit a certification form to the Department in the amount required at the time the application is submitted.

D. Determination of Substantial Equivalence

1. The Department, in consultation with the BOI as necessary, shall determine whether a proposed plan is substantially equivalent and therefore eligible for substitution. To meet the requirement that a private plan confer rights protections and benefits substantially equivalent to those provided to employees under the Paid Family Medical Leave Act, a private plan need not be identical to the provisions set forth in the Act.

2. The following minimum requirements must be met in order to be determined substantially equivalent:

a. The plan must provide for family leave and medical leave to be taken for: the covered individual's own serious health condition; safe leave; a qualifying exigency; bonding leave; to care for a family member who is a covered service member; to care for a family member with a serious health condition; and for any other reason set forth in 26 M.R.S. § 843(4);

b. The plan must provide leave to care for a family member and must account for all definitions of family listed in §850-A(19);

c. The plan must allow for at least 10 weeks of aggregate leave per benefit year;

d. The plan must allow a covered individual to take intermittent or reduced schedule leave, except that the requirements of section III(B) of this Rule need not be met;

e. The cost to employees of the plan may not be greater than the cost charged to employees under § 850-F of the Act; and

f. The plan must provide an internal reconsideration process for denial of family leave benefits or medical leave benefits.

3. Any plan which does not meet the minimum criteria in paragraph 2 may not be determined as substantially equivalent and shall not be eligible for substitution. If all of the above criteria are met, the Department shall determine whether the plan provides the same or greater aggregate monetary benefit to employees. This shall be determined by comparing the plan's wage replacement amount multiplied by the maximum number of weeks to the maximum Weekly Benefit Amount under the Act multiplied by 12 weeks. If the former is equal to or greater, the plan may be determined to be substantially equivalent and therefore eligible for substitution.

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

a. A plan that provides the amount of leave set forth in 850-B (4) during a 12-month period shall be found to be substantially equivalent even if that 12-month period is not calculated in a manner identical to a "benefit year" as defined in 26 M.R.S. § 850-A(5);

b. A plan that provides for intermittent or reduced schedule leave but requires that such leave may only be taken in minimum increments of four (4) hours may be found to be substantially equivalent;

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.

5. Notwithstanding the above provisions, the following may not be determined as substantially equivalent and therefore shall not be eligible for substitution:

a. A plan which provides benefits only for the covered individual's own serious health condition, such as a short term or long term disability plan; and

b. A plan which consists of leave benefits provided pursuant to employer policy and which are subject to change at the employer's discretion; and

c. A plan that consists of leave benefits that need to be accrued (such as sick, vacation, or paid time off) that does not provide full coverage of benefits regardless of time with the employer or availability of accrued time.

6. The Department shall evaluate any appeal pursuant to § 850-H (5) in terms of whether it constitutes grounds for withdrawal of approval of substitution.

Section XIV: Returning From Leave

A. Any employee that has been employed with their employer for at least 120 consecutive calendar days is entitled, upon return from leave, to be restored by the employer to the position held by the employee when the leave commenced, or to be restored to an equivalent position with equivalent employment benefits, pay and other terms and conditions of employment. Whether a position is equivalent for the purposes of the Act shall be governed by 29 C.F.R. § 825.215 (eff. Feb. 6, 2013) subject to the limitations under 29 C.F.R. § 825.216 (eff. Feb. 6, 2013).

B. If an employee is on initial probation at the time that the employee begins leave, the employer may toll the employee's probationary period during the period of the employee's leave, including intermittent or reduced schedule leave, and doing so shall not be considered a violation of § 850-B (8) or § 850-J (2) of the Act.

C. If at any point an employee notifies the employer in writing that they do not intend to return to their job at the end of their leave, the employer is no longer obligated to hold the job open.

Section XV: Appeals

A. An aggrieved party may appeal the following issues to the Department within 15 business days from the date the decision is issued, except that the period within which an appeal may be filed may be extended for a period not to exceed an additional 15 business days, for good cause shown. Good cause for the late filing of an appeal is at the discretion of the Department. Issues which may be appealed are:

1. Denials of applications for benefits;

2. Issues as to the amount of benefits;

3. Findings that an employer determination of undue hardship is unreasonable;

4. Delay or denial of a claim for benefits due to a finding of reasonable undue hardship;

5. Any fine or penalty imposed, including fines related to late or non-payment of premiums;

6. Disqualification of a self-employed individual;

7. Disapproval or revocation of private plan substitutions;

8. Findings of fraud; and

9. Denial of waiver of overpayments.

B. The Department shall appoint a qualified Hearing Officer, employed or contracted by the Department, to hear any appeal.

C. Hearings on appeals conducted pursuant to this rule shall be adjudicatory proceedings, governed by the Maine Administrative Procedures Act (MAPA), 5 M.R.S. § 9051-9064.

D. Hearings may be conducted by telephone or by video conference.

E. The Hearing Officer shall issue such orders as are necessary for efficient and expeditious processing of an appeal. The Hearing Officer may require exhibits and/or witness lists to be filed in advance of the hearing.

F. A Notice of Hearing must be issued to the appealing party, and to the extent applicable, the covered individual, the employer and the Administrator at least ten (10) business days before the date of the hearing.

G. The Administrator must submit documents to the Hearing Officer relating to the issue on appeal and any reconsideration decision within 5 days after notification by the department. Such documents shall be provided to all parties. The Administrator is not required to appear at the hearing, unless directed to appear by the Hearing Officer.

H. The Hearing Officer will make a decision de novo and is not required to defer to any decision by the Administrator. The Department may designate certain decisions by Hearing Officers to be precedent in similar appeals. The Department may issue written guidance, which will be publicly available, to ensure consistency between Hearing Officers in determining similar issues.

I. Decisions of the Hearing Officer shall be in writing and shall state the Hearing Officer's findings of fact and basis for the decision. Decisions by the Hearing Officer shall constitute final agency action within the meaning of 5 M.R.S. § 8002 (4) and shall be reviewable in Superior Court pursuant to 5 M.R.S. § 11001 et. seq.

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.

B. All requests for advisory rulings shall be made in writing and submitted to the director of the Paid Family and Medical Leave Program, 50 State House Station Augusta, Maine. The request must include the following:

1. The name, address, and telephone number of the person requesting the ruling;
2. Facts that establish the substantial interest of the requesting person to the program with respect to which the ruling is requested;
3. The statute or rule of which an interpretation is requested;

4. All facts that are necessary to issue the advisory ruling;
5. All assumptions that relate to the advisory ruling; and
6. A statement indicating whether to the requester's knowledge, the issue upon which an advisory ruling is sought is the subject of a pending matter with respect to adjudication of claims for benefits, application for substitution of private plans, enforcement of penalties including revocation of substitution regarding private plans, a pending appeal to which the requested person is an aggrieved party or a prior advisory ruling.

C. The director of the program may request from any person securing an advisory ruling any additional information that is necessary. Failure to supply such additional information shall be cause for the program to decline to issue an advisory ruling.

D. Issuance of advisory rulings by the program is discretionary and will be determined on a case-by-case basis. The program shall either issue a written advisory ruling or notify the requester of the reasons that an advisory ruling will not be rendered no later than 60 days from the date all information necessary to make a ruling was submitted to the director of the program.

E. The program may decline to issue an advisory ruling if any administrative or judicial proceeding is pending with the person requesting the ruling on the same factual grounds. The program may decline to issue an advisory ruling if such a ruling may harm the program interest in any litigation in which it is or may be a party.

F. No advisory ruling shall be binding upon the program provided that in any subsequent enforcement action initiated by the department, any person's reliance on such ruling shall be considered in mitigation of any penalty sought to be assessed.

STATUTORY AUTHORITY:

26 M.R.S. § 850 – Q

EFFECTIVE DATE:

January 1, 2025

FISCAL IMPACT ON MUNICIPALITIES AND COUNTIES:

minimal costs for reporting requirements

EXHIBIT
2

12-174
Chapter 1
Rules Governing the Maine Paid Family and Medical Leave Program

BASIS STATEMENT
AND SUMMARY AND RESPONSE TO COMMENTS

SUMMARY:

The Maine legislature enacted the Paid Family and Medical Leave (PFML) law in October 2023, establishing the program effective January 1, 2026. The PFML law is codified at 26 M.R.S. §§ 850-A – 850-R. The PFML law, at 26 M.R.S. § 850-Q, directs the Department of Labor to adopt rules necessary to implement the law by January 1, 2025. The PFML law and this rule will apply to most employees and employers in the State of Maine. PFML will provide up to 12 weeks of paid leave per benefit year for family, medical or safe leave, with such benefits beginning in mid-2026. Premium contributions will begin January 2025.

Before the formal rulemaking process began, the Department held informal listening sessions to solicit feedback from the public about questions or issues surrounding PFML that may benefit from further detail or clarification in rule. The Department hosted four informal listening sessions on the following topics: January 25, 2024 (Contributions), February 1, 2024 (Eligibility), February 12, 2024 (Private plans) and, February 28, 2024 (Any provisions related to the PFML law). Furthermore, the Department consulted with other paid leave states as to their experiences with implementing their respective programs to further inform the Department's rulemaking. The Department considered United States Department of Labor regulations and guidance with respect to federal Family Medical Leave. Furthermore, the Department considered the legislative history of the statute. The Department also held meetings with the Paid Family Leave Authority and considered their recommendations. The Department also relied upon the expertise and experience of its staff.

On May 20, 2024, the Maine Department of Labor ("The Department") invited comments on the new Chapter 1 of the rules governing the Maine Paid Family and Medical Leave Program (PFML). Comments were accepted through July 8, 2024.

On August 28, 2024, the Department invited a second round of comments on amendments to the proposed Rule based on comments submitted in the first comment period. The second comment period ended on September 30, 2024. The Department carefully considered more than 1,600 comments submitted by approximately 500 commenters during both comment periods. This statement contains the factual and policy basis for each section, comments from the first and second round and the response to the comments in each round. In addition to the changes set forth below, the Department made minor grammatical and formatting changes.

General comments on Paid Family and Medical Leave Law or Rule

General comments:

Summary of comments in round 1: Commenters AC 5, 001,002 003, 004, 006, 007, 008, 010, 011, 012, 013, 017, 018, 021, 022, 023, 024, 027, 028, 030, 031, 032, 033, 034, 035, 036, 042, 046, 047, 048, 049, 051, 055, 057, 059, 064, 067, 068, 069, 070, 071, 072, 074, 075, 076, 077, 078, 079, 080, 081, 093, 094, 095, 096, 098, 099, 101, 116, 117, 121, 125, 127, 128, 129, 138, 139, 140, 141, 142, 145, 149, 152, 153, 156, 165, 172, 173, 174, 180, 182, 183, 184, 187, 190, 191, 192, 193, 194, 197, 200, 202, 203, 205, 207, 209, 210, 211, 212, 213, 218, 220, 229, 230, 269, and 277 provided general opinions or suggestions regarding the Paid Family and Medical Leave law. Some comments expressed concerns about burdens on businesses as a result of the law creating a paid family and medical leave program. One comment suggested the proposed rule should be a major substantive rule. Other comments provided general support of the creation of the law and asked general questions that did not address any specifics about the rule.

> **Round 1 response to comments**: The Department does not have the authority in Rule to eliminate or broadly change the PFML Law, and therefore no changes were made to the Rule in response to these comments. The statute explicitly states at 26 M.R.S. § 850-J that this rule is a routine technical rule.

Comments received in round 2: Commenters 016, 048, 057, 059, 061, 063, 090, 124, 127, 137, 140, 148, 166, 168, 182, 207, 235, 242, 250, 258, 266, 268, 267, 279, 282, 283, 284, 285, 286, 289, 292, 293, 294, 308, 311, 312, 313, 314, 317, 318, 320, 321, 324, 325, 326, 330, 334, 335, 336, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 357, 358, 360, 361, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 391, 392, 393, 394, 395, 396, 397, 399, 401, 403, 405, 406, 407, 408, 409, 410, 413, 414, 415, 416, 417, 418, 419, 420 421, 422, 423, 425, 426, 427, 428, 429, 432, 434, 435, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 473, 474, 475, 476, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502 provided general opinions or suggestions regarding the Paid Family and Medical Leave law and the proposed rule. The comments provided ranged on various subjects such as the overall impact on the state's workforce that could affect the operations of businesses with the creation of the Paid Family and Medical Leave law, the impact on small businesses with the addition of another tax (or premium) imposed. One comment suggested the proposed rule should be a major substantive rule. Other comments encouraged the Department to find ways to strengthen the law or the rule that provides greater protections employees without specifics on what should be changed in rule. This also includes over 150 comments offered to encourage the Maine Department of Labor to ensure

the proposed rule remains strong to support workers in accessing the Paid Family and Medical Leave Program.

> **Round 2 response to comments:** The Department does not have the authority in Rule to eliminate or broadly change the PFML Law, and therefore no changes were made to the Rule in response to these comments. The statute explicitly states at 26 M.R.S. § 850-J that this rule is a routine technical rule.

Section I - Definitions

Factual and policy basis: This section implements and furthers the goals of the law by clarifying certain definitions contained in 26 M.R.S § 850-A and by adding other definitions that will facilitate operationalization of the law.

Section I(A)(2) – Definition of "Administrator" –Second version of proposed rule
Note: The Department added a definition of "Administrator" Section I(A)(10) in the second version of the proposed rule, for the sake of clarification. The rule states that "Administrator" has the same meaning as 26 M.R.S. § 850-A(1).
No comments were received on this change.

Section I(A)(2) – Definition of "affinity relationship"
Note: In the second draft of the proposed rule, the Department struck the definition of "affinity relationship" that had been in Section I(A)(2). This change was made in response to comments, as explained below.

Round 1 comment summary: Commenters 059, 060, 065, 073, 111, 115, 116, 118, 120, 122, 136, 142, 147, 148, 151, 154, 157, 158, 160, 162, 171, 185, 196, 198, 205, 219, 221, 222, 225, 226, 232, 237, 241, 242, 246, 256, 257, 258, 259, 262, 263, 268, 271,274,276, and 280 commented the definition in the proposed rule is too broad and recommended the Department provide additional guidance to determine what constitutes an affinity relationship. Commenters 115 (PFML Authority), 122, 185, 205, 221, 225, 232, 242 and 268 suggested the Department adopt the Oregon model that uses the "totality of the circumstances" approach to define affinity relationships. Commenter 073 stated the Oregon model would add ambiguity and uncertainty in the processing of claims.

> **Round 1 response to comment:** The Department removed the term "affinity relationships" in the second proposed rule because that phrase is not in the statute. Instead, the second draft of the proposed rule at Section I(A)(12) refers back to 26 M.R.S. § 850-A(19) which uses the phrase "an individual with whom the covered individual has a significant personal bond." Additionally, in accordance with the recommendation of the Paid Family Medical Leave Authority, the Department added criteria for establishing the "existence of a significant personal bond" similar to those used in Oregon. Those

additional clarifying criteria appear in the second proposed rule sent out for comment in Section VI(A)(4).

Round 2 comment summary: Commenters 059, 157 and 408 note the removal of the term "affinity relationships" but state that the definition in the statute is still too broad lacking appropriate criteria. Commenters 059, 257 and 314 suggested reinstating the provision limiting a covered individual to one designee with whom they have a significant bond per year. Commenter 257 recommends there be some form of verification of the significant personal bond relationship.

> **Round 2 response to comment:** The Department removed the definition of affinity relationship in favor of reliance on the existing statutory definition of family member coupled with more specific criteria in Section VI (A)(4) for demonstrating a significant personal bond. The Department finds that this approach establishes an appropriate balance in demonstrating a significant personal bond.

Section I(A)(5) – Second version of proposed rule -Definition of "business day" –
Note: The Department added a definition of "business day" at Section I(A)(5),in the second draft of the proposed rule, for the sake of clarity, as that phrase was used in the rule.

Round 2 comment summary: Commenter 168 suggested adding the term "federal holiday" in the list of exclusions from the definition of "business day."

> **Round 2 response to comment:** The Department declines to make this change as the definition includes all state holidays, which encompasses all federal holidays.

Section I(A)(5) – Definition of "calendar week"
Note: The definition of "calendar week" was at Section I(A)(5) in the first proposed rule; it moved to Section ((A)(6)in the second draft of the proposed rule.

Round 1 comment summary: Commenter 061 stated the current definition of calendar week with the calendar week beginning on a Sunday impacts the definition of a benefit year causing a benefit year to commence on the Sunday before leave starts. The commenter feels if this is accurate, it should be made clearer and notes that by starting on a Sunday, the Maine Paid Family and Medical Leave law would conflict with unpaid FMLA. Additionally, the commenter believes employers should be able to define the start of the benefit period according to their workweek or to align it with unpaid FMLA.

> **Round 1 response to comment:** The Department made no changes as it determined the provisions in the rule are sufficiently clear. While the Department sought to align Maine PFML with Federal and State unpaid family and medical leave requirements, it was not feasible to do so in all instances.

Section I(A)(6) – Definition of "calendar week" -second version of proposed rule

Round 2 comment summary: Commenter 061 reiterated its Round 1 comment since no change was made by the Department.

> **Round 2 response to comment:** The Department made no changes as it determined the provisions in the rule are sufficiently clear. While the Department sought to align Maine PFML with Federal and State unpaid family and medical leave requirements, it was not feasible to do so in all instances.

Section I (A)(6) – Definition of "continuous leave" –
Note: Section I(A)(6) defining "continuous leave" became subparagraph 7 in the second draft of the proposed rule.

Round 1 comment summary: Commenters 124 and 168 suggested the Department revise the definition of continuous leave to clarify that a leave may be requested only on a one-time basis and encouraged the Department to adopt a definition and examples of intermittent leave similar to that used in Massachusetts.

> **Round 1 response to comment:** The Department declined to make the suggested change as it conflicts with the language and intention of the intermittent leave provisions contained in the statute.

Section I(A)(7) – Second version of proposed rule
Note: In the second proposed version of the rule, the Department changed the word "leaving" to "leave," for the sake of clarity.

Round 2 comment summary: Commenters 124 and 168 suggest the Department make the word "block" singular rather than plural.

> **Round 2 comment response:** To avoid confusion and provide clarity, in the final version of the rule, the Department will change the rule from "blocks for" to "a block of" consecutive days or weeks.

Thus, the definition of "continuous leave" in the final rule is "leave occurring in a bloc of consecutive days or weeks."

Section I(A)(10) – Definition of "employer" –Second version of proposed rule

Note: The Department added a definition of "employer" at Section I(A)(10) in the second version of the proposed rule in response to comments, for the sake of clarification.

Round 1 comment summary: Commenter 137 suggested the Department add language to the rule to clarify that an employer in leasing contractual arrangements means a client company.

> **Round 1 comment response:** The Department added a definition of "employer" to the second version of the proposed rule. That definition notes that for purposes of employee leasing arrangements, the employer is the client company as defined in 32 M.R.S. § 14051(1).

Round 2 comment summary: Commenter 140 expressed support for the clarification that the client company is the employer in employee leasing arrangements for the purpose of the Paid Family and Medical Leave law. Commenter 168 suggested the Department not incorporate the provisions pertaining to employee leasing companies at this time. The commenter suggested that, in the case of an employee leasing company, the employer should not be the client but, rather, the employee leasing company. The concern was raised that Professional Employer Organizations may be considered an employer under the Federal Family Medical Leave Act (FMLA) and employees of a PEO could qualify for FMLA for leave that would not be concurrent with the Maine Paid Family and Medical Leave law.

> **Round 2 response to comment:** The Department made no additional changes as it determined that the clarification that the client company is the employer in employee leasing arrangements is an appropriate policy.

Round 2 comment summary: Commenter 137 suggested the Department use the term "Employer Account Number (EAN)" rather than "Federal Employer Identification Number (FEIN)." The suggested change would make the definition consistent with Maine's Employment Security Law (Title 26, chapter 13, hereinafter referred to as "unemployment law.")

> **Round 2 comment response:** The Department finds that virtually all employers have a FEIN, and therefore declines to use the Bureau of Unemployment Compensation's EAN, as that account number has a more narrow use. Therefore, no change was made to the Rule.

Section I (A)(9) – Definition of "family leave"

Note: Section I(A)(9) defining "family leave" became subparagraph 11 in the second draft of the proposed rule.

Round 1 comment summary: Commenter 061 suggests the Department clarify the definition of "family leave" in the proposed rule since, like medical leave, the definition of family leave

includes leave due to a family member's serious health condition. The commenter believes this creates confusion since there is a separate definition of medical leave.

> **Round 1 response to comment:** The Department made no changes in the rule as the rule and the statute are sufficiently clear.

Section I (A)(11) – Second version of proposed rule - Definition of "family leave"

Round 2 comment summary: Commenter 061 reiterated its Round 1 comments set forth above since the Department did not make any changes.

> **Round 2 response to comment:** The Department made no changes in the rule as the rule accurately reflects the legislative intent.

Round 2 comment summary: Commenters 124 and 168 note the reference to Maine's unpaid Family and Medical Leave law and state that the reference will result in confusion given conflicting provisions throughout. Commenter 168 suggested the Department remove reference to 26 M.R.S. § 843(4) since by including a citation to the definition, the rule incorporates by reference all provisions of Maine's unpaid Family and Medical Leave law including those that are conflicting.

> **Round 2 response to comment:** The Department made no changes as the rule is consistent with the PFML statute which cites 26 M.R.S. § 843(4) in setting forth the parameters of family leave eligibility at 26 M.R.S. § 850-B(2)(f).

Section I(A)(12) – Second version of proposed rule - Definition of "family member"
Note: The Department added a definition of "family member" at Section I(A)(12) in the second version of the proposed rule. New section I(A)(12) states, for the sake of clarity, that "family member" has the same meaning as 26 M.R.S. § 850-A(19).

Round 1 comment summary: Commenters 115 suggested that the Department add a definition of "family member" that includes any of the relationships identified in 26 M.R.S. § 850-A(19), including those with an affinity relationship as defined in rule.

> **Round 1 comment response:** The Department added a definition of "family member" as suggested by the Commenter, for the sake of clarity and because it is consistent with statute.

Round 2 comment summary: Commenters 140, 258, 267 and 268 suggested the definition should not be changed.

> **Round 2 comment response:** The Department retains the definition and makes no changes in response to this comment.

Round 2 comment summary: Commenter 408 suggested the Department narrow the definition of family member since a definition of family member with no legal or familial relationship is too broad.

> **Round 2 comment response:** The Department notes that requiring a legal or family relationship would be contrary to the statute, 26 M.R.S. § 850-A (19)(G). The Department made changes in section VI of the rule to add more specific criteria for demonstrating a significant personal bond.

Section I(A)(13) – Definition of "good cause" in final version of rule

Department Finding: The Department added a definition of "good cause" at Section I(A)(13) of the final rule, for the sake of clarity, as the term good cause is used in various places throughout the rule.

Section I (A)(10) – Definition of "health care provider"

Note: Section I(A)(10) defining "health care provider" became subparagraph 13 in the second draft of the proposed rule and then became subparagraph 14 in the final rule.

Round 1 comment summary: Commenters 144, 147, 151, 223, 226 and 255 remarked that the Department's current definition of "health care provider" in the proposed rule should remain broad without changes. Meanwhile commenter 217 and 276 commented that the definition is too broad and should be narrowed noting that pharmacists can be considered health care providers under some provisions of Maine law.

> **Round 1 response to comment:** The definition of "health care provider" in the rule refers back to the statutory definition and provides further clarification by reference to the definition and to the list of providers set forth in the federal Family and Medical Leave Act of 1983. The Department finds that aligning the definition with the federal law provides consistency and clarity for employers, employees and for the Department. The Department further notes that neither the definition in the Maine Paid Family Medical Leave law nor the federal Family and Medical Leave Act of 1983 include pharmacists within the list of providers. Therefore, the Department made no changes as a result of this comment.

Section I (A)(11) – Definition of "intermittent leave"

Note: Section I(A)(11) defining "intermittent leave" became subparagraph 14 in the second draft of the proposed rule, and it became subparagraph 15 in the final rule.

Round 1 comment summary: Commenters 124 and 168 suggested the Department revise the definition of intermittent leave to clarify that a leave may be requested only on a one-time basis and encouraged the Department to adopt a definition and examples of intermittent leave similar to that used in Massachusetts.

Round 1 response to comment: The Department made no changes as the suggestion is inconsistent with the language and the intention of the intermittent leave provisions contained in the statute.

Round 1 comment summary: Commenters 059 states that the rule should clarify how the seven-day waiting period impacts the use of intermittent leave. Additionally, the commenter believes that the rule, as written, would allow employees to stretch intermittent leave throughout the course or the entire year which the commenter states is contrary to the intention of the law.

Round 1 response to comment: The Department made no changes as the provision in the rule are consistent with the language and the intention of the intermittent leave provisions contained in the statute. In fact, intermittent leave may be used throughout the course of the entire year, within the limits set forth in the law.

Section I (A)(14) – Second version of proposed rule– Definition of "intermittent leave"

Round 2 comment summary: Commenter 059 reiterated its Round 1 comments.

Round 2 response to comment: The Department made no changes as the provisions in the rule are consistent with the language and intent of the law. In fact, intermittent leave may be used throughout the course of the entire year, within the limits set forth in the law.

Section I (A)(12) – Definition of "independent contractor"
Note: Section I(A)(12) defining "intermittent leave" became subparagraph 15 in the second draft of the proposed rule, and it became subparagraph 16 in the final rule.

Round 1 comment summary: Commenter 061 stated the reference to "salaried employee" is vague and suggested that if the intent is to refer to employees exempt from overtime under the Fair Labor Standards Act, that should be clearly stated.

Round 1 comment response: The Department made no changes. The citation to 26 M.R.S. § 663(3)(K) provides clarity.

Section I(A)(15) – Definition of "reduced schedule leave"
Note: Section I(A)(15) defining "reduced schedule leave" became subparagraph 18 in the second draft of the proposed rule and subparagraph 18 in the final rule.

Round 1 comment summary: Commenter 059 suggests that the definition of reduced schedule leave conflicts with the requirement that intermittent or reduced schedule leave be taken in

increments of not less than one scheduled workday. The commenter also asks the Department to clarify whether employers can refuse increments less than one hour.

Round 2 comment response: The Department made no changes to this section as it determined the provisions in the rule, including Section II.B., are clear and are consistent with 26 M.R.S. § 850-B(10)(C).

Section I(A)(18) – Second version of proposed rule - Definition of "reduced schedule leave"

Round 2 comment summary: Commenter 059 commented that employees should be required to exhaust sick leave before using increments of leave that are less than a full scheduled workday. The commenter also suggests that the definition of reduced schedule leave conflicts with the requirement that intermittent or reduced schedule leave be taken in increments of not less than a scheduled workday.

Round 2 comment response: The Department made no changes as it determined the provisions in the rule are consistent with 26 M.R.S. § 850-B (10)(C). The Department further notes that the use of intermittent and reduced leave is explained in detail in Section III.B. of the rule. The Department also notes that the employee and the employer may agree to a reduced leave schedule in increments of less than a scheduled workday. 26 M.R.S. § 850-B(5).

Round 2 comment summary: Commenter 059 reiterated its Round 1 comments and commented that employees should be required to exhaust sick leave before using increments of leave that are less than a full scheduled workday.

Round 2 comment response: The Department made no changes as it determined the suggestion conflicts with 26 M.R.S. § 850-B (10(C).

Section I(A)(16) –Definition of "safe leave"

Note: Section I(A)(16) defining "safe leave" became subparagraph 19 in the second draft of the proposed rule and subparagraph 20 in the final rule.

Round 1 comment summary: Commenter 232 and 268 suggests the Department clarify that a protection order or court finding is not required to qualify for safe leave.

Round 1 response to comment: The Department makes no change to the definition. Section VI(C) was changed to clarify that an application for safe leave must include an "attestation" that the applicant meets the requirements for safe leave set forth in the act. The word "signed statement" was changed to "attestation" for the sake of consistency as an applicant must attest to the truthfulness of the entire application.

Section I(A)(19) – Second version of proposed rule - Definition of "safe leave"

Round 2 comment summary: Commenter 258 recommends that the definition make clear that documentation of violence or abuse, whether through a court order or police report, is not required to qualify for safe leave. Alternatively, the commenter asks for clarification in Section VI (C) of the proposed rule.

Round 2 comment response: The Department notes that documentation for safe leave is not required in section VI (C). The Department further notes, as set forth above, that Section VI(C) of the final rule was amended to change "signed statement" to attestation" for the sake of consistency throughout the rule.

Section I (A)(17) – Definition of "scheduled workweek"

Note: Section I(A)(17) defining "scheduled workweek" became subparagraph 20 in the second draft of the proposed rule and then became subparagraph 21 in the final rule.

Round 1 comment summary: Commenters 061, 069 and 181 suggested changes to the definition of scheduled work week based on the federal Family Medical Leave Act or employee work schedules.

Round 1 comment response: The Department made no changes as it is using the concept of scheduled workweek for a specific purpose of determining benefit proration and to clarify schedules for irregular work weeks. The Department determined that this approach appropriately balances the interests of employees and employers.

Section I(A)(21) – Definition of "scheduled workweek" - Second version of proposed rule

Round 2 comment summary: Commenters 061 and 063 suggested the definition be amended to allow an employer to use the work week as established by the employer or the 12-month period as established in the Federal Family and Medical Leave Act in order to have more consistency.

Round 2 response to comment: The Department made no changes as it determined the provisions in the rule strike a balance as to the interests of employees and employers and is administratively feasible.

Section I(A)(21) – Definition of "State Average Weekly Wage" -Second version of proposed rule

Department Finding: In the second version of proposed rule, the Department added a definition of "State Average Weekly Wage" (SAWW) at Section I.(A)(21), which became subparagraph 22 in final rule. The rule refers to the statutory definition at 26 M.R.S. § 850-A(30) and further clarified that for purposes of the rule, the SAWW is updated annually on July 1. This change was made for the sake of clarity as comments were made to other section asking about the logistics of using the SAWW.

Round 2 comment summary: Commenters 060, 063 and 503 suggested clarifying the definition of Average Weekly Wage as the definition may create confusion with the definition of State Average Weekly Wage.

Round 2 response to comment: The Department made no changes as it determined the provisions in the rule are sufficiently clear. "Average weekly wage" for the purposes of determining the weekly benefit for an individual and "state average weekly wage" as published by the state are two different concepts and both are defined in the statute.

Sections I(A)(18) and I(A)(22) – Definitions of "Tier 1 wages" and "Tier 2 wages"
Note: Section I(A)(18) defining "Tier 1 wages" became subparagraph 22 in the second draft of the proposed rule and subparagraph 23 in the final rule. Section I(A)(22) defining "Tier 2 wages" became subparagraph 24 in the second draft of the proposed rule and subparagraph 25 in the final rule.

Round 1 comment summary: Commenter 234 suggested the Department provide clarification on the application of tier 1 and tier 2 wages to benefits.

Round 1 comment response: The Department made no changes as it determined the provisions in the statute and rule are sufficiently clear. These definitions are used to calculate the portion of wages attributable to the two statutory wage replacement rates. The Department may provide additional guidance with examples.

Sections I(A)(22) and I(A)(24) – Definitions of "Tier 1 wages" and "Tier 2 wages" -Second version of proposed rule

Round 2 comment summary: Commenter 168 recommends that the definitions of "Tier 1 wages" and "Tier 2 wages" be removed suggesting that their inclusion creates confusion with the general definition of "wages."

Round 2 response to comment: The Department made no changes as it determined the provisions in the rule are sufficiently clear and are useful. These definitions are used to calculate the portion of wages attributable to the two statutory wage replacement rates.

Section I (A)(22) - Definition of "waiting period"

Note: Section I(A)(22) defining "waiting period" became subparagraph 26 in the second draft of the proposed rule and subparagraph 27 of the final rule. Minor changes were made as explained below.

Round 1 comment summary: Commenters 124, 168 and 227 suggested the Department revise the definition of the waiting period to reflect that the waiting period begins on the first day of leave taken rather than on the day that the claim was filed consistent with the Maine paid leave law related to the waiting period for medical leave claims.

Round 1 response to comment: In the second proposed rule, the Department amended the rule to clarify that the waiting period commences on the first day of leave to be consistent with the statute.

Round 1 comment summary: Commenters 061 and 181 suggested the Department clarify that the waiting period counts toward the employee's 12-week leave.

Round 1 response to comment: The Department made no changes in response to this particular comment as this suggestion would conflict with statute.

Section I(A)(26) – Definition of "waiting period" - Second version of proposed rule

Round 2 comment summary: Commenter 061 suggested the Department clarify whether an individual's waiting period will count towards the totally allowable weeks allowed under the Paid Family and Medical Leave Program.

Round 2 response to comment: The Department made no changes as it determined this suggestion would conflict with statute.

Round 2 comment summary: Commenter 063 suggests the Department revise the definition so the waiting period begins on the first day of leave rather than the day the claim is filed.

Round 2 response to comment: The Department further amended the final rule to clarify that the waiting period means that medical leave benefits are not payable for the first 7 calendar says at the start of the leave. This is consistent with the statute.

Section I (A)(27) – Definition of "Wages" – Second set of proposed rules

Note: The Department added a definition of "wages" at Section I(A)(27) in the second draft of the proposed rule in response to the comments below. This definition became subparagraph 29 in the final rule, with no additional changes .

Round 1 comment summary: Commenter 050 noted that while there is a definition of wages for self-employed individuals, there is no definition of wages for employees in either the law or the proposed rule.

Round 1 comment response: The Department added a definition of wages applicable to employees in the second version of the proposed rule at Section I(A)(28). The rule refers to the definition of wages in the Maine's unemployment law, 26 M.R.S. § 1043(19)(B-E), and notes that it generally means wages subject to Maine unemployment tax.

Round 2 comment summary: Commenter 250 suggested that the Department make the definition of wages consistent with what is tracked by an employer and reported to tax authorities to reduce the burden on small employers.

Round 2 comment response: The definition of wages do mirror the definition in Maine's unemployment law. The Department finds that the definition in the rule balances the requirements of the law with efforts to reduce administrative burdens for employers.

Round 2 comment summary: Commenter 311 suggested removing the final sentence in the definition of wages as it appears to be duplicative of the first two sentences of the definition.

Round 2 comment response: The Department finds that the last sentence is not duplicative as it refers to the localization of work analysis in Maine's unemployment law, and provides guidance as to whether wages are earned in Maine.

Round 2 comment summary: Commenter 140 suggests the Department remove any reference to the federal Social Security wage limit in the proposed rule.

Round 2 comment response: The Department made no changes as it determined that such reference is necessary for clarity and consistency with statute.

Round 2 comment summary: Commenter 148 asked whether premiums deducted from employees' wages will be considered a taxable benefit.

Round 2 comment response: The Department made no changes. The taxability question cannot be determined by the Department and must be made by the United States Internal Revenue Service (IRS). The Department, and other states, are awaiting such guidance such the IRS.

Section I (A)(23) – Definition of "Wages for self-employed individuals" –

Note: Section I(A)(23) defining "wages for self-employed individuals" became subparagraph 28 in the second draft of the proposed rule and subparagraph 29 in the final rule.

Round 1 comment summary: Commenter 101 encouraged the Department to clarify whether wages for self-employed individuals who elect coverage will be based on federal net wages or Maine net wages.

Department response: The Department made no changes as it determined the provisions in the rule are sufficiently clear.

General Comments on Definitions

Round 1 comment summary: Commenter 124 encouraged the Department to clarify the definitions of Average Weekly Wage, Base Period, Benefit Year, Covered Individual, Employee,

Employment and Serious Health Condition without additional context on what those clarifications should be.

Round 1 comment response: The Department made no changes as it determined the provisions in the rule are sufficiently clear and definitions of these terms can be found in statute.

Round 1 comment summary: Commenter 168 suggested the Department add additional definitions to the rule that are currently in statute as it would add additional context to the rule.

Round 1 comment response: The Department made no changes as it determined the definitions in the rule are sufficient and no additional definitions to clarify provisions in the rule is necessary.

Round 1 comment summary: Commenter 181 suggested the Department provide clarification on the definition of average weekly wage. There was concern that the current definition may cause confusion on how a claimant's average weekly wage is determined.

Round 1 comment response: The Department added subsection A.3. to Section VIII of the Rule to add clarity as to the calculated of an applicant's Average Weekly Wage.

Round 1 comment summary: Commenter 201 suggested the Department provide clarification as to what constitutes a de facto relationship.

Round 1 comment response: The term "de facto parent," "de facto grandparent," "de facto child," and "de facto grandchild," appear in the definition of "family member" in the statute. The Department made no changes as it determined the definition of some terms can be found in the Maine Parentage Act and the terms are sufficiently clear for purposes of PFML.

Round 1 comment summary: Commenter 233 asked the Department to clarify that the 12-month period for a PFML benefit year is a 12 month period measured forward, effective 5/1/2026.

Round 1 comment response: The Department made no changes as it determined 26 M.R.S. § 850-A(5) sufficiently defines benefit year.

Round 1 comment summary: Commenter 267 suggests that the word "employee" be changed to "individual" throughout the definition section so that definitions include those who are self-employed.

Round 1 comment response: The Department made no changes as it determined the provisions in the rule are sufficiently clear.

Round 2 comment summary: Commenter 267 reiterated their round 1 comments regarding various definitions.

Round 2 response to comment: The Department made no changes as it determined the provisions in the rule are sufficiently clear.

Round 2 comment summary: Commenter 127 asked the Department to clarify how wages will be deducted on a W-2 form.

Round 2 comment response: The Department made no changes as it determined the provisions in the rule are sufficiently clear for purposes of the PFML program. Additional practical information, such as reporting employee contributions on a W-2 form, may be found on the program's website.

II. Coverage

Factual and policy basis: This section implements definitions and clarifies individuals that are eligible for paid family and medical leave benefits. The Department defined wages based on Maine's unemployment law, which already applies to the vast majority of employers and employees. The Department also identified categories of individuals who are not eligible based on preemption by federal law, an attempt to be consistent with certain aspects of other state laws, or due to the unique circumstances of certain categories of individuals.

Section II(A)(1) – Covered employees

Note: The Department moved the wage eligibility for benefits (6 times the state average weekly wage earned during the first 4 of the last 5 completed calendar quarters immediately proceeding the first day of the individual's benefit year) to Eligibility, Section IV (A)(2). This clarifies that all employees who earn wages paid in the State are covered employees, but they are not eligible for benefits until the meet the wage eligibility threshold.

Round 1 comment summary: Commenters AC3, 011, 034, 086, 117, 160, 161, 181, 198, 241, and 267 suggested the Department clarify how the State Average Weekly Wage (SAWW) is calculated and applied, the commenters also raised concerns about potential exclusions due to earnings thresholds.

Round 1 response to comments: The Department notes this wage eligibility language was moved to Section IV (A)(2). The Department notes that "state average weekly wage" is published by the Workers' Compensation Board on their website. The Department will post relevant information about "state average weekly wage" on its website for further administrative ease.

Round 1 Comment Summary: Commenter 267 suggests that covered employees include those who are recently unemployed but still meet the financial eligibility provisions.

Round 1 response to comments: The Department finds that the intention of the program is to provide paid family and medical leave from work. The Department notes that a change was

made in the second proposed rule in Section IV.A.4., as discussed in that section below. The second proposed rule clarified that an applicant must be employed on the date of application if applying in advance of leave, or be employed as of the date of leave beginning if applying retroactively for leave.

Round 1 Comment Summary: Commenters 085, 095, 116, 124, 166, 168, 179,198, 205, 225, 227, 228, 232, 244, 258, 267, and 268 suggested that the Department use the statutory term "covered individual" rather than "covered employees" to avoid confusion.

Round 1 response to comments: The Department made no changes as it determined the rule is sufficiently clear.

Round 2 comment summary: Commenters 140 and 205 suggested to remove "covered employees" to be consistent with the statue language of "covered individuals" and to make this change throughout the entire rule.

Round 2 response to comments: The Department made no changes as it determined the rule is sufficiently clear.

Section II (A)(1)(a) – "wages paid in the State"

Note: In the second version of the proposed rule, the Department clarified that wages include severance and terminal pay, as such payments are considered wages in other contexts. As requested by some commenters, the Department revised the definition of wages to align with Maine's unemployment law, 26 M.R.S. § 1043 (11)(E). In the final version of the rule, in response to additional comments and questions, the Department clarified that the determination of whether wages are "paid in the State" is pursuant to the localization portion of Maine's unemployment law, 26 M.R.S. § 1043 (11)(A) and (D).

Round 1 comment summary: Commenters 144, 147, 151, and 158, 196, 208, 226, 232, 242, 251, 258, 263, and 268 stated that they support the Department for including all tips and gratuities.

Round 1 response to comments: The Department acknowledges the comment and made no changes to the Rule.

Round 1 comment summary: Commenter 223 said wages should include tips.

Round 1 response to comment: The Department made no changes as the definition of wages in statute, 26 M.R.S. § 850-A(31) expressly states that tips and gratuities are included as wages.

Round 1 comment summary: Commenters AC3, 116**,** 161, 166 suggested a need to have a more complete and thorough definition of wages to calculate premiums.

Round 1 response to comments: In the second proposed rules, the Department updated the definition of wages paid in the state to provide more clarity and align with Maine's unemployment law as it relates to calculating total wages and determining the locality of work.

Round 2 comment summary: Commenters 105 and 166 recommend aligning the definition of wages that are subject to premiums with that of Maine's unemployment law and using the Social Security wage limit as the cap for premiums and using these same rules to determine where work is performed.

Round 2 response to comments: The Department made no changes as it determined the Department sufficiently clarified the definition of wages in the updated language in the second draft of proposed rules.

Round 2 comment summary: Commenter 061 expressed concern that taking premiums from severance can result in financial hardship for the employee.

Round 2 response to comments: The Department acknowledges the comment but makes no changes in the rule, finding that severance pay is considered wages in other contexts.

Round 2 comment summary: Commenter 311 and 250 suggested to remove "wages" as it is already defined in Section I.

Round 2 response to comments: The Department finds that the duplication of the definition in Section two is necessary to clearly define the concept of a "covered employee".

Round 2 comment summary: Commenters 284 and 250 asked the Department how a Maine employer who employs out-of-state employees would qualify for Maine Paid Family Medical Leave benefits.

Round 2 response to comments: The Department made no changes as it determined the rule is sufficiently clear as it refers to the localization of work criteria set forth in unemployment law, 26 M.R.S. § 1043 (11)(A). The Department may issue guidance to assist employers in applying the localization of work criteria.

Round 2 comment summary: Commenter 471 asked the Department to clarify whether temporary and seasonal employees would qualify for Paid Family Medical Leave.

Round 2 response to comments: Yes, temporary and seasonal workers who earn wages in the state are covered. The Department made no changes as it determined the statute and rule are sufficiently clear.

Section II (A)(2) – individuals who elect coverage

Round 1 comment summary: Commenter 181 suggested the Department clarify whether self-employed individuals or tribal governments that can elect coverage would be subject to similar income requirements such as meeting the six times the state average weekly wage requirement.

Round 1 response to comment: The Department made no changes as the rule is sufficiently clear.

Round 2 comment summary: Commenter 061 recommends the rule be clarified to identify what employees, beyond those covered by the unemployment law are included in the wage calculation.

Round 2 response to comments: The Department made no changes as the rule is sufficiently clear.

Round 2 comment summary: Commentor 166 suggested clarifying that independent contractors can elect coverage similar to self-employed individuals.

Round 2 response to comments: The Department made no changes as it determined the rule is sufficiently clear.

Section II (B) – Types of employment not covered by the PFML Act

Note: In the second proposed rule, the Department clarified that volunteers and employees of the federal government are not covered. In the final rule, the Department further clarified that the exclusion for students earning wages as part of federal work-study, includes students employed at any public or private higher educational institution in the state of Maine. The Department also clarified that employees of the United States Postal Service are considered federal employees for purposes of the PFML program and are not covered.

Round 1 comment summary: Commenters 027, 154, 225, and 266 suggest the Department expand the exclusion to include all enrolled college students in Maine. Commenter 266 suggested the rule should also include students earning wages from the Maine Maritime Academy.

Round 1 response to comments: In the second proposed rule, the Department made no changes, but clarified in the final rule that the exclusion includes all student earnings from any public or private higher educational institution in Maine, adding the words “any other public” to Section II.B.4.

Round 1 comment summary: Commenters 205, 232, 258, 267, and 268 suggested removing exclusions such as employees subject to the federal Railroad Unemployment Insurance Act, incarcerated people, and Federal Work Study.

Round 1 response to comments: The Department did not adopt this change. These populations each bring unique legal and situational circumstances that make their income differ from wages of other types of employees.

Round 1 comment summary: Commenter 257 suggested adding an exclusion for foreign visa workers who are in the United States for a limited period of time.

Round 1 response to comments: The Department did not adopt this change as it finds the intent of the statute is to broadly cover all workers, including seasonal workers.

Round 2 comment summary: Commenter 140 asked why "incarcerated" individuals are exempt from Paid Family and Medical Leave benefits.

Round 2 response to comments: The Department determined that these individuals have unique legal and situational circumstances. No change was made to the rule.

Round 2 comment summary: Commenters 294 and 338 suggested to exclude "elected officials" from benefits because they are different than regular employees while another suggested school employees should be exempt from Paid Family and Medical Leave benefits because they already qualify for numerous other benefits. Commenter 059 suggested that state, municipal, and school employees should be exempt since their inclusion would result in creases taxes for citizens.

Round 2 comment response: The Department declines to adopt these suggestion as they are inconsistent with statue.

Round 2 comment summary: Commenter 474 suggested exempting agricultural seasonal employees from benefits as it's an undue hardship for farmers.

Round 2 comment response: The Department did not adopt this change as it is inconsistent with the intention of the statute.

Section III-Use and types of Leave

Factual and policy basis: This section clarifies the administration of each type of leave that is authorized under the Maine paid family and medical leave law. This section also clarifies 26 M.R.S §850(B)(5) regarding the use of intermittent leave to include reporting and notice requirements for the use of internment and reduced leave.

Section III (A) – types of leave

Round 1 Comment Summary: Commenters 006 asked the Department how the Paid Family and Medical Leave Program intersects with the Family Federal Medical Leave Act (FMLA) in terms of the use of leave and if employees can take both leaves and use sick time.

Round 1 response to comments: 26 M.R.S. § 850-B (11) states that Maine PFML runs concurrent with federal FML. Section VIII(C)(3) of the rule explains that the weekly benefit amount (WBA) is not deducted if the employer pays the difference between the WBA and the typical weekly wage. Sick leave may be used to pay this difference. The Department made no changes in response to comment.

Round 2 comment summary: Commenters 140, 326 and 474 commented on the types of leave that can be taken. Commenters 326 and 474 suggested the three different leave types need additional clarification regarding intermittent and reduced leave since it appears it is the same type of leave. Commenter 326 suggested that intermittent leave be used in full consecutive weeks instead of smaller increments. Commenter 140 suggested the types of leave described in the rule should not be changed.

Round 2 response to comment: The Department makes no changes in response to comment. The Department finds that the rule is sufficiently clear on how leave may be taken pursuant to Paid Family and Medical Leave law.

Round 1 Comment Summary: Commenter 088 asked the Department to clarify what happens if an employee does not take any type of leave during a benefit year.

Round 1 response to comments: In the second proposed rule the Department made no changes as it determined this suggestion does not need additional clarification in rule.

Section III (B)(1) – Use of Intermittent and Reduced Schedule Leave

Department Finding: *In the final rule, in response to a comment, the Department changed the phrase "full 12 weeks of leave" to "up to 12 weeks of approved leave," for the sake of clarification. This is consistent with the statute, which provides that an individual may take no more than 12 weeks.*

Round 1 Comment Summary: Commenter 063, 065 and 181 suggested the Department clarify whether the use of intermittent or reduced leave reduces the total number of weeks allowed for leave in a benefit year.

Round 1 response to comment: The Department made no changes as it determined that the statute and the rule are sufficiently clear. Use of intermittent and reduced leave will reduce available leave in a benefit year by a prorated amount. For example, 8 hours of intermittent leave in a 40-hour workweek will not reduce the 12 weeks of leave by one full week, but will reduce leave by 1/5 of one week.

Round 2 comment summary: Commenter 279 suggested the Department add the word "up to" instead of "full" 12 weeks of leave and mirror language in the Federal Family and Medical Leave Act (FMLA) and the Maine Family Medical Leave Act.

Round 2 response to comment: The Department made this change in the final rule.

Section III (B)(2) – increments of a scheduled workday

Round 1 Comment Summary: Commenter 034 asked the Department to clarify reporting and tracking requirements of intermittent and reduced leave.

Round 1 response to comment: The Department made no changes as it determined the rule is sufficiently clear.

Round 1 comment summary: Commenter 059 and 136 stated that some employers with multiple worksites could have employees that work different set schedules, such as 8-hour shifts and 12-hour shifts and therefore have different workdays, creating inconsistency within the company.

Round 1 response to comments: The department acknowledges that employers may have different work schedules for its workers and finds that the law and rule provide sufficient flexibilities for these scenarios. No changes are made.

Round 1 Comment Summary: Commenter 164 recommended to the Department language that the employer may approve intermittent or reduced leave on a case-by-case basis with the employee.

Round 1 response to comment: The Department made no changes in rule as it finds that the rule is sufficiently clear, as nothing written in rule prohibits an employer from allowing less than a full day use of intermittent leave on a case-by-case basis.

Round 1 comment summary: Commenter 169 suggested the Department clarify the type of notice for intermittent leave that will be required for workers that may use safe leave on an intermittent leave basis.

Round 1 response to comment: The Department made no changes as it determined the law and the rule are sufficiently clear. Section V of the rule and these responses to comments in Section VI address notice requirements in more detail.

Round 1 comment summary: Commenter 198 suggested to the Department to clarify in rule to require employers to offer half day increments. Commenter 275 suggested the Department revise the rule to allow an employee to take leave in increments that do not require a full workday as it may cause additional undue burden on workers and will help create more scheduling stability for employers.

Round 1 response to comment: The Department made no changes as it determined these suggestions would conflict with statute, 26 M.R.S. § 850-B(5).

Round 1 comment summary: Commenter 205 suggested the Department state in rule that approval of an intermittent leave application should not depend on an employer's agreement on the proposed intermittent schedule.

Round 1 response to comment: The Department made no changes to this section. The employer may claim undue hardship as explained in Section V of the rule and in these responses to comments, for any leave, including intermittent leave.

Round 1 comment summary: Commenter 232 suggested the Department allow self-employed individuals to have the ability to take leave in hourly increments.

Round 1 response to comments: In the second proposed rule the Department made no changes as it determined it is not administratively feasible.

Round 1 Comment Summary: Commenter 016 recommended that the use of intermittent leave not be required to be in writing.

Round 1 response to comment: The Department made no changes as it determined this suggestion may cause an administrative burden on the Department in determining whether the applicant has satisfied the requirements for complete application for benefits. The Department notes that Section VI of the rule further explains the application requirements.

Round 2 comment summary: Commenter 016 reiterated the comment not to require the use of intermittent and reduced leave to be required in writing and if it still is required, suggested that the Department provide a sample agreement.

Round 2 response to comment: The Department makes no changes as it determined this suggestion may cause an administrative burden on the Department in determining whether the applicant has satisfied the requirements for complete application for benefits.

Round 1 comment summary: Commenter 061 seeks clarification of intermittent leave and the impacts on benefit amount if any and to address the intersection between Maine Paid Family Medical Leave and Family Medical Leave Act.

Round 1 response to comment: The Department made no changes as it determined the rule is sufficiently clear.

Round 2 comment summary: Commenter 061 reiterated its Round 1 comments since the Department made no change.

Round 2 response to comment: The Department made no changes as it determined the rule is sufficiently clear.

Round 2 comment summary: Commenter 059 asked how the 7-day waiting period in the statute on medical leave claims impacts intermittent and reduced leave. The commenter further

suggested that an employee should exhaust sick leave before taking Paid Family Medical Leave benefits.

Round 2 response to comment: The Department made no changes as it determined the rule is sufficiently clear that the waiting period applies to the first week of intermittent or reduced leave. A requirement that an employee exhaust sick leave before taking PFML benefits would violate the statute.

Section III (B)(3)

Round 1 Comment Summary: Commenter 034 questioned who the administrator is and if they will be the one gathering the information from employers.

Round 1 response to comments: The Department made no changes as it determined the rule refers to the statute, 26 M.R.S. § 850-A(2), and is sufficiently clear.

Round 1 Comment Summary: Commenters 053 and 061 required more clarification on how Maine Paid Family and Medical Leave Program will run concurrently with the Federal Family Medical Leave Act (FMLA) and whether one will be reduced or affected.

Round 1 response to comments: In the second proposed rule, in Section IV.B.2., the Department made minor changes to the rule to clarify how leave not taken concurrently with other types of leave will be reduced.

Round 1 Comment Summary: Commenter 061 asked the Department to clarify the process to confirm the hours a covered individual would have worked were they not taking leave..

Round 1 response to comments: The Department made no changes as it determined the rule is sufficiently clear.

Round 1 comment summary: Commenter 058 asked the Department for clarification on how individuals that use intermittent leave will also be entitled to 12 weeks of leave under the law.

Round 1 response to comments: The Department made no changes as it determined the rule is sufficiently clear.

Round 1 Comment Summary: Commenter 092 asked the Department to clarify the process for an employee taking intermittent leave when they work a schedule other than five 8-hour days.

Round 1 response to comments: The department finds that Section III(B)(2) and (3) provide sufficient guidance for this scenario. No changes are made.

Round 1 comment summary: Commenter 099 asked the Department if the applicant can apply their average weekly hours over the last 12 weeks

Round 1 response to comments: The Department made no changes in this section as it determined the rule is sufficiently clear. The Department further notes that reduction and proration of benefits is explained in detail in Section XVIII(C) of the rule.

Round 1 comment summary: Commenter 114 asked the Department to use and to maintain the employees' average number of hours worked prior to the leave being taken as it was suggested hours could fluctuate which could affect their benefit payment based on the demand of the employer.

Round 1 response to comments: In the second proposed rule the Department made no changes to this section as it determined the current rule appropriately balances the interests of workers and employers and is administratively feasible. The Department further notes that reduction and proration of benefits is explained in detail in Section XVIII(C) of the rule.

Round 1 comment summary: Commenter 126 suggests an annual weekly average hour's approach as it may be more administratively efficient and potentially fair for the employee.

Round 1 response to comments: The Department made no changes in the proposed rule as it determined the current rule appropriately balances the interests of workers and employers, is administratively feasible for all parties and for the Department, and is consistent with the statute.

Round 1 comment summary: Commenter 160 suggested the Department amend the rule to use the term "hours worked" to "hours scheduled" to reduce confusion.

Round 1 response to comment: In the second proposed rule, the Department made no change to the rule as it determined using the terms hours work has been correctly defined.

Round 2 comment summary: Commenter 016, 061 and 148 commented on the terms used such as "variable", "workweek, or "workday."

Commenter 016 asked if the Department will define the process of determining if an employee schedule is variable enough where the covered individual worked a full work week.

Commenter 061 suggested the Department clarify the terms "workweek" or "workday" as it will be administratively burdensome and complex to determine payments for each applicant that applies for leave.

Commenter 148 suggested to the Department that the proration of benefits needs more explanation for the use of interment leave or to define the definition of workweek or workday.

Round 2 response to comment: The Department made no changes as it determined the rule is sufficiently clear and properly balances the interests of employees and employers.

Round 2 comment summary: Commenter 063 asked the Department to consider moving this subsection of determining employee's workweek to the definition of "schedule workweek"

Round 2 response to comment: The Department made no changes in the proposed rule as it determined this suggestion would result in confusion.

Section III (B)(4)

Note: The second proposed rule, in response to comments, added language clarifying that, although a separate application is not required for each occurrence of intermittent leave, a covered individual must still inform their employer of intermittent leave use according to the employer's reporting policies.

Round 1 Comment Summary: Commenter 061 asks the Department to clarify in the rule whether employees will have to include information in their request for intermittent leave about the frequency and duration of absences and the steps an employer should take if the estimated frequency and duration is exceeded. Commenter 034 commented whether the use of intermittent will be required to be self-reported and what role the employer play in the leave.

Round 1 response to comment: The Department changed the rule to clarify that a covered individual must inform their employer of any intermittent leave use according to the employer's reporting policies. The intention of the statute and the rule is that the employee will provide the employer the best estimate with information available at the time, but actual frequency and duration may change from the estimate based upon the actual medical situation.

Round 1 Comment Summary: Commenters 061, 154, 168, and 275 commented that 15 days may be too long to report a missed day of work and to consider aligning with the Federal Family and Medical Leave Act (FMLA) reporting and tracking requirements.

Round 1 response to comment: The Department makes no changes in the proposed rule to reduce the amount of time to report intermittent leave as the current rule appropriately balances the interests of workers and employers and is administratively feasible.

Round 1 Comment Summary: Commenter 275 suggested the Department streamline the process for the reporting of intermittent leave and allow the employee to report the leave schedule in advance.

Round 1 response to comment: The Department made no changes in the proposed rule as it determined the rule is sufficiently clear.

Round 1 comment summary: Commenter 232, 258, and 276 suggested clarifying in the proposed rule using business days to align with how days are used in other parts of the rule and ensure consistency.

Round 1 response to comment: "Business day" was defined in the second proposed rule and updated throughout the rule for consistency.

Round 2 comment summary: Commenters 061 and 063 suggested the Department clarify the consequences for an employee who fails to meet the reporting requirements for intermittent leave.

Round 2 response to comment: The Department made no changes as it determined the rule is sufficiently clear.

Round 2 comment summary: Commenter 140 suggested removing or rephrasing the last sentence in the subsection because the Department should be deciding on reasonable notice.

Round 2 response to comment: In the second proposed rule, the Department made no changes as the proposed rule appropriately balances the interests of workers and employers and is administratively feasible.

Round 2 comment summary: Commenter 250 suggests pre-approved intermittent leave blocks of 5 to 10 days at a time.

Round 2 response to comment: The Department makes no changes in the rule as the proposed rule appropriately balances the interests of workers and employers and is administratively feasible.

Section III(B)(5) – proration of intermittent leave from 2 or more employers

Round 1 Comment Summary: Commenters 142, 151, 158, 179, 181, 185, 205, 208, 219, 226, 228, 242, 253, 258, 268 and 275 commented that intermittent leave should not require agreement from all employee's employers and suggested it be removed or amended.

Round 1 response to comment: The Department made no changes as the statute allows individual employers the right to agree on intermittent leave schedules with their employees. The rule is consistent with 26 M.R.S. §§ 850-B(5) and (7).

Round 1 comment summary: Commenter 164 suggested that benefits be prorated on a "per employer" basis.

Round 1 response to comment: The Department makes no changes in the rule as the proposed rule appropriately balances the interests of workers and employers.

Round 2 Comment Summary: Commenters 061 and 063 suggested that benefits should be prorated on a "per employer" basis to streamline the process and reduce administrative burden especially when employers are not part of the same plan.

Round 2 response to comment: The Department makes no changes in the rule as the proposed rule appropriately balances the interests of workers and employers and is administratively feasible for employers and for the Department.

Round 1 Comment Summary: Commenter 061 suggested an employer should be permitted to claim undue hardship for the use of intermittent leave.

Round 1 response to comment: The Department makes no changes in the rule as undue hardship is clearly addressed in Section V, and the rule sets forth no prohibition on an employer claiming undue hardship for the use of intermittent leave.

Round 2 Comment Summary: Commenter 061 reiterated its Round 1 comment suggesting an employer should be permitted to claim undue hardship for the use of intermittent leave.

Round 2 response to comment: The Department makes no changes in the rule as undue hardship is clearly addressed in Section V, and the rule sets forth no prohibition on an employer claiming undue hardship for the use of intermittent leave.

Section IV-Eligibility

Factual and policy basis: This section implements and clarifies 26 M.R.S. §850-B regarding the eligibility of individuals to apply for Maine Paid Family and Medical Leave benefits.

Section IV(A)

Round 1 comment summary: Commenters 140, 163 and 263 supported the work of the Department in this section.

Round 1 response to comments: The Department acknowledges the comments.

Round 2 comment summary: Commenter 205 suggested that the term "covered employee" should be changed to "covered individual" to conform with the statute.

Round 2 response to comment: The Department makes no changes as these are two distinct terms describing different concepts and are used intentionally and separately throughout rule.

Section IV(A)(2)

Department Findings: *In the second proposed rule, the wage eligibility was moved from Section II(A)(1), Covered Individual, to the Eligibility section because the Department found that this paragraph better fits in the section describing eligibility for leave. This language is from statute, 26 M.R.S. § 850-A(9). In the final rule, the Department added language to clarify the intention that the calculation of eligibility based on wages is based upon the amount of state average*

weekly wage on July 1 preceding the date of the application for benefits. As set forth in other sections herein, the Department will state that dollar amount on its website.

Round 2 comment summary: Commenters 063 and 168 suggested to the Department to use the State Average Weekly Wage (SAWW) in place at the time leave begins rather than at the time the application is filed.

Round 2 response to comments: The Department made no additional changes as it determined the rule is sufficiently clear.

Round 2 comment summary: Commenter 307 asked the Department how to treat employees that may not meet the earnings requirements, but premiums would still be deducted from their wages.

Round 2 response to comment: The Department makes no changes in rule in response to comment as statute rule are clear that premiums are owed on any wages earned in Maine. The Department will review all information of the applicant to determine whether the earnings requirement has been met.

Section IV(A)(3) - formerly Section IV(A)(2) – time for filing an application

Round 1 comment summary: Commenter 232 supports the Department ability to give flexibility to employees for taking leave especially in emergency situations.

Round 1 response to comments: The Department acknowledges the comments.

Round 1 comment summary: Commenters 034, 059, 060, 126, 136, 143, 154, 168, 232 and 233 noted concerns to the Department regarding applicants applying for leave retroactively after 90 days of absence, recommending applying for benefits within 5 days after leave, finding it unrealistic for employers to hold positions open during such extended periods of absence without prior notice.

Round 1 response to comments: The Department made no changes as the suggestion conflicts with statute, 26 M.R.S. section 850-D (2).

Round 2 comment summary: Commenter 157 stated that the provision in rule that allows an individual to apply for benefits 90 days after the leave has begun will cause undue hardship for the employer.

Round 2 response to comments: The Department made no changes in rule as the provision is in statute, 26 M.R.S. section 850-D (2).

Round 2 comment summary: Commenters 168 and 199 suggested to the Department to amend the ability for an individual to apply for benefits from 90 days to 30 days.

Round 2 response to comments: The Department made no changes in rule as suggestion conflicts with the statute, 26 M.R.S. section 850-D (2).

Section IV(A)(4)

Department Finding: A *new Section IV(A)(4) was added to the second draft proposed rules, stating that to be covered, an individual must be employed as of the date of application if applying in advance or leave, or be employed as of the date of leave beginning if applying retroactively for leave. The Department found, in reviewing the totality of the comments, that such clarification was needed. The Department considered the intention of the statute, the need to protect the PFML fund, and balanced the interests of employees and employers in making this clarification.*

Round 2 comment summary: Commenters 059, 061, 140, 167, 178, 179, 205, 221, 232, 246, 258, 267, 268, 290, 291, 310, 332, 333, and 400 offered comments regarding this section. The commenters suggested the Department remove this requirement that the applicant be employed at the time of application as it may conflict with the intent of the Act authorizing Paid Family and Medical Leave.

Round 2 response to comments: The Department made no changes in rule as the Department finds this provision is consistent with the intention of the statute.

Round 2 comment summary: Commenter 217 supported the requirement that an individual must be employed at the time the application for benefits is filed.

Round 2 response to comments: The Department acknowledges the comment and makes no change as a result.

Round 2 comment summary: Commenters 063, 124, 168 and 311 suggested the Department offer clarity on the provision that an applicant must be employed to avoid any confusion regarding eligibility to obtain benefits.

Round 2 response to comments: The Department made no changes as it determined the rule is sufficiently clear.

Section IV(B)(1)

Round 1 comment summary: Commenter 232 suggested that the provision to allow an applicant to take family leave immediately after taking medical leave should remain in the rule.

Round 1 response to comments: The Department made no changes as it is consistent with the intention of the statute.

Round 1 comment summary: Commenters 013, 160 and 227 commented asking for clarification if the 12 weeks are for the entire benefit year and not 12 weeks for each leave totaling 24 weeks.

Round 1 response to comments: The Department made no changes as it determined the statute and the rule are sufficiently clear, and the last sentence of IV(B)(1) expressly addresses this.

Section IV(B)(2)

Round 1 comment summary: Commenter 009 suggested the Department should not require an individual to use any leave under the Federal Family and Medical Leave Act and Paid Family and Medical Leave if the leave is the result of an injury on the job.

Round 1 response to comment: The Department made no changes as the Paid Family and Medical Leave statute anticipates an employee sometimes receiving workers compensation and PFML benefits at the same time as specified in 26 M.R.S. 850-C(5)(A).

Round 1 comment summary: Commenters 045, 053, 061, 092, 154, 164, 181, 232, 258, 267, and 268 seek clarification from the Department on the alignment of both the state and federal medical leave laws in the proposed rule.

Round 1 response to comments: In the second proposed rule the Department made changes to the rule to clarify the alignment of leave taken concurrently under both leave laws. The Department clarified that PFML leave will be reduced by any leave taken under other leave programs in the 12-month period preceding the leave.

Round 2 comment summary: Commenter 016 asked the Department to clarify whether the date of incorporation is the correct date for the enactment of the Federal Family Medical Leave Act.

Round 2 response to comments: The Department is using the correct date for purposes of incorporating by reference the federal Family Medical Leave Act, that is, it is relying on the version of the federal law as of December 30, 2019.

Round 2 comment summary: Commenter 060 and 449 suggested that the Department require that leave under the Federal Family and Medical Leave Act should be taken first prior to leave being taken under the Paid Family and Medical Leave Program. Commenter 060 suggested that the Department make taking FMLA a pre-requisite to obtaining PFML.

Round 2 response to comments: The Department finds this suggestion is inconsistent with statute, and therefore makes no changes.

Round 2 comment summary: Commenter 124 suggested the Department clarify the types of leave under the Federal Family and Medical Leave Act that may result in a reduction of leave time taken under the Paid Family and Medical Leave Program.

Round 2 response to comments: The Department made no changes as it determined the statute rule are sufficiently clear. The statute requires leave taken under any of the unpaid leave programs to run concurrently with paid family and medical leave program.

Round 2 comment summary: Commenters 140, 179, 205, 221, 232, 246, 258, 267, 314, 333 and 337 offered comment regarding the current provision that will require a reduction of leave under the Paid Family and Medical Leave Program if an individual has used leave under the Federal Family Medical Leave Act or the Maine Unpaid Leave Program in the 12 months prior to taking leave under the Paid Family and Medical Leave Program. The commenters suggested the Department reinstate the provision that will not reduce an individual's leave time if use of the unpaid leave programs were used.

Round 2 response to comments: The Department made no additional changes as statute requires leave taken under any of the unpaid leave programs to run concurrently with paid family and medical leave program. The Department finds that the current language is consistent with the intention of the statute.

Round 2 comment summary: Commenter 168 recommends that the Department clarify as to when leave taken under Federal Family and Medical Leave Act and the Maine unpaid Family and Medical Leave Program will also reduce an employee's leave under the Maine Paid Family and Medical Leave Program.

Round 2 response to comments: The Department made no changes as it determined the rule is sufficiently clear.

Round 2 comment summary: Commenter 199 asked the Department to clarify whether an employee can take leave under the Federal Family and Medical Leave Act prior to leave taken under the Maine Paid Family and Medical Leave Program.

Round 2 response to comments: The Department made no changes as statue, as Section 850-B (11), requires leave taken under any of the unpaid leave programs to run concurrently with paid family and medical leave program.

Round 2 comment summary: Commenter 293 ask the Department to clarify whether benefits run concurrently with the federal FMLA.

Round 2 comment response: The statute at Section 850-B(11) states "Leave taken under this subchapter runs concurrently with leave taken under the federal Family and Medical Leave Act of 1993…" The Department does not believe that further clarification is needed in the rule.

Section IV (B)(3)

Note: In response to comments, in the second proposed rule, the Department removed the language limiting leave to one person per year with whom the employee has an infinity relationship. The Department found that this language was inconsistent with the statute, which only limits the amount of leave.

Round 1 comment summary: Commenters 59, 60, 111, 115 (PFML Authority), 122, 125, 133, 139, 140, 142, 144, 145, 147, 151, 158, 167,181, 185, 196, 201,205, 208, 215, 217, 219, 223, 226, 232, 234, 239, 242, 246, 251, 253, 258, 267, 268 and 275 suggested that the Department remove the one person per year limitations while some further recommended to remove all or any limitations on affinity relationships that an employee can claim for leave.

Round 1 response to comments: The Department removed this language in the second draft of proposed rules as it determined that the limit is inconsistent with the statute, which only limits the total amount of leave.

Round 1 comment summary: Commenter 061 suggested there be no increase to or removal of the one person per year limitation. Further the commenter asked the Department to limit an employee's ability to take leave for an affinity relationship if there is some other caretaker available. Finally, the commenter asked the Department to clarify the process for claiming an affinity relationship including requiring an attestation from the employee.

Round 1 response to comments: The Department removed this one person per benefit year language in the second draft of proposed rules, as explained in response to the preceding comment. The Department further notes that it made changes to Section VI(A)(4), explaining the process for applying for leave to care for an individual with whom the employee has a significant personal bond. The Department finds that the current version of the rule, with these changes, is an appropriate balance of the interests of employers and workers, and is administratively feasible, and is consistent with the intention of the statute.

Round 2 comment summary: Commenter 061 notes the removal of the section on affinity relationships but reiterates the comment regarding their view that leave to care for someone with whom the employee has a close personal bond should be limited to one person per year and leave should not be granted if there is some other caretaker available. Commenter 059 disagrees with the removal of the provision and suggests that additional guardrails be put in place to prevent abuse.

Round 2 response to comments: The Department finds that the current version of the rule is consistent with the intention of the statute. The Department further notes that changes were made to Section VI.4. to set forth information that should be provided at the time of application to demonstrate the existence of a significant family bond.

Section IV(B)(4)

Note: This section became IV(B)(3) in the second proposed rule when previous section IV(B)(3) was removed.

Round 1 comment summary: Commenters 024, 036, 059, 111, 160, 227, 253, and 260 commented that the Department should reconsider and change taking leave on day one of employment due to creating unpredictability for employers. One person recommended mirroring language found in the Federal Family and Medical Leave Act (FMLA)

Round 1 response to comments: The Department will not adopt this suggestion as it is inconsistent with statute. The Department further notes that 26 M.R.S. § 850-J does not require an employer to restore an employee to their former position if the employee has been employed by less than 120 days by that employer when the leave started.

Round 1 comment summary: Commenters 170, 140, 208, and 226 provided a comment that employees should be eligible for benefits regardless of how long they worked at a particular place of employment.

Round 1 response to comments: The Department notes that such eligibility is consistent with statute and expressly set forth in the rule.

General comments regarding Eligibility

Round 1 comment summary: Commenter 186 suggested that fathers should not be eligible to receive up to 12 weeks of benefits for childbirth unless the birthing parent or child had medical issues to warrant the time.

Round 1 response to comment: The Department finds this would be inconsistent with statute.

Round 1 comment summary: Commenter 216 generally supported the presumed eligibility of workers in the eligibility section.

Round 1 response to comment: The Department acknowledges the response.

Round 1 comment summary: Commenter 273 suggested aligning Maine Paid Family and Medical Leave eligibility criteria with Federal Family Medical and Leave Act requirements.

Round 2 response to comments: The Department made no changes. The Department attempted to make Maine PFML consistent with FMLA, but that was not always feasible, given the differences between the two statutes.

Round 2 comment summary: Commenter 063 suggested the Department specify if benefits are payable for claims that began prior to May 1, 2026, but have a need for leave that continues beyond that date. The commenter highlighted an example of an individual that gave birth in late 2025 and asked if someone would be able to take 12 weeks of bonding leave under the program as long as they are within 12 months of birth. Similarly, if someone needs 12 weeks of leave for knee replacement beginning April 1, 2026, can they begin receiving benefits as of May 1, 2026.

Round 2 response to comments: The Department made no changes as it determined the statute and rule are sufficiently clear.

Round 2 comment summary: Commenter 063 suggested to the Department to provide clarity on what happens to a claim for an employee who becomes unemployed during the claim.

Round 2 response to comments: If an applicant loses their employment during the period they are on leave, the remainder of the benefits that were approved before the loss of employment will continue. The Department made no changes as it determined the provisions in the rule are sufficiently clear.

Round 2 comment summary: Commenter 264 asked the Department to clarify eligibility for an employee for the Paid Family and Medical Leave Program and to obtain benefits.

Round 2 response to comments: The Department made no changes as it determined the rule is sufficiently clear.

Round 2 comment summary: Commenter 281 asked the Department to clarify whether the employer is required to comply with the job protections provision in the Act authorizing Paid Family and Medical Leave.

Round 2 response to comments: The Department made no changes as it determined the provisions in the statute and the rule are sufficiently clear.

Round 2 comment summary: Commenters 293 and 314 suggested to the Department to require a waiting period prior to an individual applying for benefits.

Round 2 response to comments: The Department finds this suggestion is inconsistent with statute.

V. Notice and Undue Hardship

Factual and policy basis: This section clarifies 26 M.R.S. §850-F(7) to explain an employee's responsibility to provide reasonable notice of intent to use Paid Family and Medical leave and outlines the process by which an employer can reasonably determine an undue hardship as it pertains to the scheduling of the leave request.

Note: In response to comments, as explained below, the Department made changes to Section V in the second proposed version of the Rule. The Department made additional clarifying changes in the final version of the Rule. The Department finds that the final rule is based upon consideration of many comments and is an appropriate balance of the interests of workers and employers, in a manner that is consistent with the statute and administratively feasible.

Section V(A)

Comments on rule provision that thirty days written notice presumed to be reasonable

Round 1 comment summary: Commenter 053 asked the Department to define a reasonable timeframe for notice.

Round 1 response to comments: Section V (A) of the proposed rule states that 30 days' notice shall be presumed to constitute presumed reasonable notice.

Round 1 comment summary: Commenters 059 and 136 suggested the Department extend the time for notice for foreseeable leave to be increased from 30 days to 60 days. Commenter 059 suggested that 60 days' notice would be consistent with statutory language that allows an applicant to apply no more than 60 days prior to the leave beginning.

Round 1 response to comments: The Department did not adopt this suggestion. The designation of 30 days as presumed reasonable notice is consistent with the Federal Family and Medical Leave Act (FMLA), and the administration of most other State Paid Family and Medical Leave laws.

Round 1 comment summary: Commenters 061, 168, 258 and 267 suggested the Department amend this section to conform to the Federal Family Medical Leave Act standard where it states 30 days' notice when practicable, or as soon as is practicable if 30 days' notice is not practicable.

Round 1 response to comments: The Department finds that the rule already addresses this suggestion.

Round 1 comment summary: Commenter 181 suggested the Department add a specific consequence if an employee does not provide proper notice.

Round 1 response to comments: The Department made no changes as the rule is consistent with the intent of the statute. The rule already provides that the employer may claim undue hardship if reasonable notice is not provided.

Round 1 comment summary: Commenter 010 suggested the Department define good faith in section A of the rule.

Round 1 response to comments The Department made changes to Section V, but retains the language, in section V(D)(3) that the employer makes a good faith attempt to work out a schedule. "Good faith" is a commonly used phrase, and the department does not define it in rule.

Round 1 comment summary: Commenters 059 reiterated its Round 1 comment that the time for notice for foreseeable leave to be increased from 30 days to 60 days.

Round 1 response to comments: The Department did not adopt this suggestion. The designation of 30 days as presumed reasonable notice is consistent with the Federal Family and Medical Leave Act (FMLA), and the administration of most other State Paid Family and Medical Leave laws.

Round 2 comment summary: Commenter 279 suggested to the Department to adopt a provision that the notice provided to the employer must be acknowledged by the employer. The concern from the commenter stemmed from possible delays either by email or electronic communication that could occur.

Round 2 response to comments: The Department made no changes as it determined that such a requirement would be unnecessarily burdensome and would be inconsistent with statute.

Round 2 comment summary: Commenter 181 suggested the Department clarify the consequences of when an employee fails to provide notice to the employer to schedule leave. Commenter 258 asks the Department to include language stating if the employer fails to provide any statutorily required notices, the employee's notice obligations are waived.

Round 2 comment response: The Department makes no change since, when read in conjunction with the statute, the rule is sufficiently clear.

Section V(A) - Comments on notice in the case of "emergency, illness or other sudden necessity" and comments on safe leave

Round 1 comment summary: Commenters 232, 258 and 268 suggest that safety concerns related to safe leave be clearly identified as an emergency or sudden necessity exempt from the 30 days' notice requirement. Commenter 268 reiterated their comment in the second round.

Round 1 response to comment: The Department acknowledges the comments, and finds that safe leave will often, but not always, be considered an emergency, and makes no change to the rule based on this comment.

Round 1 comment summary: Commenter 235 provided a general comment that 30 days for leave where an emergency exists for life-threating events is not reasonable and should be changed. Commenter 257 suggested requiring the employee or some family member to provide notice to the employer within 5 business days of an emergency circumstance.

Round 1 response to comments: The Department made no changes as it determined the provisions in the rule are sufficiently clear, as it specifies that in the case of emergency, illness, or other sudden necessity, the employee should make a good faith effort to provide written notice as soon as is feasible under the circumstances

Round 1 comment summary: Commenter 205 asked the Department to clarify that a "sudden necessity" does not necessarily have to constitute an emergency.

Round 1 response to comment: The Department made no changes as the rule is sufficiently clear.

Round 2 comment summary: Commenters 167, 179, 198, 215, 221, 245, 246, 257, 258, 328, 329, 331, 333, 338, 390 and 412 suggested the Department make explicit in the rule that requests for safe leave should be considered an emergency notice which does not require an employee to provide at least 30 days' notice to the employer.

Round 2 response to comments: The Department acknowledges the comments, and finds that safe leave will often, but not always, be considered an emergency situation, and makes no change to the rule based on this comment.

Section V(A) - Comments on undue hardship when employee has provided thirty days' notice

Round 1 comment summary: Commenters 134, 189 and 272 suggested the Department use the undue hardship provisions that were established in the Maine Earned Paid Leave law. Commenter 189 also suggested the Department develop a standard form that may assist with information to include in the notice to schedule leave.

Round 1 response to comments: The Department made some changes and finds that the final version of the rule is consistent with the language and the intention of the statute. The Department determined and set forth in Rule that a prescribed form not be required.

Round 2 comment summary: Commenters 061 and 157 offered a comment regarding the presumption that 30-days is sufficient for an employee providing reasonable notice to the employer when scheduling leave. The commenters elaborated this provision conflicts with the statutory language as they emphasized that undue hardship is to be reasonably determined by the employer without the constraints the proposed rule imposes.

Round 2 response to comments: The final rules were clarified to outline that the employer retains the ability to challenge 30 days' notice as insufficient in the process specified in rule.

Round 2 comment summary: Commenter 082 offered comment regarding the 30-day notice provision to schedule leave with the employer is reasonable and should not be changed.

Round 2 response to comments: The Department did not change the 30-day notice provision as it determined that notice period is consistent with the federal FMLA and the administrative of most other State Paid Family and Medical Leave laws. The final rules were further clarified to outline that the employer retains the ability to challenge 30 days' notice as insufficient in the process specified in rule.

Section V(B) – Comments on requirement that notice be in writing.

Note: The second version of the proposed rule deleted language in V(B)(4). The rule now requires that notice be "written."

Note: Previous Section V(B)(5) (providing that the 10-day review period for undue hardship may be waived) was moved to its own section as Section V(C) in final rule, for the sake of clarity.

Round 1 comment summary: Commenters 017, 059, 084, 119, 124, 130, 136, 145, 160, 205, 241, 275 and 276 suggested the Department clarify whether notice needs to be in writing as there appears to be conflicting language between Section A and Section B where it states notice providing information to the employer describing the scheduling of leave that is foreseeable does not need to be in writing.

Round 1 response to comments: In response to these comments, the Department revised the second draft prosed rules. The rule now requires that the employee notice must be in writing.

Round 1 comment summary: Commenters 139, 142, 147, 151, 158, 185, 196, 205, 219 and 221 suggested the Department provide flexibility on how an employee may provide notice to the employer when scheduling leave to include text messaging or email when communicating with the employer.

Round 1 response to comments: In the second proposed rule, the Department clarified in Section V(B)(4) in that notice in writing can include text messages and emails.

Round 2 comment summary: Commenter 140 suggested the Department reinstate the provision that notice does not need to be in writing when the employee is providing notice to the employer.

Round 2 response to comments: The Department will retain the provision that notice will need to be in writing to ensure documentation of the date of leave request.

Section V(B) – Comments on form of notice

Round 1 comment summary: Commenter 090 asked the Department to clarify whether employers may still require employees to fill out FMLA paperwork when the employer receives notice that the reason for leave may also qualify for FMLA given the restrictions for employees to use forms when requesting leave for the Maine Paid Family and Medical Leave Program.

Round 1 response to comments: The Department made no changes as the rule is not intended to address federal FMLA and the Department has no jurisdiction to enforce federal FMLA.

Round 1 comment summary: Commenters 169, 178, 205, 242, 246, 258, 263 and 275 suggested the Department limit the employer in asking for specific information to be disclosed from the employee to ensure the applicant's privacy is protected on the reason to take leave. Commenters 242 and 263 encouraged the Department to allow employees to use questions from the Federal Family Medical Leave Act (FMLA).

Round 1 response to comments: The Department made no changes as it determined the provisions in the statue and the rule are sufficiently clear.

Round 1 comment summary: Commenters 252 and 268 suggested the Department clarify the type of information the employer can request when an employee is providing information to

schedule leave. Commenter 258 suggested the Department require only general information from the employee with the ability of the employer to follow up with a request for additional information.

Round 1 response to comments: The Department made no changes as it determined the provisions in the rule are sufficiently clear.

Round 1 comment summary: Commenters 179 and 228 suggested to the Department that the applicant should not disclose any additional information pertaining to the request for leave if it is for safe leave.

Round 1 response to comments: The Department made no changes as it determined the provisions in the rule are sufficiently clear.

Round 1 comment summary: Commenter 274 suggested to the Department to strike the language that prohibits an employer from using a prescribed form when an employee is scheduling leave for the Maine Paid Family and Medical Leave Program.

Round 1 response to comments: The Department finds that the provisions in the rule as sufficiently clear on this issue and consistent with stature. The Department did clarify in the second draft proposed rules that the notice must be in writing.

Round 2 comment summary: Commenters 199 and 408 offered comments regarding the information that is to be provided in the notice section when scheduling leave. Commenter 199 encouraged the Department to create a standard template form that will assist the employee in providing proper notice. Similarly, commenter 408 asked the Department to clarify what relevant details should be.

Round 2 response to comments: The Department finds that the provisions in the rule are sufficiently clear and makes no change to the rule.

Round 2 comment summary: Commenters 016 and 101 suggested the Department clarify if the notice requirements are the same for the use of intermittent leave in Section III(B)(2).

Round 2 response to comments: The Department made no changes as it determined the provisions in the rule are sufficiently clear.

Section V (C) – Note: Previous Section V(C) became section V(D) in final rule.

Round 1 comment summary: Commenter 010 suggested the Department define good faith in section C(3), now D(3) of the rule.

Round 1 response to comment: The Department made changes in the second proposed rule and in the final rule with respect to this section and finds that the provisions in the rule are

sufficiently clear. "Good faith" is a commonly used phrase, and the department does not define it in rule.

Round 1 comment summary: Commenter 061 suggested the Department remove the requirement placing the burden to prove undue hardship on the employer and enumerate reasons for businesses to be able to reasonably assert hardship stating the statute makes it the business's determination and not the Department's. Additionally, the commenter stated the rule places added burdens on the employer and creates a presumption that employee notice suffices to overcome undue hardship which is not supported by the statute.

Round 1 response to comments: In the second version of the proposed rule, the Department removed the burden of proof and made additional changes in the second proposed rule and in the final rule to clarify what may constitute undue hardship. The current rule is consistent with the statute.

Round 1 comment summary: Commenter 114 suggested to the Department to develop a template for employers to use regarding undue hardship claims under this section and provide it to their employees.

Round 1 response to comments: The Department finds that the rule, with the changes in the second proposed rule and the final rule, are sufficiently clear, and makes no additional change to address this comment. The Department will consider developing templates and forms as it deems appropriate and useful before benefits are effective.

Round 1 comment summary: Commenter 134 and 252 suggested the Department add an additional consideration to account for situations where an employer could have multiple employees out on Paid Family Medical Leave simultaneously under an undue hardship analysis. Furthermore, they suggested the Department remove the phrase or modify the language "approval of the employee's health care provider" as it may override or fail to account the employer's ability to decide whether an undue hardship claim exists.

Round 1 response to comments: The Department notes that it made changes to this section in the second proposed rule and in the final rule, and finds that the provisions in the final rule are sufficiently clear and are consistent with statute.

Round 1 comment summary: Commenter 181 commented that the Department should apply the undue hardship provision to only non-medical leaves, potentially providing employers even more control by leveraging the Federal Family and Medical Leave Act (FMLA) language for the scheduling of intermittent and reduced schedule leaves. Commenter 063 made this same comment in the second round of comments.

Round 1 response to comments: The Department finds it is inconsistent with statute to limit undue hardship to only non-medical leave claims. The Department made no change after either round of comments.

Round 1 comment summary: Commenter 267 and 268 stated that comment regarding the provisions of this section are consistent with other leave laws around the country and Maine's paid family and medical leave statute. In addition, commenter 268 believes the requirements are clear and are consistent with the statute.

Round 1 response to comments: The Department acknowledges the comments and makes no change to the rule as a result, although other changes are made as explained herein.

Round 2 comment summary: Commenters 061, 090, 140, 167, 178, 179, 199, 205, 221, 250, 258, 267, 268, 280, 290, 291, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 309, 310, 323, 390, 400, 412 and 477 offered comments both for and against the deference to the employer in this section.

Round 2 response to comments: The Department made further clarifications in the final rule and finds that the provisions in the final rule are sufficiently clear and are consistent with statute.

Round 2 comment summary: Commenters 061, 090, 199, 295, 296, 297, 298, 299, 306 and 309 suggested this provision conflicts with the intent of the Act authorizing Paid Family and Medical Leave based on the text of § 850 (B)(7) that the scheduling of leave may not cause undue hardship as reasonably determined by the employer and believe the rules should provide more deference to the employer to determine a reasonable undue hardship.

Round 2 response to comments: The Department made further clarification in the final rule and finds that the provisions in the final rule are sufficiently clear and consistent with statute.

Round 2 comment summary: Commenters 140, 167, 178, 179, 198, 205, 221, 232, 250, 258, 268, 290, 291, 310, 323, 390, 412 and 477 suggested this provision may create barriers for applicants to schedule leave given the burden for the employer to prove undue hardship is now removed.

Round 2 response to comments: The Department considered many comments and made changes to appropriate balance the interests of workers and employers, in a manner that is consistent with the statute and administratively feasible.

Round 2 comment summary: Commenter 115 suggested the Department requires the employer to establish the burden of undue hardship when the employee is scheduling leave.

Round 2 response to comments: The Department considered many comments and made changes to appropriate balance the interests of workers and employers, in a manner that is consistent with the statute and administratively feasible

Round 2 comment summary: Commenter 198 suggests that an employer should not be able to claim undue hardship as long as 30 days written notice has been given or there are emergency or sudden necessity circumstances. The commenter recommends deleting the phrase "unless the employer establishes that, in the specific context of the employer's business, the amount of notice provided was insufficient."

Round 2 response to comment: The Department does not make the recommended change. The final rule appropriately balances the interests of workers and employers, in a manner that is consistent with the statute and administratively feasible

Section V(D) - Undue Hardship

Note - Section V(D) was removed and replaced with a new section V(D) in the second draft of proposed rules. In final rule, previous Section V(C) was moved to section V(D) and previous section previous Section V(D) was subsumed as subsection V(D)(4). Additional clarifying changes were made in the final rule to balance the interests of workers and employers in a manner that is consistent with the statute.

Round 1 comment summary: Commenter 232 stated that the provision placing the burden on the employer to prove undue hardship should not be changed.

Round 1 response to comments: The Department made various changes to this provision, to appropriately balance the interests of workers and employers, in a manner that is consistent with the statute.

Round 1 comment summary: Commenters 134 and 257 commented this section conflicts with statutory language in 850-B(7) regarding the employer determination of undue hardship and suggested to the Department that the rule should conform to the language in statute. Commenter 268 suggested the provision be removed from the rule or have sufficient guardrails put in place,

Round 1 response to comments: In the second proposed rule, this section was changed to appropriately balance the interests of workers and employers, in a manner that is consistent with the statute and administratively feasible

Round 1 comment summary: Commenters 116, 205, 258, 267 and 268 commented this section conflicts with section V(A) of the rule. Commenters believed section V(A) allows an employer to have sufficient notice of 30 days for leave that is foreseeable. Commenters were concerned that section D may allow an employer to place additional barriers on applicants to be approved for leave if some employers believed 30 days would not be enough to constitute reasonable notice. Commenters suggested the Department remove part of the rule allowing employers to claim undue hardship despite receiving sufficient notice. In the alternative, commenters encouraged the Department to place guardrails in the proposed rule to ensure employees know how much notice to provide the employer. Commenter 232 stated that an employer should be required to inform all employees if an employer needs more than 30 days' notice for leave.

Round 1 response to comments: In the second proposed rule, this section was changed to appropriately balance the interests of workers and employers, in a manner that is consistent with the statute and administratively feasible

Round 2 comment summary: Commenters 060 and 503 offered a suggestion to the Department to consider providing additional guidance to medical providers by developing criteria or standards for a medical provider to use when determining whether a proposed leave schedule is unreasonable.

Round 2 response to comments: The Department declines to make changes in the rule, but defers to medical expertise.

Round 2 comment summary: Commenter 198 suggests that if the employee is taking family leave for the medical condition of a family member, the family member's medical provider should be able to determine whether undue hardship should apply.

Round 2 response to comment: The Department made no changes in response to comment as the determination of reasonable undue hardship is made by the employer, and subject to the review of the employee's health care provider in medical claims only.

Round 2 comment summary: Commenters 032, 061, 205, 217, 267 and 398 offered comments regarding the provision that states if the employer's proposed schedule is found to be unreasonable by the employee's health care provider that the undue hardship claim does not apply, expressing various concerns including the concern it is contrary to the intent of the law.

Round 2 response to comments: The Department finds it is important that the employer's proposed schedule accommodate the needs of the employee in the judgment of the employee's medical provider. The Department made changes in the second proposed to clarify the limits of the health care provider's review. The Department finds that this section of rule appropriately balances the interests of workers and employers, in a manner that is consistent with the statute and administratively feasible

Round 2 comment summary: Commenter 168 posed two questions to the Department regarding the party responsible for reimbursement of a provider offering a medical opinion on the proposed schedule and whether there will be an opportunity for the employer to modify a rejected schedule and resubmit it to the health care provider.

Round 2 response to comments: The ideal solution is for the employer and the employee to agree on a proposed schedule that meets the healthcare needs of the employee. Such attempts on a mutually agreed schedule may continue after a schedule proposed is rejected. If agreement cannot be reached, the process set forth in Section VI(H) will apply and the employer may appeal a denial of the employer's undue hardship claim. Payment to the provider

is in accordance with customary arrangements for such payment, which may include the employee's health care plan. The Department makes no changes to the rule to allow the employer multiple attempts to claim undue hardship once that claim has been rejected.

Round 2 comment summary: Commenters 178, 198, 246, 258 and 474 offered comments regarding the provision that states if the employer's proposed schedule is unreasonable the undue hardship claim does not apply should not be changed. The commenters also suggested expanding this provision to all of types of qualifying leave under the Act authorizing Paid Family and Medical Leave.

Round 2 response to comments: The Department determines no additional changes will be made to expand the undue hardship provision to other types on leave.

Section V (E) – Note: Section V (E) was stricken in second draft of rules

Note: The standards for undue hardship are now set forth in Section V(D)(1). The Department made an additional clarifying change in the final rule that the timing and/or the duration of the leave may be the basis of undue hardship.

Round 1 comment summary: Commenter 126 suggested the Department consider that medically necessary leaves be considered "reasonable" in terms of scheduling when they follow the recommendation of a health care provider. Any other factors that may pose a burden on the employee's ability to take leave should not be considered regarding undue hardship.

Round 1 response to comments: In the second proposed rule, section V(E) was stricken in its entirety in second draft of proposed rules. The final version of the Rule, at Section V(D)(4) states that the employer's proposed schedule must be sufficient to accommodate the healthcare needs of the employee seeking medical leave, in the judgment of the employee's healthcare provider. The Department finds that the final rule balances the interests of workers and employers, and is consistent with the language and the intention of the statute.

Round 1 comment summary: Commenter 134 suggested to the Department to add to the list of factors on whether undue hardship was reasonable to include the number of employees out on leave at one time and the employee's roles, responsibilities and specialized expertise that may preclude an employee's preferred leave schedule.

Round 1 response to comments: In the second proposed rule, section V(E) was stricken in its entirety in second draft of proposed rules. Section V(D)(1) now states that, in asserting an undue hardship, the employer may explain the impact of the absence of the specific employee and the impact on the operation of the business.

Round 1 comment summary: Commenter 181 suggested the Department apply undue hardship to only non-medical leave that could leverage the Federal Family Medical Leave Act regarding the scheduling of intermittent leave and reduced leave.

Round 1 response to comments: The Department declines to make this change, as it is inconsistent with the statute.

General comments on Notice and Undue Hardship

Round 1 comment summary: Commenters 135, 158, 169, 185, 196, 221 and 228 suggested the Department allow a safe leave exemption when an employee is scheduling leave.

Round 1 response to comments: Situations surrounding safe leave will be considered during application to determine whether this is a "sudden necessity of leave" that prevents at least 30 days presumed reasonable notice. No change is made to the rule for a blanket exemption.

Round 1 comment summary: Commenter 124 suggested the Department narrow the notice requirement for foreseeable leave to be limited to only bonding claims pertaining to undue hardship while other types of leave such as medical (employees own serious health condition), undue hardship requirements should not be included as those are often less scheduled.

Round 1 response to comments: The Department did not adopt this suggestion as it is not consistent with statute.

Round 1 comment summary: Commenter 140 suggested the Department put in the rule to limit the number of times an employer can claim an undue hardship when an employee is scheduling leave.

Round 1 response to comments: The Department makes no changes in rule with respect to this specific comment. The rule, including Section VI.H., as amended in the second proposed rule and in the final rule, is sufficiently clear, balances the interests of the employer and the worker, and is consistent with the statute.

Round 1 comment summary: Commenters 230, 236, 251 and 253 offered comments supporting the undue hardship provisions established in the proposed rule and offered no changes to be made to this section.

Round 1 response to comments: The Department acknowledges the comments, and notes that changes were made to the rule as explained herein.

Round 1 comment summary: Commenters 061, 097, 102, 119, 146, 160, 199, 204, 217, 224 and 250 offered comments to the section pertaining to undue hardship. The commenters believed the provisions in the rule to not align with statutory language regarding undue hardship and should either be removed from the rule entirely or significant changes to be made to simplify the process.

Round 1 response to comments: In the second proposed rule, the Department amended the rule to simplify and clarify the process for employers and employees.

Round 1 comment summary: Commenters 168 and 205 suggested the proposed rule on undue hardship should align with notice requirements similar to the Federal Family Medical Leave Act (FMLA).

Round 1 response to comments: The Department makes no changes in rule as the federal Medical Leave Act is not consistent with the Maine PFML Act and it is not feasible to align the 2 laws on undue hardship.

Round 1 comment summary: Commenter 202 suggested the Department cross reference the paid family and medical leave statute regarding notice.

Round 1 response to comments: The Department made no changes as it determined the rule is sufficiently clear.

Round 2 comment summary: Commenter 063 recommended the Department provide additional clarity on the consequences if proper notice is not provided.

Round 2 response to comments: If the employee does not provide reasonable notice on their intent to take leave, and the employer establishes an undue hardship, the leave may be subject to the employer's proposed schedule. No additional change is made, other than the clarifications made in the second proposed rule and the final rule as to such procedures.

Round 2 comment summary: 080 suggested for the Department consider the nature of the business when considering undue hardship given current staffing shortages and the needs of the business if an employee takes leave.

Round 2 response to comments: The Department finds that the final rule balances the interests of workers and employers and is consistent with the statute.

Round 2 comment summary: Commenter 145 suggested to the Department add additional specificity around undue hardship to ensure employers do not subject it to abuse.

Round 2 response to comments: The Department made no changes in response to the specific comment as it determined the rule is sufficiently clear and strikes a proper balance to avoid abuse by employers.

Round 2 comment summary: Commenters 310, 319 and 337 suggested that standards on undue hardship must be universal and consistent. The commenter further suggested that without consistent standards it could harm workers and make it easier for employers to avoid providing leave when it's needed.

Round 2 response to comments: The Department acknowledges the comment but makes no changes in rule. The changes in the second proposed rule and the final rule strike a proper balance between the interests of the employer and the employee and is consistent with the statute.

Round 2 comment summary: Commenter 311 suggested to the Department if leave under the Federal Family and Medical Leave Act (FMLA) runs concurrently with Maine Paid Family and Medical Leave, notice and certification requirements under FMLA should take precedence.

Round 2 response to comments: The Department made no changes. The Department attempted
to make Maine PFML consistent with FMLA, but that was not always feasible, given the differences between the two statutes.

VI. Process for Application and Approval of Benefits

Factual and policy basis: This section implements 26 M.R.S. §850-D regarding the process for applications and approval of benefits. It clarifies the responsibilities of the employer and employee in the application process to obtain benefits; these include documentation, medical authorization, timeline to submit information, and application submission and employer notification.

Department Finding: The Department made a change in the final rule to Section VI (8) and (9) to clarify that documentation from the health care provider of the applications or the family member's serious health condition must include the anticipated duration of the leave. This explicit requirement is consistent with the statute which provides leave for a covered individual with a serious health condition that makes the covered individual unable to work. 26 M.R.S. § 850-B (2) and (3). This information is routinely required for federal Family Medical Leave.

Section VI(A) - Application

Round 1 comment summary: Commenter 061 states the rule should have specific requirements for qualifying for medical leave including requiring that an employee establish they are "incapacitated from work and daily activities due to a covered medical condition."

Round 1 response to comment: The Department made a change in the final rule specifying that documentation of a serious health condition should include the anticipated duration of the leave, as the statute states that leave is for a serious health condition that makes an individual unable to work.

Round 1 comment summary: Commenters 205 and 267 suggested that the methods for filing an application should be expanded to include methods other than online.

Round 1 response to comment: The Department makes no changes as the rule is sufficiently clear that an application may be submitted online but does not preclude the ability to file an application using other methods.

Round 1 comment summary: Commenter 116 states that the rule should require all requests for leave by an employee be put in writing and provided to the employer.

Round 1 response to comment: The Department made no changes. Section V requires the employee to provide notice of the intent to use leave. The rule requires that the notice be in writing absent an emergency or sudden necessity.

Section VI (A) (1) – Proof of personal identity

Round 1 comment summary: Commenters 205, 232, 267 and 268 suggest that the Department clarify what is required to establish proof of identity. Commenters 232, 258 and 267 suggest that the rule include a specific list of documentation that would be acceptable for establishing proof of identity. Commenter 205 asks the Department to limit the number of documents required.

Round 1 response to comment: The Department makes not changes as the rule is sufficiently clear.

Round 2 comment summary: Commenter 140 suggested the Department provide a list of suitable documents for establishing proof of identity as well as listing a variety of ways claimants can submit documents.

Round 2 response to comment: The Department made no changes as the rule is sufficiently clear.

Section VI(A)(3) – Proof of personal identity of family member if applying for paid family leave

Round 1 comment summary: Commenters 129, 140, 142, 185, 205, 214, 232, 246, 258 and 268 suggested that the Department remove the requirement that proof of identity for a family

member must be provided for an application to take leave to care for the family member. Some Commenters suggested that requiring proof of identity could create barriers for older individuals who may not be able verify their identity or may have expired information. Commenters 168 and 124 suggested that the Department remove the requirement to prove the identity of a family member and instead allow the applicant to attest to their relationship because requiring proof of identity of the family member may delay the application process.

Round 1 response to comment: The Department made no changes in response to comments because the requirement to prove identity protects the integrity of the program from potential fraud.

Round 1 comment summary: Commenters 233 and 258 suggested that the Department clarify the type of information needed to prove the identity of family members when applying for leave.

Round 1 response to comment: The Department made no changes in response to these comments as the provisions in the rule are sufficiently clear.

Section VI(A)(4) – Information regarding the existence of a significant personal bond

Note: As explained below, in response to comments, the Department removed the word "affinity relationship," as it is not in the statute, and added language to set forth factors to demonstrate a significant personal bond.

Round 1 comment summary: Commenters 035, 060, 258 and 268 suggested the rule provide more guidance on what constitutes an affinity relationship. Commenter 60 also suggested including adding "affinity" in all places where there is reference to family member. Further, Commenter 60 stated that only one affinity relationship should be allowed at a time. Commenter 115 (PFML Authority) specifically recommended that the family-like bond be determined based upon six factors that are set forth in Oregon law. (Similar comments were made under the definition section, I (A)(2).

Round 1 response to comment: The Department made changes in the second version of the rule to remove the use of the term "affinity relationship" and to clarify factors that may demonstrate the type of family member relationship described in 26 M.R.S. § 850-A(19)(G), drawing on similar factors used by the State of Oregon, as recommended by the PFML Authority. The Department finds that these changes appropriately address the requirement to provide for leave for all types of family members outlined in the statute. The six factors set forth in the final rule are:

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

Round 1 comment summary: Commenters 122, 134 and 164 suggested that the Department require applicants filing claims for affinity relationship family members to provide either an attestation or a signed affidavit to provide greater assurance that claims are not subject to fraud or abuse.

Round 1 response to comment: The Department did not make this specific requested change. The Department made changes in the second version of the rule to clarify factors that may demonstrate the type of relationship described in 26 M.R.S. § 850-A(19)(G), set forth above. The Department finds these changes, along with the requirement in Section VI(D) that all applications must be signed by the applicant, attesting that the information contained is true and accurate to the best of the applicant's knowledge, appropriately balance the goal of preventing fraud with the requirement to provide for leave for all types of family members outlined in statute.

Round 2 comment summary: Commenters 059, 060, 061, 105, 157, 254, 257 and 398 expressed that "significant personal bond" is too broad, geographic proximity is not an appropriate sign of a family like bond, and suggested that this section to be further refined. The commenters suggested if the claimant applies for leave for a family member, that family member should be required to confirm the relationship and not just the applicant.

Round 2 response to comment: The Department made no changes to the rule in response to the comments. "Significant personal bond" is the standard in 26 M.R.S. § 850-A(19)(G), and the Department is bound by the statute. The Department finds that the factors for determining a significant personal bond set forth in the second version of the rule is consistent with the intention of the statute.

Round 2 comment summary: Commenters 232, 258 and 323 liked the additional clarity of language explaining a "significant personal bond" and encouraged the Department to keep the language in rule.

Round 2 response to comment: The Department acknowledges the comments and made no further changes as a result.

Round 2 comment summary: Commenters 217 and 398 suggested that the Department add a limit on how many times a claimant may take leave for a family member or claim "significant personal bond".

Round 2 response to comment: The Department notes that it removed this limitation that was in the initial version of Section IV(B)(3) in response to comments asking for the removal of that limitation. The Department finds that the statute does not permit a limit on how

many claims a claimant may make or on how many family members such claims may be based on.

Section VI(A)(6) Proposed Scheduling and Duration of Leave

Round 1 comment summary: Commenter 061 asked the Department to include information in the rule on how the Department will obtain information confirming the employee gave appropriate notice and worked with the employer to reach agreement on a schedule.

Round 1 response to comment: The Department made no changes as the rule is sufficiently clear.

Section VI (A) (7) – Waiver of Undue Hardship – new in second proposed Rule

Department Finding and Change to Rule: In the second version of the Rule, the Department added section VI (A)(7), that documentation in an application may include "a *waiver signed by the employer that the proposed schedule of leave is not an undue hardship, if applicable,"* finding that an application could be processed more quickly if the employer signed a waiver that the proposed schedule of leave is not an undue hardship.

Round 2 comment Summary: Commenters 167, 246 and 258 recommend removing the undue hardship waiver from the application process and that all applications be processed within 5 days of being filed.

Round 2 response to comment: The Department made no changes in the rule in response to the commenters' suggestion. The proposed rule appropriately balances the interests of workers and employers and is administratively feasible.

Round 2 comment summary: Commenters 061 and 258 suggested that the provision allowing the employer to sign a waiver acknowledging that claimant's leave does not cause undue hardship should be removed from rule. Commenter 61 claimed that it creates an additional burden on the employer. Commenter 258 claimed that it creates an additional burden on the employee applying for leave.

Round 2 response to comment: The Department made no changes in rule as the inclusion of a signed waiver by an employer encourages proactive conversation between both parties in advance of leave as is the intent of the reasonable notice and allows faster processing of claims where undue hardship is not at issue. The Department finds that the waiver does not create an additional undue burden.

Round 2 comment summary: Commenter 61 suggested that after signing a waiver, an employer should be able to change its mind if there is a change in circumstances for the business.

Round 2 response to comment: The Department made no changes in the rule as once a determination on leave is made, both the employer and employee have an interest in a level of certainty.

Section VI (A) (8) and (9) Documentation from health care provider

Department Finding: In the final rule, the Department added language that the documentation from the health care provider must include information as to the duration of time that the applicant is expected to be unable to work. This was presumed, as it is the practice in federal FML, and because 26 M.R.S. § 850-B (3) expressly states that medical leave eligibility is for a serious health condition that makes the covered individual unable to work. The added language clarifies the intention of the statute.

Round 2 comment summary: Commenter 474 supports the requirement of documentation from a healthcare provider.

Round 2 response summary: The Department acknowledges the comments and notes there is a change in the final rule as explained in the Department Finding above.

Section VI(B) - Authorization for medical information

Round 1 comment summary: Commenters 232 and 268 suggested that the provision allowing applicants to authorize the Administrator to directly obtain medical information should not be changed in rule.

Round 1 response to comment: The Department made no changes to this section of the rule and acknowledges the comment.

Round 1 comment summary: Commenter 061 suggests the rule clarify that an application can be delayed or denied if an employee refuses to sign an authorization statement.

Round 1 response to comment: The Department made no changes as the rule is sufficiently clear that not signing the Authorization Statement may cause a delay in processing of the application, for a failure to provide required information The Administrator may not deny an application solely because the applicant chose not to sign an Authorization Statement.

Section VI(C) signed statement for safe leave

Round 1 comment summary: Commenters 061 and 169 suggested the Department clarify the type of information that is needed for applicants that apply for safe leave.

Round 1 response to comment: The Department made no changes to the rule in response to comment as the rule is sufficiently clear.

Round 2 response to comment: Commenter 061 suggested to the Department to require documentation for safe leave be consistent with documentation required in statute in the proposed rule.

Round 2 response to comment: The Department made no changes in rule in response to comment as the rule is sufficiently clear.

Round 1 comment summary: Commenters 232 and 245 suggested the Department provide a template form for applicants that may request safe leave.

Round 1 response to comment: The Department made no changes to the rule in response to comment as the rule is sufficiently clear.

Round 1 comment summary: Commenter 245 and 268 provided positive feedback on the ability of safe leave to be verified through self-attestation and not requiring court paperwork which may not be available in all safe leave cases.

Round 1 response to comment: The Department acknowledges the comment and makes no changes in rule in response to comment.

Round 2 comment summary: Commenter 245 suggested the proposed rule should explicitly note that, for safe leave requests, the worker need only provide a short, plain statement that they meet the requirements of 26 M.R.S. § 850-A. The Commenter expressed that the rule should limit either the employer or the program administrator from requiring more details about their victimization unless there is a good faith basis to believe false information was given by the employee

Round 2 response to comment: The Department made no changes in rule in response to comment as the rule is sufficiently clear.

Section VI(D) – Signed statement with completed application attesting that information is true

Note: In the second proposed rule, the Department amended the rule in response to the comment, and changed the word "declaring" to "attesting."

Round 1 comment summary: Commenter 115 (PFML Authority) suggested that the Department amend the rule to state than an applicant "attest" rather than "declare" regarding the signed statement that must be completed for relationships that have a personal significant bond as a family member.

Round 1 response to comment: In the second proposed rule, the Department amended the rule in response to the comment, and changed the word "declaring" to "attesting."

Section VI(E) – Incomplete applications

Note: In the second proposed rule, the Department changed the time for an applicant to provide outstanding information on an incomplete application from 7 days to 10 business days.

Round 1 comment summary: Commenter 061 suggests the rule make it clear that an application can be delayed or denied if the Department does not receive enough information to adjudicate the claim.

Round 1 response to comment: Section VI(E) states that failure to provide "reasonably necessary information or documentation" may result in a delay or a denial of the application. The Department made no changes in the rule as the rule is sufficiently clear.

Round 1 comment summary: Commenters 122, 140,160, 176, 205, 214, 226, 253, 258, 263, 268 and 275 suggested that the Department extend the time an applicant can submit incomplete information to the Administration from 7 days to 10 days. Commenters 125, 208, 226 and 253 suggested that the Department extend the time to allow an applicant to submit incomplete information but did not specify the time to extend the application.

Round 1 response to comment: In the second proposed rule, The Department amended the rule and extended the submission period from 7 days to 10 business days for applicants to submit incomplete information.

Round 2 comment summary: Commenter 217 offered a positive comment on expanding the number of days from 7 days to 10 days to allow an applicant to finalize an incomplete application.

Round 2 response to comment: The Department acknowledges comment and made no additional changes as a result.

Round 2 comment summary: Commenter 061 suggested that the revised 10 business day period to remedy an incomplete application is too long. Additionally, the commenter suggested that the rule should say an application "shall" be denied if information is not provided.

Round 2 response to comment: The Department made no changes as the rule provides an appropriate balance between the needs of applicants, employers and administrative efficiency.

Section VI (F) Timing of submission of application

Round 1 comment summary: Commenters 015, 59, 61, 116, 133, 148, 154,158, and 280 commented that the provision that allows an individual to apply for leave 90 days after the start of leave is too long. Commenters 061, 116,168, and 277 suggested that the length of time should be no more than 30 days.

Round 1 response summary: The Department made no change to the rule as the statute set the application window of 60 days prior to and 90 days after the start of leave, and the Department is bound by the statute.

Round 1 comment summary: Commenters 140 and 267 suggested that the Department should not change the provision that an applicant may apply for benefits 90 days after the start of leave.

Response 1 response to comment: The Department acknowledges the comments and made no changes to the rule in response.

Round 2 comment summary: Commenter 059 expressed concern about the 90-day timeframe an applicant can apply for leave and asked whether the employer is required to hold the position open in these circumstances.

Round 2 response to comment: Section XIV addresses the employer's obligations regarding restoration of the employee. The Department makes no change to rule in response to the comment as the rule is sufficiently clear.

Round 2 comment summary: Commenter 061 suggested that the Department amend the deadline an individual may apply retroactively for leave to 30 days instead of 90 days to minimize disruption and enhance the predictability of leave. The commenter recognized that this may require a statutory change.

Round 2 response to comment: The Department made no change to the rule as the statute set the application window of 60 days prior to and 90 days after the start of leave, and the Department is bound by statute.

Section VI(G) Waiver of application deadline

Department Finding and Note: *In the final rule, the definition of "good cause" is deleted from this section and moved to Section I (A)(13) Definitions, with appropriate modifications. The Department found, in reviewing the totality of comments, that the phrase "good cause" existed in other parts of the rule, and therefore the definition is the same throughout the rule.*

Round 1 comment summary: Commenter 267 suggests the list of examples of good cause include when the employer fails to provide an employee notice of their rights as required by the statute.

Round 1 response to comment: In the final rules, the Department removed the good cause language from this section and added a full definition in Section I applicable throughout the rule. The Department finds that the new definition is sufficiently clear as to what may constitute good cause. The situation described by the Commenter may qualify under that definition, but the Department declines to add it as an independent basis for finding good cause and therefore makes no changes to the rule in response.

Round 2 comment summary: Commenter 250 suggested that the Department's provision on good cause for retroactive applications after a qualifying event for leave in the law should be restricted to circumstances that prevented an application being made prior to the leave beginning.

Round 2 response to comment: The Department changed the rule to remove the examples of good cause and added a specific definition of good cause in Section I. The

Department chose not to update this section to restrict good cause as suggested above, as the Department finds that that is too restrictive on the applicant in considering the emergent reasons that might prevent an applicant from applying before leave begins.

Round 2 comment summary: Commenter 217 suggested that the Department clarify the term "Administrator" as the language in this section may be read to mean an employer's Third-Party Administrator (TPA).

Round 2 response to comment: The Department makes no changes to the rule as it is sufficiently clear. Administrator is defined in 26 M.R.S. § 850-A(1).

Section VI(H) – Notification to Employer and process for claiming Undue Hardship

Note: In response to comments, the Department made clarifying changes to this subsection. The Department also clarified that an application will be processed immediately if there is an agreement as to the scheduling of leave. The Department also clarified that either an employee or an employer may appeal an Administrator's finding with respect to undue hardship.

Round 1 comment summary: Commenters 101, 136, 148, 217, 252, 257 and 258 suggested that the Department remove the provision that allows an employer only 10 days to claim an undue hardship when an applicant is scheduling leave.

Round 1 response to comment: The Department makes no changes to rule. The proposed rule appropriately balances the interests of workers and employers and is administratively feasible.

Round 1 comment summary: Commenter 140 appreciated that if an employer does not provide objections to an employee's leave schedule application within the 10 day employer review, that the schedule requested by the employee is used if the claim is approved.

Round 1 response to comment: The Department acknowledges the comment and makes no changes to the rule in response to comment.

Round 1 comment summary: Commenter 059 and 267 suggests the Department include the ability of the employee to appeal a finding of undue hardship.

Round 1 response to comment: The Department included the ability of an employee to appeal in the second version of the proposed rule. The Department further notes that a paragraph was added to Section XV, Appeals, to allow for appeals for denial of a claim for benefits due to a finding of reasonable undue hardship.

Round 1 comment summary: Commenter 160 asked the Department why the employee can't notify the employer on the filing of a claim at the same time that the employee files the claim with the Administrator.

Round 1 response to comment: Section V addresses the notice required by the employee to the employer. The Department makes no changes in response to this comment as the rule is sufficiently clear as to the notice required by the Administrator to the employer.

Round 1 comment summary: Commenter 169 suggested that the Department consider the confidentiality of victims of gender-based violence when an employer is required to be notified of an employee filing a claim within 5 business days by limiting the amount of information disclosed to the employer.

Round 1 response summary: The Department acknowledges the comment and makes no changes in response to comment as the rule is sufficiently clear that the employer will receive the basic claim information, but not confidential employee information.

Round 1 comment summary: Commenter 232 suggested that the Department shorten the time an employer will have to provide any additional facts regarding an applicant's claim before it is processed.

Round 1 response to comment: The Department made no changes to the rule in response to the comment as the rule reflects an appropriate balance to ensure fairness in the review of claims for both the employee and employer.

Round 1 comment summary: Commenter 268 suggested the Department allow an employer to claim an undue hardship when providing information on an applicant's request for leave, but otherwise not be able to provide any other information that might infringe on the applicant's right to take leave related to the certification of the reasons for leave.

Round 1 response to comment: In the second proposed rule, the Department made no changes to the rule in response to the comment as the rule reflects an appropriate balance to ensure fairness in the review of claims for both the employee and employer. The employer is asked to provide information pertinent to the scheduling of leave and other information pertinent to eligibility, and the applicant is asked to provide documentation that supports the verification of eligibility criteria. The Administrator will review the pertinent information provided by both parties as specified in rule.

Round 1 comment summary: Commenters 258, 267 and 268 asked the Department to clarify whether it is the Department or the Administrator that makes the determination on undue hardship since this section appears to conflict with Section V(E).

Round 1 response to comment: Section V(E) was removed from the rule leaving undue hardship determinations to the process set forth in Section VI, which is performed by the Administrator.

Round 1 comment summary: Commenter 267 asked the Department to clarify that if an employee appeals a determination that undue hardship is reasonable, the employee will still have access to PFML and job protections.

Round 1 response to comment: The employee will have job protection for any approved leave, including leave that is taken by the employer's proposed schedule in a case in which reasonable undue hardship is found. The Department finds that no change to the rule is needed.

Round 1 comment summary: Commenter 133 suggested that the Department establish an online portal to manage communications regarding the notification to the employers within five days of an employee filing a claim.

Round 1 response to comment: The Department acknowledges the comment and makes no changes in rule in response to comment as the suggestion is operational.

Round 1 comment summary: Commenter 136 suggested that the Department remove the provision that if an employer's claim of undue hardship is determined reasonable that the Administrator will instruct employee and employer to determine a schedule that does not constitute an undue hardship within 14 days. The commenter believes this provision should be removed to reflect the unique needs of each business regarding the scheduling of leave.

Round 1 response to comment: In the second proposed rule this provision was amended and allows an employer to determine the reasonable schedule if a reasonable undue hardship has been shown.

Round 2 comment summary: Commenter 232 suggested that the Department restore the previous language regarding the negotiation of a schedule.

Round 2 response to comment: The Department made no changes to the rule in response to comment. The proposed rule appropriately balances the interests of workers and employers and is administratively feasible.

Round 2 comment summary: Commenter 267 suggested that an employee be allowed to start their paid leave while the Administrator is considering the employer's assertion of an undue hardship.

Round 2 response to comment: The Department makes no change to the rule in response as the Administrator must consider an employer's claim of reasonable undue hardship prior to approving the employee's proposed schedule of such leave.

Round 2 comment summary: Commenter 408 suggested that the Department strike the 10-day period for an employer to provide additional information regarding the applicant claim to allow greater flexibility for employers as circumstances change for the employer.

Round 2 response to comment: The Department made no change to the rule in response to the suggestion. The proposed rule appropriately balances the interests of workers and employers and is administratively feasible.

Round 2 comment summary: Commenters 205, 221, 258 and 268 suggested that the Department separate undue hardship claims from the application process and process claims within five business days after the claim was filed.

Round 2 response to comment: The Department made no changes in response to the suggestion as the proposed rule appropriately balances the interests of workers and employers and is administratively feasible.

Round 2 comment summary: Commenter 311 suggested that the provision that states the employer submitting any additional facts regarding the applicant's eligibility needs additional clarification as to when the 10 day review period begins.

Round 2 response to comment: The Department made no changes as the rule is sufficiently clear that it begins after the employer is notified by the administrator of the employee's application.

Round 2 comment summary: Commenters 140, 145, 221, 246, 332 and 398 expressed concerns regarding the Administrator determining undue hardship claims. The commenters suggested the Maine Department of Labor should determine the reasonableness of undue hardship claims rather than leaving it to the Administrator that will likely to be a third-party entity.

Round 2 response to comments: The Department made no changes as it would not be administratively feasible to have the Administrator, which may be a third party vendor of the Department, process some types of claims and the Department to process some types of claims. The Administrator will process all initial and reconsideration claims and the Department will consider all appeals of denials of reconsideration claims.

Round 2 comment summary: Commenter 059 appreciated the revised version of the rule that allows the employer to impose a reasonable schedule if they make a reasonable undue hardship determination.

Round 2 response to comment: The Department acknowledges the comment and makes no changes in rule in response to comment.

General Comments Regarding the Process for Application and Approval of Benefits

Round 1 comment summary: Commenter 188 suggested that Department ensure that communication is offered digitally and within the same day if an employer is notified of an applicant's claim.

Round 1 response to comment: In the second proposed rule, the Department added a provision that clarified that the Administrator will notify the employer 5 business days after the claim is approved. The Department chose 5 business days to ensure consistency with the notice to the employer of a claim being filed.

Round 1 comment summary: Commenters 061 and 087 suggested that the employer should be able to ask for a second medical opinion for claims related to medical leave with a medical provider identified by the employer, and that such second opinions should be at the employer's expense.

Round 1 response to comment: The Department made no changes as it determined the provisions in the rule are sufficiently clear that the only medical documentation and review is that provided by the employee's health care provider, including any additional documentation required by the Administrator during its review.

Round 1 comment summary: Commenter 117 asked the Department to clarify the type of applications that will be available from the Administrator for individuals to apply for paid leave benefits.

Round 1 response to comment: In the second proposed rule, the Department made no changes as the rule is sufficiently clear.

Round 1 comment summary: Commenter 201 expressed concerns about health care staffing challenges that may make deadlines to provide medical information difficult and may lead to denials of claims due to incomplete information.

Round 1 response to comment: In the second proposed rule, the Department extended the applicant to provide incomplete information from 7 to 10 business days. The rule appropriately balances the needs of workers, employers and program administration.

Round 1 comment summary: Commenters 120 and 219 suggested the Department clarify or provide greater privacy protections for applications to ensure medical information is not disclosed to others including the employer.

Round 1 response to comment: The Department made no changes to the rule in response to the suggestion as the statute rule are sufficiently clear.

Round 1 comment summary: Commenter 102 suggested that the Department clarify what types of information an employer can ask for from the employee to support a leave request.

Round 1 response to comment: The Department made no changes as the provisions in the rule are sufficiently clear as to what information an employee is required to provide an employer related to a leave request and confidential health or medical information provided to the Administrator cannot be shared with the employer without the employee's permission. An employer may still request documentation needed for their determination of leave under the Federal Family and Medical Leave Act.

Round 1 comment summary: Commenter 217 suggested that the Department explicitly state that written consent to obtain medical information for an affinity relationship family member is necessary.

Round 1 response to comment: The Department made no changes in the rule in response to the comment as Section VI(B) addresses the process for obtaining medical information for family members and the rule is sufficiently clear.

Round 1 comment summary: Commenter 158 offered a comment that all provisions in section VI should not be changed.

Round 1 response to comment: In the second proposed rule, the Department made several changes to the rule in Section IV including subsections VI(A), (D), (E) and (H) to strengthen the application process and provide clarity.

Round 1 comment summary: Commenters 133, 169 and 274 suggested that the Department provide additional information on the type of documentation, including medical information, necessary for claims for leave to care for an affinity relationship family member.

Round 1 response to comment: The Department made clarifications in second draft of rule that a relationship with a "significant personal bond" is a type of family member, and as such all documentation required for a family leave claim is also required for this type of relationship.

Round 1 comment summary: Commenter 061 suggested the Department clarify in the rule whether leave can be taken for events that predate the start of the program.

Round 1 response to comment: The Department makes no changes as the rule is sufficiently clear that the Administrator will evaluate applications beginning on May 1, 2026 based on the need for medical leave or the need for family leave, consistent with these rules. Approved leave benefits will only be payable from May 1, 2026 onward.

Round 1 comment summary: Commenter 060 suggested the Department clarify how the statutory requirement that medical leave means the employee is unable to work will be operationalized.

Round 1 response to comment: The Department made no changes as the rule is sufficiently clear that medical certification will be required to prove a "serious health condition," as defined in statute, by a health care provider.

Round 1 comment summary: Commenter 181 suggested the Department provide more detail in the rule about the claims adjudication process including timelines for decisions and payments, standards for when an employee has to provide updated medical information, and what information must be included in any notification to the employer.

Round 1 response to comment: The Department made no changes as the rule is sufficiently clear.

Round 1 comment summary: Commenter 116 suggests that if an employee takes leave while their application is pending and then their application for benefits is denied, the employee should be subject to termination for being away without leave.

Round 1 response to comment: The Department made no changes as rule is sufficiently clear that job protections provided by the law applies to only approved leave.

Round 2 comment summary: Commenters 061 and 063 suggested the Department develop standards for the claim adjudication process including required timelines for claim decisions and payments. This will assist both the state and private plans when processing applications and ensure accountability.

Round 2 response to comment: In the second proposed rule, the Department made no changes as the Administrator will determine the appropriate prioritization of claims for review balancing the needs of claimants, employers and administrative efficiency.

Round 2 comment summary: Commenter 063 commented that employees frequently need leave on an ongoing basis, especially intermittent leave. In addition, the Commenter suggested that the rules should specify when an employee can be required to provide updated medical information to support continued need for leave. The commenter cited the Federal Family and Medical Leave Act (FMLA), 29 CFR 825.308 as a potential good model to follow.

Round 2 response to comment: The Department made no changes as the rule is clear that medical certification is provided at the time of application and will cover the approved period of leave, including intermittent leave.

Round 2 comment summary: Commenter 168 asks the Department to provide further clarification about the undue hardship process and develop a checklist that provides objective standards for determining whether there is a reasonable undue hardship.

Round 2 response to comments: The Department made no changes as the rule is sufficiently clear.

Section VII- Review of Claims for Benefits

Factual and policy basis: This section specifies the process for how the Administrator will review claims submitted for paid family and medical leave benefits. This section also outlines how the applicant and the employer will be notified of the status of the claim and applicants' rights to seek reconsideration of the Administrator's determination for benefits.

Note: The Department made clarifications in the second proposed rule and in the final rule with respect to review and processing of claims. The Department added subparagraph E in the second proposed rule to state that the employer will receive notice of an employee's approved leave within 5 business days of the approval date. The Department added subparagraph F in the final rule to clarify that all notifications will be in writing which may include email or electronic portal notifications.

Section VII(A)

Round 1 comment summary: Commenters 139, 144, 178, 205, 223, 232, 242, 258, 268, and 275 suggested that the Department develop a process to allow claims to be reviewed on an emergency basis if requested.

Round 1 response to comment: The Department made no changes. Operational decisions as to the appropriate prioritization of claims for review balancing the needs of claimants, employers and administrative efficiency are not required in rule.

Round 1 comment summary: Commenters 101 and 268 suggested that the 10-day timeframe for the review of applicants may be too long if applicants submit claims immediately before taking leave. Commenter 202 recommended that the Department strike the 10-day period and allow it to be open for an indeterminant time period.

Round 1 response to comment: The Department made no changes as the10-day period appropriately balances the needs of claimants with the requirement to obtain information from employers and is administratively feasible.

Round 1 comment summary: Commenter 227 commented that the Department should provide better clarity on the length of time to review claims as it remains unknown in the proposed rule.

Round 1 response to comment: The Department made no changes. Claims will be processed as quickly as possible, balancing the needs of claimants, employers and administrative efficiency.

Section VII(B) (C) and (D)

Note: Minor changes were made to these sections for the sake of clarity.

Round 1 comment summary: Commenter 091 suggested removing the word "by" in section B in the second sentence between the word "administrator and "in writing" as it is a typo.

Round 1 response to comment: The Department fixed this typo in the final version of the rule.

Round 1 comment summary: Commenters 059, 060, 061, 075, 087, 092, 134, 136, 148, 150, 160, 164, 171, 217, 233, 260, 272,276, and 280 suggested that the Department clarify that the

Administrator should also notify the employer of whether the individual has been approved, denied or seeking reconsideration of paid family and medical leave benefits.

Round 1 response to comment: In the second proposed rule the Department amended the rule to provide that the Administrator notify the employer of the approval, reconsideration or denial of a claim.

Round 1 comment summary: Commenter 140 suggested that the Department clarify that notices from the Administrator will be in writing to applicants.

Round 1 response to comment: In final rule, the Department added subsection F to clarify that notifications provided by the Administrator will be in writing, which may include email or electronic portal notifications.

Round 1 comment summary: Commenter 181 suggested that the Department change the language of "receive the notification" to be the date of actual decision/date notification sent.

Round 1 response to comment: In final rule the Department clarified the timeframes for review in this section start from the date the notification is issued.

Round 2 comment summary: Commenter 063 recommended removing the terms "receives notification" of decision and replace with the date of actual decision/date notification is sent.

Round 2 response to comment: In final rule the Department clarified the time frame starts from the date the notification is issued.

Round 2 comment summary: Commenter 168 suggested that the Department clarify that employers may only be notified of the reasons for denial as permitted by law.

Round 2 response to comment: The Department makes no changes in rule as the rule is sufficiently clear, and the statute, 26 M.R.S. § 850-D(4) prohibits disclosure of health or medical information without the permission of the covered individual.

Section VII(E) (section added in second version of proposed rule)

No comments were submitted on this section in the second round of comments.

Section VII(F) (section added in second version of proposed rule)

Department Finding: In final rule, the Department added subsection F to clarify that notifications provided by the Administrator will be in writing, which may include email or electronic portal notifications.

General comments related to review of claims for benefits:

Round 1 comment summary: Commenter 267 recommends that all timelines for reconsideration and appeal in this section be changed to 30 days.

Round 1 response to comment: The Department makes no changes in the rule as it provides an appropriate balance between the needs of workers and employers and is administratively feasible.

Department Finding: In final rule the Department added some additional clarifying language to Section VII(B), (C), and (D). The Department decided to make changes to the appeal rights throughout the rule to ensure consistency in language and application and to provide clarity on when the appeal period runs.

Section VIII-Calculation of Benefits

Factual and Policy Basis: This section is implements 26 M.R.S §850-C regarding the calculation and payment of benefits. This section clarifies how benefits will be calculated, including the proration of benefits and when benefits may be subject to reduction. This section was developed based on the Department's review of the Paid Family and Medical Leave Law, Maine's unemployment law, and other states' paid leave laws and rules.

Department Finding: In the second proposed rule the Department added subsection (A)(2)(d) and (A)(2)(e) in order to clarify when the applicable State Average Weekly Wage and the applicable Average Weekly wage are set relative to a claim for benefits being filed, as both numbers may change quarterly or yearly, and the Department finds that it is important for claimants, employers and other stakeholders to understand which value is used during the duration of a claim.

Department Finding: In the final proposed rule, the Department added a new subsection (A)(3) in response to comments and also to clarify that the determination of the average weekly wage done at application remains static for the duration of that claim, subject to rules on benefit reduction and prorations.

Section VIII (A) – Calculation of Benefits

Round 1 comment summary: Commenters 133 and160 suggested that the Department simplify the mathematical formula used in the rule to calculate benefits or provide examples of how the calculation of benefits will work as the mathematical formula is confusing.

Round 1 response to comment: The Department made no changes as the statute and rule are sufficiently clear.

Round 1 comment summary: Commenter 061 asked the Department to provide the process it will use to seek information regarding wages received by a specific employee.

Round 1 response to comment: The Department made no changes in response to this comment as the rule is sufficiently clear as to the data relied upon. Section VIII(A)(1) states that

the covered individual's average weekly wage will be calculated based on the "applicable earnings data" reported by the employer. If no report had been filed for an individual who seeks to submit an application, the Department may conduct an audit, and based upon the findings of the audit, take appropriate action.

Round 1 comment summary: Commenter 254 asked the Department to clarify the type of income that will be considered when determining an applicant's average weekly wage. The commenter also suggested that wages from overtime, bonuses or other financial incentives should be excluded.

Round 1 response to comment: In the second proposed rule, the Department made changes to the rule in response to other comments to clarify the definition of wages are calculated in the same manner as Maine's unemployment law, in 26 M.R.S. § 1043(19)(B) – 1043(19)(E), and remain unchanged in Section II (A) of the rule. In addition, the suggestion to remove other wages conflicts with statute.

Round 1 comment summary: Commenter 274 suggested that the Department exclude bonuses from the calculation formula for benefits as bonuses are one-time payments.

Round 1 response to comment: In the second proposed rule, the Department made changes to the rule in response to other comments (as set forth to clarify the definition of wages are calculated in the same manner as Maine's unemployment law, 26 M.R.S. § 1043(19)(B) – 1043(19)(E), and remain unchanged in Section II (A) of the rule. In addition, the suggestion to remove other wages conflicts with statute.

Round 2 comment summary: Commenters 063, 124, 168, 311 and 477 asked the Department to clarify when the weekly benefit amount is determined, suggesting that it should be calculated based on wages as of the first day of leave. The commenters recommended the weekly benefit amount remain fixed throughout the benefit year, even if the State Average Weekly Wage (SAWW) or the employee's wages change.

Round 2 response to comment: The Statute establishes that benefits are based on the Average Weekly Wage, which is calculated using wages averaged over a 52-week period. In the second draft of proposed rule, the Department clarified that the State Average Weekly Wage and Average Weekly Wage, as calculated when the application is filed, are used for the benefit amount for the duration of that claim.

Round 2 comment summary: Commenters 060, 168 and 503 asked questions as to whether the Average Weekly Wage mentioned in rule is the same as the statutory definition, and if so, how the arithmetic mean in the statute applies to the actual calculation of benefits, as they need to know how to correctly calculate benefits for private plan policies.

Round 2 response to comment: Yes, the Average Weekly Wage mentioned in rule is the same as the statutory definition. In final rule the Department added a subsection, VIII(A)(3) to clarify how Average Weekly Wage is determined. The added language is:

> *The Average Weekly Wage is calculated by dividing the reported wages for the applicant in their base period by 52. Once the Weekly Benefit Amount is established for a claim it will remain consistent through the life of the claim, subject to the subsection C below.*

Section VIII (B) – Payment of Benefits

Round 1 comment summary: Commenter 247 believes the language of not paying medical claim benefits for the first 7 consecutive calendar days restricts ability of people taking 1-day intermittent leave use throughout the year for chronic conditions to be ineligible. Commenter 276 asked for clarification about how intermittent leave is affected by the 7 consecutive calendar day non-payment in medical claims.

Round 1 response to comment: The Department made no changes as it finds that the statute and rule are sufficiently clear.

Round 1 comment summary: Commenter 034 suggested that the Department add into the rule how long it will take for an application to be processed and for an applicant to receive a benefit.

Round 1 response to comment: The Department made no changes. Claims will be processed as quickly as possible, balancing the needs of claimants, employers and administrative efficiency.

Round 1 comment summary: Commenter 114 suggested that benefits may also be received by paper check and payments from self-insured plans may be issued by the self-insured plan.

Round 1 response to comment: The Department agrees that self-insured plans may issue benefits by paper check, direct deposit, or by debit card. The Department made no changes in response to the comment. as this section is intended to refer to payments made by the PFML program.

Round 1 comment summary: Commenter 168 suggested that the Department change the rule to allow benefits to be paid by debit card.

Round 1 response to comment: The Department made no change as the rule already allows for debit cards in Section VIII(B)(1).

Round 1 comment summary: Commenters 136 asked whether employees are eligible to utilize sick time in the first 7 days and whether, as a result, the leave period extends from 12 weeks to 13 weeks.

Round 1 response to comment: The statute, 26 M.R.S §850-C(1), allows an employee to use sick or vacation time during the waiting period. The waiting period does not reduce the

amount of paid medical leave under the PFML program. In response to this Comment, Section VI(A)(8) was clarified in the final rule to state that the provider must provide documentation that includes the time period that the covered individual is expected to be unable to work.

Round 1 comment summary: Commenters 242 and 268 support this provision of the rule and suggested no changes.

Round 1 response to comment: The Department acknowedges these comments and makes no changes in response.

Round 2 comment summary: Commenter 059 asked whether employees are eligible to utilize sick time in the first 7 days and whether, as a result, the leave period extends from 12 weeks to 13 weeks.

Round 2 response to comment: The statute, 26 M.R.S §850-C(1), allows an employee to use sick or vacation time during the waiting period. The waiting period does not reduce the amount of paid medical leave under the PFML program. In response to this Comment, Section VI(A)(8) was clarified in the final rule to state that the provider must provide documentation that includes the time period that the covered individual is expected to be unable to work.

Round 2 comment summary: Commenter 063 suggested clarifying whether employers who have an approved private plan will be required to follow the payment system outlined in this section. The commenter also recommended having various payment options for employees who don't have direct deposit.

Round 2 response to comment: The Department agrees that private plans may issue benefits by paper check, direct deposit, or by debit card. The Department made no changes in response to the comment. as this section is intended to refer to payments made by the PFML program.

Section VIII (C) (1) – Reduction and Proration of Benefits

Note: The Department made a change to subsection (C)(3)(e) of the final rule that supplemental payments from short term disability, combined with FLML benefits, cannot exceed the employee's typical weekly wage. The Department finds that this change is consistent with the intention of the statute.

Round 1 comment summary: Commenter 016 asked the Department which week the benefits will be prorated if individuals are taking leave for less than a week.

Round 1 response to comment: The Department made no changes as the rule is sufficiently clear.

Round 2 comment summary: Commenter 061 asks the Department to clarify how proration of benefits interacts with entitlement of 12 weeks of available leave time so that there is consistency.

Round 2 response to comment: The Department made no changes as the rule is sufficiently clear that the aggregate leave time is prorated based on partial use of work weeks as well as the benefit. For example – if an employee works half their normal work week, and used leave for half the week, their available leave time is reduced by half a week.

Round 2 comment summary: Commenters 168 and 477 suggested that employers with private plans should be exempt from any requirements to aggregate work schedules for claimants with more than one employer. Commenter 061 suggests benefits should be determined on a per employer basis not overall.

Round 2 response to comment: The Department agrees, but makes no changes to the rule. Private plans will be approved, without any requirement that such plans aggregate work schedules when prorating benefits.

Round 2 comment summary: Commenter 217 asked the Department to clarify the process that a private plan employer should use to prorate benefits based on scheduled work "for any employers" for whom the employer works.

Round 2 response to comment: The Department acknowledges that a private plan will only be able to base benefits on the wages for that employer. Ther requirement to prorate scheduled work for any employer applies to the state plan. The Department made no changes.

Section VIII (C) (2)

Round 1 comment summary: Commenter 114 suggested the Department define the term "permanent disability program" or policy in the rule.

Round 1 response to comment: The Department made no changes to the rule as it determined that short term and long-term disability policies are defined by the insurance policy.

Round 1 comment summary: Commenter 233 asked the Department to clarify if the employer can require that any accrued paid time off can be paid to the employee to cover employee insurance premiums or other agreed upon payroll deductions.

Round 1 response to comment: The Department made no changes as 26 M.R.S. section 850-B(10)(C) restricts an employer from compelling an employee to exhaust rights to any sick, vacation, or personal time prior to or while taking leave, which would include requiring an employee to use leave time to cover insurance premiums or other payroll deductions. The rule permits employers, with employee's permission pursuant to section 850-B(10)(C), to charge employees' leave time only if the employer pays the difference between the employee's Weekly Benefit Amount and their typical weekly wage and only for the amount of that difference.

Round 2 comment summary: Commenter 311 suggested the weekly benefit amount must be reduced by any other state's paid family medical leave.

Round 2 response to comment: The Department made no changes to the rule in response to this comment as 26 M.R.S. § 850-C(5) established limited circumstances in which benefits may be reduced, and the Department is bound by the statute. The Department further notes that the weekly benefit amount will not be based on wages earned in another state.

Round 2 comment summary: Commenter 061 suggests that wages be calculated per employer since the benefit will not be offset by wages received from any other employer. The commenter also suggested that the terms "authorized leave" and "typical weekly wages" should be defined.

Round 2 comment summary: The Department made no changes since the rule is sufficiently clear.

Section VIII(C)(3)(a)

Round 1 comment summary: Commenters 125, 196, 205, 242, 253, 263, 268 and 275 suggested that this provision should not change.

Round 1 response to comment: The Department acknowledges the comment and makes no changes in the rule in response.

Section VIII (C) (3) (b)

Round 2 comment summary: Commenter 059 expressed concern about allowing employees to work other jobs while also getting Paid Family Medical Leave benefits, thus potentially opening the program to abuse.

Round 2 response to comment: The Department made no changes to the rule in response to this comment as 26 M.R.S. § 850-C(5) established limited circumstances in which benefits may be reduced. The Department notes that an individual may be eligible for leave, and unable to work one job, while still able to work a different job. The Department further notes that this scenario would result in a proration of benefits as set forth in Section VIII (C)(1), but not a reduction of benefits in Section VIII(C)(2) and (3).

Section VIII (C) (3) (d)

Round 2 Comment summary: Commenter 063 suggested that the Department allow employer reimbursement if the employer allows for salary continuation so there is not a break in the employees' wages. The commenter stated once the claim is adjudicated the benefit amount could be reimbursed back to the employer.

Round 2 response summary: The Department made no changes to the rule. The employer may voluntarily pay the difference between the covered individual's Weekly Benefit Amount and their typical weekly wage, but will not be reimbursed for them.

Section VIII(C)(3)(e)

Round 1 comment summary: Commenter 005 supported that supplemental benefits from short term disability plans not offsetting Paid Family and Medical Leave Benefits, saying it better protects high-income earners.

Round 1 response to comment: The Department acknowledges the response.

Round 1 comment summary: Commenter 130 suggested that the Department define "supplemental wages" because paying supplemental wages for short-term disability benefits could lead to overpaying the employees' typical weekly wage if they are also receiving paid leave benefits and an offset is not done.

Round 1 response to comment: The Department made no changes as the rule is sufficiently clear.

Round 2 comment summary: Commenter 060 asked why short-term disability payments are not offset under the Paid Family Medical Leave Program.

Round 2 response summary: Short term disability payments were specified not to offset Paid Family and Medical Leave benefits so that employers could choose to supplement the partial wage replacement of Paid Family and Medical Leave benefits if they choose to offer these benefit plans. In the final rule, the Department clarified that short-term disability benefits and benefits under FLML may not exceed the typical weekly wage of the employee.

General comments regarding calculation of benefits:

Round 1 comment summary: Commenter 014 asked whether a covered individual may be able to receive wages from a second employer and collect the leave benefit. Commenter 034 asked the Department to clarify how income that an employee receives from a second job is factored into the benefit amount they receive while on leave if they take leave from one employer and not the other.

Round 1 response to comment: The Department made no changes as the rule is sufficiently clear that a covered individual's weekly benefit amount may not be reduced by wages received from another employer from whom the individual is not on leave.

Round 1 response summary: Commenter 053 asked whether employers are required to report if employee receive supplemental wages while an employee collecting paid family and medical leave benefits.

Round 1 response to comment: In the second proposed rule, the Department made no changes as the rule is sufficiently clear that employers must submit quarterly wage reports pursuant to Section X. Supplemental wages, such as sick leave to pay the difference between PFML benefits and the regular wage, are considered wages.

Round 1 comment summary: Commenter 083 asked whether an employee can obtain benefits under the Paid Family and Medical Leave program and short-term disability benefits at the same time.

Round 1 response to comment: In the second proposed rule, the Department made no changes as it determined the provisions in the rule are sufficiently clear.

Round 1 comment summary: Commenter 084 requested that the Department provide information about whether benefits will be taxable.

Round 1 response to comment: In the second proposed rule, the Department made no changes to the rule in response to comment. 26 M.R.S §850-M(1) requires the Department to advise individuals whether benefits are taxable based on the determination from the U.S Internal Revenue Service (IRS) that benefits may be subject to the federal income tax. The Department is awaiting guidance from the IRS.

Round 1 comment summary: Commenters 099, 136, 217, 241, 262 and 274 offered comments regarding employees that receive paid family and medical leave benefits being able to obtain supplemental wages from another employer or from other sources of income listed in the rule. The commenters stated recipients should not be able to receive supplemental wages while the employee is also using paid family and medical leave benefits.

Round 1 response to comment: The Department determined that supplemental wages or other sources of income are allowed under statute with the exception of benefits received under unemployment law or workers' compensation law. The Department clarified, in the final rule, that supplemental wages combined with PFML benefits may not exceed the amount the employee would have earned if working.

Round 1 comment summary: Commenter 217 expressed that an individual should not be able to use both workers compensation and paid family and medical leave benefits at the same time.

Round 1 response to comment: The Department made no changes as the statute and rule are sufficiently clear that paid family and medical leave benefits must be reduced if the employee is receiving supplemental wages from a workers compensation program for the same week, and thus, there is a presumption that both may be received at the same time.

Round 1 comment summary: Commenter 151 suggested the Department retain all of the provisions in section VIII without changes.

Round 1 response to comment: The Department acknowledges the comment. However, in the second proposed rule, the Department made minor changes to some subsections of this section to clarify calculation of benefits and proration of benefits.

Round 1 comment summary: Commenter 140 suggested the Department also include stipends for training programs such as the Competitive Skills Scholarship Program (CSSP) to not be subject to a reduction of benefits.

Round 1 response summary: The Department made no changes as in the rare instances in which a person taking medical or family leave from work would be actively engaged in the CSSP program, there will be a case-by-case determination as to whether that stipend is considered a wage replacement. Stipends are generally not considered to be wage replacement.

Round 1 comment summary: Commenters 159 suggested that the Department clarify whether a company-sponsored paid parental or family leave program that pays benefits from those programs are also subject to a reduction of benefits if both the state and private plan benefits are running concurrently.

Round 1 response to comment: The Department made no changes as it determined the provisions in the statute and the rule are sufficiently clear that if such payments are considered wages, they will be offset.

Round 1 comment summary: Commenter 164 suggested adding language to the rule stating that a company's paid leave program benefits are not subject to a reduction of benefits.

Round 1 response to comment: The Department declined to make this change as the Department finds that the reductions listed are consistent with the intent of statute.

Round 1 comment summary: Commenter 181 recommended that the Department include more detail in the rule clarifying how certain specific circumstances would be handled including situations when an employee goes on leave, returns, and then needs to take leave again or when an employee becomes unemployed while receiving benefits.

Round 1 response to comment: The Department made no change to the rule as the rule is sufficiently clear.

Round 1 comment summary: Commenter 181 suggests the Department allow for an employer to continue to pay salary and then be reimbursed when a claim is approved.

Round 1 response to comment: The Department made no change since the change would conflict with the statute which requires that benefits be paid to the covered individual.

Round 1 comment summary: Commenter 233 asked whether the employer can require premiums to be repaid back to the employer for missed health insurance premiums as employers can do under the Federal Family and Medical Leave Act (FMLA).

Round 1 response to comment: The Department made no change to the rule as this is addressed by 26 M.R.S §850-B(8), which requires employers to continue to provide for and contribute to the employees' health insurance benefits during the employees' leave. The employer should follow their normal procedures for funding health insurance during the employee's absence.

Section IX- Fraud and Ineligibility

Factual and policy basis: This section implements and clarifies the procedure for possible disqualification based upon false statements or material misrepresentations made during the benefit application process as set forth in 26 M.R.S § 850-L.

Section IX (A) – Definitions

Note: The Department added the word "willful" to the definition of fraud in the second version of the proposed rule, for the sake of consistency with the statute, 26 M.R.S. §§ 850-D(5) and 850-L.

Round 1 Comment Summary: Commenters 125, 139,140, 142, 151,178,185, 196, 205, 232, 242, 253, 258, 263, 267 and 268 stated that the Department should clarify or add the word "willful" to the rule to ensure applicants that make a mistake in their application and receive benefits are not deemed to have intentionally misled the Department in applying for and obtaining benefits. Some commenters also noted the word "willful" is currently included in statute and suggested the rule should align.

Round 1 response to comment: The Department added the term "willful" in the second draft of the proposed rule that was sent out for further comment, for the sake of consistency with the statute, 26 M.R.S. §§ 850-D(5) and 850-L.

Round 2 Comment Summary: Commenter 061 suggests that fraud should be found to exist whenever a false statement is made regardless of whether it is willful.

Commenters 140, 205, 232, 258, and 267 suggested addition of the term "willful" should remain in the rule. for the Department's addition of "willful" in this section.

Commenter 257 suggests developing consistent, clear standards for determining "willingness."

Round 2 response to comment: The Department determined that "willful" should be in the rule, for the sake of consistency with the statute, 26 M.R.S. §§ 850-D(5) and 850-L. Therefore, the Department makes no further changes to the rule.

Section IX (B) – Investigations and Audits

Round 1 Comment Summary: Commenter 061 recommended the rule set forth a process for an employer to alert the Department of suspected fraud.

Round 1 response to comment: The procedures for reports of fraud are operational and are not required in rule.

Round 1 comment summary: Commenter 267 suggests the rule require notice in writing to a person being interviewed including providing documentary evidence prior to the interview.

Round 1 response to comment: In final proposed rules, the Department clarified that notices of interview would be provided in writing.

Round 1 Comment Summary: Commenter 124 suggests that private plan substitutions can conduct fraud investigations as efficiently as the Department and suggests the rule be changed to include allowing private plans to investigate suspected fraud.

Round 1 response to comment: The Department made no changes to proposed rule, as Section IX applies to the Department investigating claims of fraud related to the use of the public plan. It is presumed that private plans will investigate suspected fraud related to those plans in accordance with their usual business practices.

Round 2 Comment Summary: Commenters 060 and 257 recommend that the Department accept complaints made by the public and employers and provide specific procedures and requirements in the rule for reporting such fraud. Additionally, the commenters recommend that the rule includes notice to employers when an employee is disqualified. Commenter 257 notes inconsistencies in the standards for demonstrating "willfulness" across the bureaus within the Department, and questions why an individual under investigation would be provided with 10 days' notice prior to an interview.

Round 2 response to comment: Such processes are operational and not required in rule.

Section IX (D):

Round 1 Comment Summary: Commenters 014, 026, 059, 061, 073, 099, 157, 171, 186, 241, 257, and 280 remarked that the fraud provisions in the proposed rule should be strengthened to deter fraud by imposing a longer penalty and making repayment of fraudulent benefits mandatory.

Round 1 response to comment: The Department declines to make the suggested changes since they conflict with 26 M.R.S. § 850-L.

Round 1 Comment Summary: Commenter 116 suggests that employees who take leave they were not entitled to due to fraud should be subject to termination for being absent without leave.

Round 1 response to comment: The Department made no changes as the rule is clear that job protections provided by the Statute only applies to approved leave time.

Round 2 Comment Summary: Commenters 059, 061 and 257 stated that one year's disqualification for fraud is not adequate and suggested that a permanent disqualification should be applied while also requiring repayment.

Round 2 response to comment: The Department declines to make the suggested changes since they conflict with 26 M.R.S. § 850-L.

Section IX (E)

Round 1 Comment Summary: Commenters 091, 140, 217 and 241 commented on the provision that allows the Department to waive repayment of benefits, in whole or in part, after a finding of fraud would be against equity and good conscience be removed from the rule.

Round 1 response to comment: The Department declines to make the suggested changes since they conflict with the statute.

Section IX (F) - Appeals

Department Finding: In final rule the Department added clarifying language to Section IX(F). The Department decided to make changes to the appeal rights throughout the rule to ensure consistency in language and application and to provide clarity as to when the appeal period runs. Additionally, the Department decided to change the showing of "good cause" to a showing that immediate ineligibility and termination of benefits would be "against equity and good conscience" so that this provision aligns with the standard in the statute at 26 M.R.S. § 850-L(2).

Round 1 Comment Summary: Commenter 267 suggests the rule be changed so that any individual, not just covered individuals, can appeal a finding of fraud.

Round 1 response to comment: The Department makes no changes since the suggestion would conflict with the statute and fundamental principles of administrative law, as individuals must have been a party below to have standing to appeal.

Round 2 Comment Summary: Commenter 267 reiterates its suggestion that the rule be changed so that any individual, not just covered individuals, can appeal a finding of fraud.

Round 2 response to comment: The Department makes no changes since the suggestion would conflict with the statute and fundamental principles of administrative law, as individuals must have been a party below to have standing to appeal.

Section X-Premiums

Factual and policy basis: This section implements 26 M.R.S. §850-F regarding premiums. This section also clarifies the responsibilities of the employer to remit premiums and wage reports to the Department on a quarterly basis, specifies how employers count employees for the purposes of premium liability, and establishes how premiums will be calculated for self-employed individuals and tribal governments that elect coverage. This section was developed based on the

Department's review of the paid family and medical leave law on premiums, feedback received from the listening session held by the Department on January 25, 2024 on the topic of contributions, and research gathered from other states' paid family and medical leave programs on the administration and implementation of premiums.

Section X(A)

Department Finding: *The Department made an addition to Section X(A) in the second proposed rule after the development of the online contributions system commenced to specify that all employers must to register for an account in the system.* No comments were received on this change.

Round 1 comment summary: Commenter AC 1 and 059 suggested that employers with less than 15 employees should be exempt from premium contributions.

Round 1 comment summary: The Department made no changes in rule in response to comment as the suggestion conflicts with statute.

Round 1 comment summary: Commenter 273 requested that agricultural businesses be exempted from the Paid Family and Medical Leave program as they are for many other programs.

Round 1 response to comment: The Department made no changes because the suggestion is inconsistent with statute.

Round 1 comment summary: Commenters 065, 175, 206, 243, and 265 asked the Department to exempt Medicare/Medicaid reimbursed organizations to be exempted from the premiums as there has not been an increase in these reimbursement rates to account for the new premium cost.

Round 1 comment summary: The Department made no changes in rule in response to comment as suggestion conflicts with statute.

Round 1 comment summary: Commenter 054 and 137 asked the Department to clarify whether Professional Employer Organization (PEO) reporting of premiums will be done at the client level or at the PEO level.

Round 1 response to comment: In the second proposed rule, the Department amended the definition of employer to clarify that, for the purposes of the Maine Paid Family and Medical Leave program, the employer is considered the client company. The Department also clarified that an authorized third party, including a PEO, may remit premium payments or submit contribution reports on behalf of the employer. No comments were offered in the second round regarding this suggestion.

Round 1 comment summary: Commenter 143 expressed concern that postal mail will create significant delays, and recommended that the Department use an online portal.

Round 1 response to comment: The Department notes that it will use an online portal. The Department made no changes in response to this comment as the rule is sufficiently clear that premium payments and contribution reports will be considered timely if postmarked on or before the due date, and may also be submitted electronically.

Round 1 comment summary: Commenter 160 suggested employers should utilize the quarterly 941 tax form to calculate the quarterly salary as the basis for premium payment.

Round 1 response to comment: The Department makes no changes in response to this comment as it finds the rule is sufficiently clear how premiums will be calculated.

Round 1 comment summary: Commenter 263 encouraged the Department to retain the language in this section unchanged.

Round 1 response to comment: The Department acknowledges the comment but in the second proposed rule the Department made changes to this section in response to other comments that required clarification of this section.

Round 2 comment summary: Commenter 166 seeks clarification on whether employers that have received a private plan substitution are subject to the same quarterly wage reporting requirements as the public plan.

Round 2 response to comment: The Department made no changes as the rule is sufficiently clear that employers with approved private plan substitutions are exempt from paying premiums but must still file wage reports quarterly with the Department, as set forth in XIII(A)(11).

Section X(B) (added in second proposed rule)

Department Finding: The Department added Section X(B) to the second proposed rules to clarify exactly when employers must begin to withhold contributions from wages for the purposes of paying premiums. The revised language states that such withholding of contributions should begin for the first pay period with a payment date in January 2025.

No comments were received in response to this clarification.

Section X(C) (added in second proposed rule)

Department Finding: The Department added Section X(C) to the second proposed rules to clarify rounding rules for how employers must report wages and how employers must calculate premiums.

No comments were received in response to this clarification.

Section X(D) - (was subsection B in the first proposed rules)

Round 1 comment summary: Commenter 108 asked the Department whether an employee is entitled to a refund if premiums exceed the Social Security contribution and benefit base limit when the employee worked for more than one employer in a calendar year.

Round 1 response to comment: The Department makes no changes in response to this comment as the rule is sufficiently clear that an employee may seek a refund if the employee believes they have paid premiums above this wage cap in a given calendar year, regardless of how many employers the employee worked for.

Section X(E) (was subsection C in second version of proposed rule)

Round 1 comment summary: Commenter 267 expressed that this is a good provision and should not be changed.

Round 1 response to comment: The Department acknowledges the comment and made no changes in response.

Round 1 comment summary: Commenter 108 asked the Department to clarify whether employees are entitled to receive a refund if they overpay premiums.

Round 1 response to comment: The Department makes no changes as the rule is sufficiently clear that an employee may seek a refund if the employee believes they have paid premiums above the wage cap set by the Social Security Administration in a given calendar year.

Section X(F) (was subsection D in first proposed rules)

Round 1 comment summary: Commenters 166 and 232 asked for clarification of how "net income" is defined for self-employed individuals. Commenter 166 suggested this provision conflicts with wage definition in section XII(3)(a) of the proposed rule while Commenter 232 suggested aligning it with Section I(A)(23).

Round 1 response to comment: In the second proposed rule, the Department clarified that a self-employed individual's net income will be based on the prior tax year to clarify which year will be reviewed to determine the self-employed individual's premium amount. No comments were offered in the second round regarding this suggestion.

Section X(H) (was subsection F in first proposed rules)

Note: The Department changed the method for determining employee size in accordance with a recommendation by the PFML Authority and others. The new language states:

> 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. On October 1, 2024, and October 1 of each year thereafter, the employer shall calculate its size for the purpose of determining premium liability for calendar year 2025 and each calendar year thereafter.

Round 1 comment summary: Commenter AC2 asked for clarification whether the employer size count for October 1, 2024 will be based on a report provided or if they employer will self-report the information to the Department.

Round 1 response to comment: Employers will conduct their own employer size count in accordance with process in rule and will report that count when they first register for the Maine Paid Leave portal, and yearly thereafter. The Department will check accuracy through audits.

Round 1 comment summary: Commenter 108 asked the Department to clarify what the consequences are of misclassifying an employee.

Round 1 response to comment: Misclassification of employees can lead to premiums and penalties owed for failure to remit premiums on behalf of misclassified employees. Title 26, Chapters 7 and 13 set forth other consequences for misclassifying an employee.

Round 1 comment summary: Commenter 267 suggested the Department change "covered employee" to "employee" so that all of an employer's employees are included in the count for premium purposes.

Round 1 response to comment: In the second proposed rule, the Department moved the wage threshold, but continued to require that an employer must count all "covered employees" (regardless of the wage threshold) when determining employer size for premium liability.

Round 1 comment summary: Commenters 027, 029, 056, 085, 095, 115 (PFML Authority), 116, 122, 126, 140, 161, 166, 205, 232, 241, 250, 256, 257, 267, 275, and 280 suggested different methods for determining employer size. Commenters asked the Department whether the Department will use the "payroll method", averaging workforce size over the previous calendar year or a 12-month period, or a 20-week count within the year ending September 30th.

Round 1 response to comment: In the second proposed rule, the Department amended this section to a standard recommended unanimously by the PFML Authority, set forth above. The Department found that the revised language is consistent with the method for determining

employer size under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e(b), and therefore is a calculation already done by many employers.

Round 2 comment summary: Commenter 061 and 166 asked whether an employer should apply the employer size determination to only state employees or also include out of state employees and sought clarity on the definition of covered employees.

Round 2 response to comment: The Department makes no changes the rule is sufficiently clear that the employer only counts "covered employees" when calculating their employer size for the purpose of premium liability. Covered employees are employees who earn wages in the State of Maine, as defined in Section II.

Round 2 comment summary: Commenter 137 recommended replacing FEIN (Federal Employer Identification Number) with EAN *(Employer Access Number)* while commenter 140 suggested defining an employer by FEIN as employers can reduce their taxable payroll by creating separate FEINs.

Round 2 response to comment: The Department makes no changes in rule as the Department finds that the Federal Employer Identification Number (FEIN) is commonly used by employers and is a consistent approached used in other State Paid Family and Medical Leave programs.

Round 2 comment summary: Commenters 217 and 250 expressed concerns about how small employers, specifically seasonal employers, can determine their employee size. Commenter 217 suggested using 150 days instead of the 20-week threshold over the previous 12 months and Commenter 257 suggested using a 27-week threshold.

Round 2 response to comment: The Department makes no changes as the Department finds that the method to count employees in the rule provides a reasonable and consistent method to establish employer size and was the recommendation made by a motion of the Paid Family and Medical Leave Authority in their formal comments in round 1 after a discussion about the appropriate method to use.

Round 2 comment summary: Commenters 205, 232 and 267 suggested that the new language in this section should not be changed.

Round 2 response to comment: The Department acknowledges the comments.

Round 2 comment summary: Commenter 311 suggested to change the second sentence to refer to total number of "covered employees" to limit count to employees in the state.

Round 2 response to comment: The Department makes no changes as the rule is sufficiently clear, as further explained in Section I(A)(28) and Section II.

Round 2 comment summary: Commenters 318 suggested the Department should allow employees to opt out of participation in the PFML program and therefore not have premiums deducted from their wages.

Round 2 response to comment: The Department makes no changes to the rule as the statute provides no mechanism for employees to opt out.

Round 2 comment summary: Commenter 334 suggested the Department increase the employer size moving the employer count from 15 to 25 employees to determine whether the employer will be required to pay the 0.5 percent employer share.

Round 2 response to comment: The Department makes no changes in response to comments as the statute set the standard on the size of the employer for the purposes of determining liability for premiums, and the Department is bound by the statute.

Section X(I) (was subsection G in the first proposed rules)

Round 1 comment summary: Commenter 108 asked the Department whether there is a grace period if an employer fails to remit premiums before penalties are imposed.

Round 1 response to comment: The Department makes no changes in response to this comment as Section XI(B) is sufficiently clear that employers must submit late payments on or before the due date established in the notice of delinquent payment issued by the Department or penalties will be assessed.

Round 1 commenter Summary: Commenter 178 and 198 commented that this provision might undermine the negotiation requirements for collective bargaining agreements and not address differences between bargaining units.

Round 1 response to comment: In the second proposed rule the Department revised the language to allow for different rates to be paid as required by separate collective bargaining agreements with the same employer.

Round 1 comment summary: Commenter 241 suggested that the Department should consider allowing an employer's decision regarding payment of the employee's share of premiums to apply to all similarly classified employees rather than all employees.

Round 1 response to comment: In the second proposed rule, the Department clarified the employer's decision regarding payment of the employee's share of premiums must apply to all workers, except for employers whose employees are covered by two or more separate collective bargaining agreements, as required by the terms of the relevant collective bargaining agreement.

Round 1 comment summary: Commenter 095 asked the Department which premium employers should pay when an employee works in a different state that also offers paid family and medical leave.

Round 1 response to comment: The Department makes no changes as the rule is sufficiently clear that employers are obligated to pay Maine PFML premiums for covered employees. The Department expresses no opinion on whether employers may also be obligated to pay premiums in other states.

Round 1 comment summary: Commenters 141 asked the Department whether employers can deduct between 0% and 50% of the premium from employees. Commenter 178 suggested that employers with collective bargaining agreements should negotiate premium deductions, as terms may vary between bargaining units.

Round 1 response to comment: In the second proposed rule, the Department revised the rule to clarify that the level at which an employer covers the employee's portion of the premium must be the same for all employees, unless there are 2 or more collective bargaining agreements. An employer may choose to pay all, some, or none of the employee's portion.

Round 2 comment summary: Commenters 084, 095, 148, 166, 178, 274, 287, 321, 338 and 449 asked whether the premium amount must equally be deducted from employees' wages and if employees are mandated to pay half of the premium. The Commenters suggested that the Department provide further clarity and remove "may" from the sentence. Commenter 449 sought clarity that unless an employer chooses to pay for their employee portion of premium, both employer and employee are liable for premium contribution.

Round 2 response to comment: The Department makes no changes as the rule is sufficiently clear that employers may, but are not obligated to, deduct up to 50% of the premium from employees' wages. Employers are obligated to remit 100% of the premium.

Round 2 comment summary: Commenters 178, 198 and 287 expressed concern about employers deducting premiums from employees who are covered by collective bargaining agreement. and thus these employees should not have premiums deducted from their pay without negotiation.

Round 2 response to comment: The Department makes no changes as the rule and statute are sufficiently clear that all employers must remit 100% of premiums for covered employees beginning January 1, 2025, except that pursuant to 26 M.R.S. § 850-B(10), employers and employees who are subject to a public sector collective bargaining agreement in effect on October 25, 2023 are exempt until that agreement expires.

Round 2 comment summary: Commenter 322 suggested the Department making the premiums for the paid family and medical leave program to either be a mandatory split between the employee and employer or employer paid premium.

Round 2 response to comment: The Department makes no changes to rule in response to comment as it determined the provisions in the rule are sufficiently clear. Under 26 M.R.S § 850-F(5), premiums deducted for the program may be split between the employee or employer.

Section X (J) (was subsection H in first proposed rules)

Round 1 comment summary: Commenter 267 suggested that the Department change this section to make it consistent with the time frame for private plan exemptions from premiums in Section XIII of the rule.

Round 1 response to comment: The Department amended this provision to make the two sections consistent.

Round 2 comment summary: Commenter 063 noted that the timeframe of private plan substitution exemptions from premiums in this section conflicted with the start time frame of private plan exemptions form premiums in Section XIII of rule.

Round 2 response to comment: The Department amended this provision to make consistent with the private plan substitution from premium time frame as specified in Section XIII of rule.

Section X(K)

Round 1 comment summary: Commenter 155 commented if employer premiums deductions will be reported separately on paychecks and W-2s.

Round 1 response to comment: In the second proposed rule, the Department made no changes to Rule. Such practice issues may be addressed in guidance.

Round 1 comment summary: Commenter 240 expressed concerns about whether it's practical to require a specific notation for PFML deductions, as most systems only list taxes generally.

Round 1 response to comment: The Department makes no changes as the rule is sufficiently clear that the premium deduction must be reflected on employees' pay statements, consistent with 26 M.R.S. § 665, but the rule does not dictate how the deduction must be listed.

Round 2 comment summary: Commenter 140 recommended restoring the language that was struck in what was Section L, stating that employees have the right to know premium deductions for PFML in their pay statement.

Round 2 response to comments: The Department makes no changes as the struck language was not eliminated but instead was moved to subsection K for clarity.

Round 2 comment summary: Commenter 166 seeks clarification on what label employers should use to report employee deductions on their pay statements.

Round 2 response to comment: The Department makes no changes to the rule. Such practice issues may be addressed in guidance.

Section X(L) (was section I in the first version of proposed rule) deleted and moved to K with clarifying additions

Round 1 comment summary: Commenters 108 and 126 commented on the employers having the ability to collect premiums from an employee's pay retroactively. Meanwhile Commenter 126 commented that employers should be allowed to collect overdue premiums due to insufficient pay. Commenter 166 suggested that an employer may have valid reasons to deduct or adjust premiums due to errors or paycheck calculation errors, tips or fringe benefits paid through a third party.

Commenters 140, 151, 205, 208, 253, and 258 suggested that the provision to state the employer is liable for the employee's deduction of premiums for failure to deduct should not change.

Round 1 response to comment: The Department amended this subsection to allow an employer to deduct premiums from one or more future paychecks if an employee pay has insufficient wages to cover premiums.

Round 1 comment summary: Commenter 108 asked what the consequences are for employers that fail to deduct premiums from an employee's pay.

Round 1 response to comment: The Department made no changes as the rule is sufficiently clear that an employer's failure to deduct premiums from an employee's pay shall be considered an election to pay the employee's share.

Round 2 comment summary: Commenter 288 suggests allowing employers to correct payroll errors within a reasonable time instead of the Department having the employer be considered to have elected to pay the portion of the employee share.

Round 2 response to comment: The Department makes no changes in rule in response to this comment. Notwithstanding the exception of allowing an employer to deduct premiums due to insufficient funds, the employer is ultimately responsible for payment of premiums. This is consistent with a review of other states' PFML programs that hold employers liable for the employee's share of premiums for failure to deduct premiums in a timely manner.

General comments regarding premiums:

Round 1 comment summary: Commenter 101 asked whether private plans must still submit wage information and asked if the private plan substitution exemption covers all premiums for the year, even if the employer was under the state plan part of the year.

Round 1 response to comment: Employers must still submit wage reports quarterly if approved for a private plan substitution but exempted from paying premiums on those wages. Section X(J) was clarified that the start of the exemption date is specified in Section XIII.

Round 1 comment summary: Commenter 095 asked the Department whether premiums paid by the employer increase an employee's wages.

Round 1 response to comment: Guidance is needed from the Federal Internal Revenue Services as to whether premiums paid by an employer to cover an employee's portion of State Paid Family and Medical Leave programs changes the imputed wages for employees.

Round 1 comment summary: Commenters 123 asked what constitutes taxable wages for family and medical leave premiums.

Round 1 response to comment: The Department clarified the definition of wages in the second draft of proposed rules, Section I(28).

Round 1 comment summary: Commenter 181 asked whether contributions should be deducted pre-tax or post-tax.

Round 1 response to comment: The Department awaits IRS guidance on the tax treatment of contributions.

Round 1 comment summary: Commenter 282 suggested providing premium contribution example.

Round 1 response to comment: The Department does not set forth examples in the rule, but may issue guidance.

Round 1 comment summary: Commenter 104 asked if payments made to employees on sick leave by a third-party administrator are subject to premiums.

Round 1 response to summary: The Department made no changes as rule is sufficiently clear that any wages, as defined in rule, are subject to premiums.

Section XI: Failure to Remit Premiums and Contribution Reports

Factual and policy basis: This section implements 26 M.R.S. §850-F(1), 850-F(2), 850-F(9) and 850-F(10) regarding the responsibilities and penalties for self-employed individuals or

employers who fail to pay premiums or make contributions reports to the Department. This section was developed based on the Department's review of the paid family and medical leave law on this section and information gathered from other states' paid family and medical leave programs.

Section XI (A)

Round 1 comment summary: Commenter 059, 060, 069, 126, 136, 217, 267 and 275 offered comments on the application of the 1 percent penalty. Commenter 060 suggested the 1 percent penalty should be capped at the amount owed equal to part of any premiums owed by the employer, saying it is not fair to charge the full payroll amount as penalty if only partial premiums are owed. Commenter 069 suggested that employees should also face a similar penalty of 1 percent for failing to remit premiums.

Commenter 126 suggested that the penalty should be reduced to 0.5 percent.

Commenter 129 suggested that employers should be able to recover missed premiums from employees' wages at a rate of 5% per pay period, like health insurance practices.

Commenters 134 and 217 commented that the employer penalty may be excessive as the provision does not recognize the difference between a willful act of an employer failing to remit premiums and the employer coming up short on the amount due to the Department and making a good faith effort to pay the amount.

Commenters 059 and 136 suggested that self-employed individuals should face a similar penalty of 1 percent for delinquent premiums.

Commenter 267 suggested the rule clarify that the percentage of assessment fluctuates based on the adjustment to the premium rate.

Commenter 275 supported the section of the rule and suggested that it should not be changed.

Round 1 response to comments: 26 M.R.S. section 850-F(9) sets the penalty for failure or refusal to make premium contributions at 1 percent of total annual payroll, plus the total amount of family leave benefits and medical leave benefits paid to covered individuals for whom it failed to make premium contributions. The Department makes no changes in response to these comments as the Department has no authority to set a penalty level contrary to that set in statute.

Round 1 comment summary: Commenter 061 suggested any penalty should be based on Maine wages only and the Department should have the ability to waive any penalties for honest mistakes if the employer pays retroactive premiums within 30 days of request.

Round 1 response to comments: The Department makes no changes as the rule is sufficiently clear.

Round 2 comment summary: Commenter 267 suggested the rule clarify that the percentage of assessment fluctuates based on the adjustment to the premium rate.

Round 2 response to comments: 26 M.R.S. section 850-F(9) sets the penalty for failure or refusal to make premium contributions at 1 percent of total annual payroll, plus the total amount of family leave benefits and medical leave benefits paid to covered individuals for whom it failed to make premium contributions. The Department makes no changes in response to this comment as the Department has no authority to set a penalty level contrary to that set in statute.

Round 2 comment summary: Commenters 059, 060, 061, 134, 157, 217, 398 and 503 suggested that the penalty due to failure to remit contribution should be less severe and should be proportionate to the unpaid amount instead of a flat 1 percent. Commenter 059 suggested that penalties should be consistent for both employees and employers to prevent fraud.

Round 2 response to comment: 26 M.R.S. section 850-F(9) sets the penalty for failure or refusal to make premium contributions at 1 percent of total annual payroll, plus the total amount of family leave benefits and medical leave benefits paid to covered individuals for whom it failed to make premium contributions. The Department makes no changes in response to these comments as the Department has no authority to set a penalty level contrary to that set in statute.

Round 2 comment summary: Commenters 059, 061, 105, and 398 asked whether the penalty is based on Maine payroll or whether it includes payroll in other states.

Round 2 response to comment: The penalty is based on total wages in Maine.

Section XI(B)

Round 1 comment summary: Commenter 217 suggested switching subsections A and B within the proposed rule to align with what the commenter believed the procedure should be, to notify employers of delinquent payments first, allowing time to correct issues, then imposing penalties third.

Round 1 response to comments: The Department makes no changes as the rule is sufficiently clear.

Round 1 comment summary: Commenter 125 provided a comment thanking the Department for allowing a grace period for employers to remit premiums and submit wage reports.

Round 1 response to comment: The Department acknowledges the comment and makes no changes in response.

Round 1 comment summary: Commenter 116 commented that more advance notice should be given to employers for missed premium payments and failure to submit wage reports.

Round 1 response to comments: The Department makes no changes as the rule is sufficiently clear and administratively feasible.

Round 2 comment summary: Commenter 398 suggested adding a clear deadline for employers to remit premiums after receiving a delinquency notice.

Round 2 response to comment: The Department made no changes as the rule provides a deadline.

Section XI(D)

Round 1 comment summary: Commenters 205 and 258 thanked the Department for providing self-employed individuals that have missed premium payments a "catch up period" that allows them to complete payments.

Round 1 response to comment: The Department acknowledges the comment and makes no changes in response.

Section XI (E)

Round 1 comment summary: Commenter 253 provided a comment that they supported the language in this subsection of the rule and suggested no changes be made.

Round 1 response to comment: The Department acknowledges the comment and makes no changes in response.

General comments on Failure to Remit Premiums and Contribution Reports

Round 1 comment summary: Commenter 166 commented that the Department should include in the rule a list of requirements that are needed such as what should be reported, by whom, what frequency and due date regarding the submission of wage reports and premiums.

Round 1 response to comments: The Department makes no changes as the rule is sufficiently clear on this point.

Round 2 comment summary: Commenter 166 asked whether private plans are subject to the same penalties and reporting requirements.

Round 2 response to comments: The Department makes no changes as the rule is sufficiently that employers with an approved private plan substitution must still file quarterly wage reports and may have penalties assessed for failure to do so.

Section XII: Elective Coverage

Factual and policy basis: This section sets forth the procedures and requirements for elective coverage for self-employment individuals and tribal governments pursuant to 26 M.R.S. §850-G. regarding elective coverage.

Section XII(A)(1)

Round 1 comment summary: Commenters 125, 151, 208, 242, 253, 258 and 275 provided comments about the rule allowing for both self-employed individuals and tribal governments to elect coverage to the PFML program and encouraged the Department to make no changes to this section.

Round 1 response to comments: The Department acknowledges the comment and makes no changes in the second proposed rule.

Section XII (A)(3)

Round 1 comment summary: Commenter 166 suggested the Department clarify or streamline the difference between the definition of wages for a worker that is provided in Section II of the rule and the definition of wages for a self-employed individual.

Round 1 response to comment: In the second proposed rule, the Department made clarifications that, self-employed individuals electing coverage, wages are based on net earnings from all self-employment. This revised definition of wages is based on federal law for independent contractors. No comments were offered in the second round regarding this change.

Section XII (A)(4)

Round 1 comment summary: Commenters 130, 205, 241 and 267 offered comments on withdrawal of coverage for self-employed individuals. Comments 130 suggested clarifying that an individual electing coverage may withdraw by completing a form provided by the Department within 30 days following the end of the coverage period. Commenter 205 suggested the Department clarify in the rule the process for when an individual may withdraw from elective coverage if they have found employment with another employer. Commenter 241 commented with a question of why the self-employed individual or tribal government may withdraw from coverage a form provided by the Department within 30 days following the end of the coverage period. The question raised a concern that a self-employed individual or tribal government could be paying premiums in subsequent quarters after termination of coverage. Commenter 267 suggested the Department clarify the rule to say a self-employed individual can withdraw if they move outside of Maine.

Round 1 response to comment: In the second proposed rule, the Department did not adopt these suggestions as the proposed rule sets forth a reasonable process and timeframe for withdrawal of coverage that is consistent with the statute.

XIII: Substitution of Private Plans

Factual and policy basis: This section specifies the procedures and requirements regarding substitution of private plans set forth in 26 M.R.S. §850-H. This section establishes the process for an employer to apply for a private plan substitution, establishing minimum criteria of substantially equivalent plans, revocation of private plans, rights to appeal of a revocation of plans, cancellation of private plans, application fees to apply for a substitution and the reporting requirements necessary to maintain the substitution.

Department Finding: The Department added a sentence to Section XIII(A)(2) in the final rule to specify that: *Substitutions are made in accordance with the employer's Federal Employer Identification Number (FEIN) and must provide coverage for all employees within that employer's FEIN.* The Department finds that the explicit requirement that a substituted plan must cover all of an employer's employees is consistent with the intention of the statute and the rule, and is administrative feasible. The Department further finds that this clarification is implied in the PFML law.

Section XIII(A)(2) – Date for Accepting Applications for Substitution of Private Plans

Round 1 comment summary: Commenters AC 4, 014, 019, 020, 025, 037, 038, 039, 040, 041, 043, 044, 052, 059, 060, 061, 062, 063, 066, 069, 073, 082, 085, 089, 091, 096, 099, 100, 102, 103, 105, 106, 107, 109, 110, 112, 113, 114, 115, 116, 119, 122, 124, 126, 129, 131, 132, 134, 136, 143, 145, 146, 148, 150, 154, 157, 160, 164, 166, 168, 171, 176, 181, 183, 185, 188, 189, 201, 202, 217, 224, 227, 230, 231, 232, 237, 239, 240, 241, 242, 249, 252, 254, 257, 259, 260, 261, 262, 264, 267, 270, 272,276,277, and 280 provided comments to the Department regarding private plan application beginning January 1, 2026. Some commenters proposed to allow a declaration of intent if a commenter wishes to purchase a fully funded plan or believe they have a currently employer offered plan that is "substantially equivalent" to the state plan. Some commenters suggested the Department open the private plan application process beginning on January 1, 2025, when premium deductions are to begin. Meanwhile commenters 96 and 230 suggested the Department's proposal to open private plan applications beginning January 1, 2026, and should not be changed. The PFML Authority (115) suggested that the Department allow an employer to apply for approval of a private plan no sooner than January 1, 2026, provided the employer continue to make contributions until they have a private plan that has been approved and has gone live.

Round 1 response to comments: In the second proposed rule, the Department revised the rule to allow the private plan application process to open April 1, 2025.

The second proposed rule further provides, at subsection (A)(4), for exemption from benefits on the first day of the quarter in which the substitution is approved, if the application is received at least 30 days prior to the end of the quarter. The second proposed rule also provides that, if the application is submitted less than 30 days prior to the end of the quarter, the exemption is effective the first day of the quarter following the application, assuming it is approved.

The changes were in response to the multiple comments listed above. The Department finds that the changes balance the interest of employers and the interest of establishing a fiscally sound Paid Family and Medical Leave Fund. The Department also considered the experiences of other states that have recently established a paid family and medical leave program. The timing is also based upon administrative feasibility.

Round 1 comment summary: Commenter 268 supported the oversight, process for private plan approvals, and data collection requirements outlined.

Round 1 response to comment: The Department acknowledges the comments.

Round 1 comment summary: Commenter 205 suggests the Department include a mechanism to fund the cost of oversight for private plan substitutions.

Round 1 response to comment: The Department revised the rule to include an administrative reimbursement fee for the cost of administering private plans as provided by the statute.

Round 2 comment summary: Commenters 014, 059, 062, 082, 105, 157, 199,232, 254, 264, 408, and 449 offered comments regarding the Department's proposal to require premiums to be paid into the Paid Family and Medical Leave Fund beginning on January 1, 2025. The commenters believed that there should be an opportunity for employers to opt out if they intend to apply for a private plan substitution or encouraged the department to open private plan substitutions prior to the prosed date of April 1, 2025. On the other hand, commenters 059 and 232 and 503 suggested the Department revised proposal regarding when private plan applications should remain April 1, 2025.

Round 2 response to comments: The Department will maintain the provision to open private plan applications beginning on April 1, 2025 and to require premium deductions beginning on January 1, 2025, with exemptions from premium deductions no sooner than the quarter the application is received, as set forth above and in the second proposed rule. The Department did not make any change in response to the suggestion to allow an exemption from payment of premiums based on a certification of intent to apply for a private plan substitution. The Department's decision is based upon review of comments from multiple stakeholders, the experiences of other states that have recently established a paid family and medical leave

program, and is a reasonable balance of the interests of employers with the interest of establishing a fiscally sound Paid Family and Medical Leave Fund.

Round 2 comment summary: Commenter 030 suggested that the reimbursement for the application of private plans was excessive.

Round 2 response to comment: The Department established the fee amount based on a review of other states with paid family and medical leave application fees. The Department finds that $500 is reasonable considering the administrative time to process and review applications. No comment was offered in the first round as this was a new provision included in the second proposed rule.

Section XIII(A)(3)- Approved Substitution valid for 3 years

Round 1 comment summary: Commenter 181 asked the Department to clarify that a fully insured private plan substitution is valid for three years regardless of whether the employer changes insurance carriers.

Round 1 response to comment: The Department makes no changes as the rule is sufficiently clear that an employer may apply for a new 3-year substitution within a previous 3 year substitution if an employer changes carriers previously approved insurance plan. If the new substitution is approved, it will begin a new 3-year substitution period.

Round 1 comment summary: Commenter 267 suggested the rule be changed so an approved private plan substitution is valid for one year subject to annual renewal.

Round 1 response to comment: The Department makes no changes since the rule provides an appropriate balance of interests, aligns with other timelines in the rule such as elective coverage, and is administratively feasible.

Round 2 comment summary: Commenters 314 and 398 offered a comment regarding the employer requirement to resubmit an application after the conclusion of the initial three-year approval of a private plan substitution. The commenter was concerned that it would create unnecessary costs and barriers for the employer.

Round 2 response to comment: The Department makes no changes in rule in order to ensure requirements established in rule on private plans have been met after the conclusion of the three-year period of a substitution. No comments were offered on this suggestion in the first round.

Section XIII(A)(4) – Date of exemption from obligation of premiums

Note: In response to comments to Section XIII(A)(2) regarding the start date for applications and exemptions, the Department made changes to subsection (A)(4) in the second proposed rule. The Department finds that the changes are a reasonable balance of the interests of employers

with the interest of establishing a fiscally sound Paid Family and Medical Leave Fund. In the final rule, the Department made formatting changes to this section, for the sake of clarity.

Round 2 comment summary: Commenters 060, 063, 105, 124, 257 and 503 suggested to the Department that the effective date for a substitution to take effect should be when the application has been filed with the Department. Commenter 063 elaborated that other states with paid family and medical leave law allow that the effective date is the date an application was submitted.

Commenters 060 and 503 suggested revised language regarding the refund of premiums after the effective date of the private plan substitution.

"An employer must remit to its employees any tax amount withheld after the effective date of the tax exemption granted pursuant to an approval of an employer private plan."

Round 2 response to comment: The Department makes no additional substantive changes in response to these comments. In the final rule, formatting changes were made. The Department must review applications to ensure minimum criteria is met before determining that remittance for premiums to the Paid Family and Medical Leave Fund will cease.

Round 2 comment summary: Commenters 060, 105, 124, 166, 168 and 311 asked for clarification to the Department on whether a private plan submitted by an employer on April 1, 2025, and approved by the State on May 1, 2025, means that all employee premiums withheld from employees' pay for the month of April 2025 are required to be refunded to the employee.

Round 2 response to comment: Yes. The Department made no substantive changes to this section as it finds the statutes and rules are sufficiently clear on this point.

Round 2 comment summary: Commenters 124, 166, 168 and 311 suggested to the Department to clarify the approval process and whether premiums will still be collected while the application is under review by the Department.

Round 2 response to comment: The Department made no changes in response to these comments as it finds that the rule is sufficiently clear on the timing of the exemption of premiums once a private plan substitution is approved.

Round 2 comment summary: Commenter 166 suggested to the Department to provide clarity as to whether employees of employers who elect substitute plans are covered under the state plan for periods prior to the substitute plan effective date.

Round 2 response to comment: Employees will be covered by the State plan after benefits begin for all employees on May 1, 2026 (or thereafter, as provided by 26 M.R.S. § 850-

P) and before benefit coverage under the private plan begins, if coverage by that private plan is not otherwise provided to those employees.

Round 2 comment summary: Commenter 279 posed a question to the Department asking the length of time it will take to review a private plan substitution and whether there will be a maximum fee range for the submission of the application for substitution.

Round 2 response to comment: The Department makes no changes in rule as it finds the rule is sufficiently clear on fee range and anticipated length of review.

Round 2 comment summary: Commenters 217 and 327 suggested an employer should be refunded previous premiums remitted to the Department if an employer receives an approved private plan substitution.

Round 2 response to comment: The Department will not provide refunds to employers for premiums remitted prior to the approval of a private plan substitution. The Department notes that approval or denial of a private plan will take place before premiums are due for that quarter. The substitution application process was developed balancing the interest of employers and the interest of establishing a fiscally sound Paid Family and Medical Leave Fund. The Department also considered the experiences of other states that have recently established a paid family and medical leave program. The timing is also based upon administrative feasibility.

Section XIII(A)(5) – Cancellation of private plans

Department Finding: *In final rule the Department added some additional clarifying language to Section XIII(A)(5). As a general rule, businesses assess the potential impact of numerous variables in order to plan for a viable future. The Department decided that a more appropriate standard in reviewing a request to cancel a private plan substitution are issues causing a negative impact on the business such that the employer believes cancellation is the best solution. Additionally, the Department decided to clarify that it did not intend to allow any and all premium increases to meet the standard for cancellation but, rather, only those that are unanticipated and unreasonable.*

Round 1 comment summary: Commenter 267 suggests employers be permitted to withdraw their private plan substitution at any time without the need to establish good cause for doing so. Commenter 059 suggests that an employee should not have to wait three years to reapply if they change insurance carriers or plans as long as the employees do not have a lapse in coverage.

Round 1 response to comment: The Department makes no changes in response to this comment as the rule reflects an appropriate balance between the needs of workers, employers and administrative efficiency.

Round 2 comment summary: Commenters 314 and 398 offered a comment regarding the cancellation of a substitution prior to the conclusion of the three-year period unless for good

cause. The commenter was concerned this provision would restrict the flexibility of employers to assess plans that would also be in the best interest of employees and could counteract the state's policy goals on creating access to paid family and medical leave.

Round 2 response to comment: The Department does not change the prohibition on cancellation during the three-year period because that provision in the rule ensures consistency in the application of private plans offered by insurers and employers, and protects workers and the fiscal integrity of the Fund. Finding that the term "good cause" was not consistently used in the rule, the Department changed the criterion for allowing cancellation upon showing "direct negative business impact," defined as an unanticipated and unreasonable premium increase.

Section XIII(A)(6) – notification of material change

Round 1 comment summary: Commenter 181 suggested the Department provide additional clarity on what constitutes materials changes to the plan.

Round 1 response to comment: The Department made no changes in the rule as the rule is sufficiently clear. The rule states that material change is any change which affects the rights, benefits or protections afforded to employees under the Paid Family and Medical Leave law.

Round 2 comment summary: Commenters 061 and 063 suggested to the Department to provide additional clarity on what constitutes material changes to the plan.

Round 2 response to comment: The Department makes no changes in rule in response to comment as the rule states that material change is any change which affects the rights, benefits or protections afforded to employees under the Paid Family and Medical Leave law.

Section XIII(A)(7) Audits and investigations

Round 1 comment summary: Commenter 267 asked the Department to change its permissive authority to investigate employee complaints to mandatory.

Round 1 response to comment: The Department declines to make this change as it finds that the current language appropriately permits the Department to exercise discretion as to how to respond to a complaint. The Department further notes this is consistent with fundamental principles of agency enforcement discretion.

Section XIII(A)(10) date submission

Note: The Department clarified this section in round of the proposed rule to state that data reports prepared for fully insured private plans to insurance companies offering such plans to

several employers may meet the requirement, and to state that failure to submit data reports may result in revocation of the substitution.

Round 1 comment summary: Commenter 232 suggested that the Department include a breakout of data for private plans compared with the public plan.

Round 1 response to comment: The Department makes no changes as the statute and the rule are sufficiently clear.

Round 1 comment summary: Commenter 181 noted that insurance carriers do not collect data on race and ethnicity since it could infer discrimination in the claims process. The commenter suggested that insurers should be excluded from providing this data.

Round 1 response to comment: The Department makes no changes in the rule in response to the comment to ensure consistency in data collection between what is required by the Department and what is required from employers with approved private plan substitutions.

Round 1 comment summary: Commenter 168 asked that the data reporting provisions be deferred to future rulemaking so insurers could consult on the types of data they might provide on an aggregated basis for their insured customers.

Round 1 response to comment: The Department makes no changes in the rule since the statute requires the reporting of certain data and the Department finds that it is reasonable to ensure consistency between what is required by the Department and employers under an approved private plan substitution.

Round 2 comment summary: Commenter 063 offered a comment about data reporting requirements for private plans. The Commenter expressed that insurance carriers do not collect data on race and ethnicity and by collecting this type of data could infer discrimination in the claims process. The commenter suggested that carriers should be excluded by the Department to collect this data.

Round 2 response to comment: The Department makes no changes in rule in response to comment to ensure consistency in data collection between what is required by the Department and any employers that is under an approved private plan substitution.

Round 2 comment summary: Commenter 168 asks the Department to clarify whether data reports prepared by insurers for fully insured private plans can be aggregated across the entire block of business.

Round 2 response to comment: The Department makes no change as the rule is sufficiently clear that aggregate reports for the specific plan are sufficient.

Round 2 comment summary: Commenter 232 suggested that the Department clarify what "may" means in reporting requirements.

Round 2 response to comment: The Department will require information reported by insurance companies to be similar to reporting requirements to meet 26 M.R.S. § 850-E(6).

Section XIII(A)(11) Contribution reports

Note: The Department clarified this section in the second round to expressly state that failure to file contribution reports may result in revocation of the substitution.

Round 1 comment summary: Commenter 061 states private plans should be exempt from filing contribution reports as well as from remitting contributions.

Round 1 response to comment: The Department makes no change in the rule. The Department disagrees that the substitution of a private plan removes the requirement to report wages. Title 26 Section 850-F(2) requires employers to remit both employer contribution reports and premiums. Title 26 Section 850-F(8) states that employers with approved private plans are not required to remit premiums, but does not waive the contribution/wage reports.

Round 2 comment summary: Commenter 061 states that private plan employers should not be required to submit quarterly contribution/wage reports to the Department since the employer would not be required to submit contributions to the Department.

Round 2 response to comment: The Department makes no additional changes. The Department disagrees that the substitution of a private plan removes the requirement to report wages. Title 26 Section 850-F(2) requires employers to remit both employer contribution reports and premiums. Title 26 Section 850-F(8) states that employers with approved private plans are not required to remit premiums, but does not waive the contribution/wage reports.

Section XIII(A)(12)

Department Finding: In the second proposed rule, the Department added subsection 12 to require employers with an approved substituted plan to provide appropriate tax forms to employees taking leave. This section was added for the sake of clarity.

No comments were received in the second round of comments on this particular section of rule.

Section XIII(A)(13) Appeals

Department Finding: In final rule the Department added some additional clarifying language to Section XIII(A)(13). The Department made changes to the appeal rights throughout the rule to ensure consistency in language and application and to provide clarity as to when the appeal period runs.

Section XIII (B)(1) – Fully-Insured Private Plans

Round 1 comment summary: Commenter 160 suggested the Department explain the difference between a fully insured plan and a self-insured plan.

Round 1 response to comment: The Department makes no changes in response to this general comment in rule as it finds the statute and rule in Sections XIII(B) and (C) are sufficiently clear as distinguishing between a fully-insured plan and a self-insured plan. No additional comments were made in the second round regarding this suggestion.

Round 1 comment summary: Commenter 267 suggested the Department incorporate language in the rule that the Administrator of the Paid Family and Medical Leave Program cannot offer private plan insurance coverage in Maine to avoid any potential conflicts of interest. This provision will ensure that there will be a key safeguard to include if the Department chooses to contract with a third-party administrator for the purpose of program administration.

Round 1 response to comment: The Department made no changes in response to this comment in rule as such a change would unduly limit potential qualified bidders to be the Administrator of the program.

Round 1 comment summary: Commenter 168 suggested the Department clarify that fully insured plans may include an internal reconsideration process like what is included in Section XIII(D)(2)(e) [now subsection (f) in the final rule].

Round 1 response to comment: The Department made no changes. The internal reconsideration process set forth in Section XIII(D)(2)(e) is applicable to both fully-insured and self-insured private plan substitutions. The plan's internal reconsideration process must be exhausted before a denied private claim can be appealed to the state.

Section XIII(B)(2)

Department Finding: In final rule the Department added some additional clarifying language to Section XIII(B)(2). The Department will explicitly an employer with a fully-insured private plan to notify the Department if an insurer intends to cancel or non-renew the policy supporting the plan. This notice will allow the Department to determine appropriate next steps to ensure continued availability of benefits and premium contributions into the fund, as appropriate.

Section XIII(B)(5) Notification of Cancellation or Non-Renewal

Round 1 comment summary: Commenter 073 suggested the Department revise language in the proposed rule to state that the Department may use a checklist to determine whether or self-insured plan meets the minimum requirements to be determined a substantially equivalent private plan.

Round 1 response to comment: In the second proposed rule, the Department amended language to state the Department will work with the Maine Bureau of Insurance to develop a

check list to determine the minimum criteria for substantially equivalent plans based on the Bureau's experience in reviewing insurance policies. The Department will then issue a certificate of eligibility.

Section XIII(C)(1) – Self-Insured Private Plans

Round 2 comment summary: Commenters 073, 082 and 168 encouraged the Department to work with the Maine Bureau of Insurance on developing a policy filing checklist to allow a more streamlined process for insurers to comply with law without having to seek secondary approval by the Department.

Round 2 response to comments: The Department amended language to state that the Department may use the checklist developed with the Maine Bureau of Insurance, but the Department retains the Authority in 26 M.R.S §850(H)(1) to review private plan substitutions. Insurers will make their filings with the Bureau of Insurance, and the Department will make the certification.

Section XIII(C)(3)

Round 1 comment summary: Commenters 061 and 232 suggested the Department specify the minimum amount in rule that an employer must pay for a bond for a self-insured plan to prevent either an under or overpayment to the Department.

Round 1 response to comment: The Department made no changes in response to this comment. As set forth in the rule, the Department will determine the required bond amount and will publish it as part of the application process. The cost of the bond will be determined by the bonding company. The Department does not receive any funds unless there is a default.

Section XIII(D)(1) – Determination of Substantial Equivalance

Section XIII(D)(2)(a)

Round 1 comment summary: Commenter 267 suggests the Department clarify that it is the sole decisionmaker as to whether a private plan is substantially equivalent although the Department may consult with the Bureau of Insurance in making that determination.

Round 1 response to comment: The Department revised this section to remove "or the Bureau of Insurance as its delegee" and replace it with "in consultation with the BOI as necessary."

Round 2 comment summary: Commenter 398 stated the proposed rules do not require the Department or the Maine Bureau of Insurance (BOI) to explain to an applying employer the specific reasons why their proposed private benefit plan was denied. The commenter further

elaborated that 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.

Round 2 response to comment: The Department made no changes in rule in response to this comment. The Department will provide proper notification and state reasons for approval or denial of the application. No comments were offered in the first round regarding this suggestion.

Section XIII(D)(2)(b)

Round 1 comment summary: Commenters 122, 258 and 268 ask the Department to clarify that "family member" includes all family members required in the statute. Commenter 122 stated that a plan must provide leave to care for a family member as defined in statute.

Round 1 response to comment: The Department changed the second version of the proposed rule noted to expressly state a substantially equivalent plan must account for all definitions of family listed in §.850-A(19). The revised rule is consistent with the language and the intent of the statute.

Round 2 comment summary: Commenters 232 suggested additional language to clarify that "family member" includes all family members required in the statute.

Round 2 response to comment: The Department notes that second version of the proposed rule noted to expressly state a substantially equivalent plan must account for all definitions of family listed in §.850-A(19).

Round 2 comment summary: Commenter 061 asks whether an employer can satisfy the minimum requirements if the plan uses the same definition of family member as is in the federal FMLA.

Round 2 response to comment: The final rule clarifies that the plan must, at a minimum, include all definitions of family listed in 26 M.R.S.§.850-A(19). The Department made no additional changes to the rule in response to this comment.

Section XIII(D)(2)(c)

Round 1 Comment summary: Commenters 125, 140, 145, 147, 151, 160, 162, 163, 167, 178, 195, 198, 205, 208, 212, 214, 215, 221, 222, 223,225, 230, 232, 236, 238, 239, 242, 246, 250, 251, 253, 255, 258, 263, 267, 268, 275, 356, 359, 362 suggested the Department when establishing the minimum criteria to determine a substantially equivalent plan must be similar to the rights, benefits and protections must be similar to the state plan with emphasis. An emphasis was placed on ensuring the maximum amount of time an individual can take leave, wage replacement and family members covered are similar to the state plan. Commenter 122 stated that an additional subsection should be added to explicitly state that a private plan must provide

at least 12 weeks of leave. Commenter 232 suggested that the requirement that private plans be equivalent in the number of weeks and wage replacement contradicts the statute.

Round 1 response to comment: In the second proposed rule, the Department added a provision that 10 weeks of leave may constitute substantially equivalent plan. The Department cited 10 weeks from the Maine Family Medical Leave Act (26 M.R.S §844) to ensure familiarity and consistency in similar leave laws in Maine. The Department finds that the requirement that a private plan provide at least 10 weeks of leave to be substantially equivalent is consistent with the language and the intention of the statute.

Round 2 comment summary: Commenters 115 (PFML Authority), 205, 232, 246, 255, 258, 267, 268, 279, 291, 311, 315, 316, 319, 332, 333, 400, 402, 404, 411, 412, 424, 430, 431, 433, 436, 448, 472, 477, 478, 479, and 481 suggested to the Department to ensure that private plans that are available and utilized provide at least 12 weeks of leave compared to the 10 weeks in the proposed rule. The PFML Authority (115) suggested language in the rule be changed to read "in general, the plan must allow for at least 12 weeks of aggregate leave per benefit year, except by voluntary agreement between the employer and the employee." Commenters 279 and 311 posed a question seeking clarity on whether the intent of the Department was to allow 10 weeks as the maximum amount of leave for private plans.

Round 2 response to comment: The Department made no additional changes in response to the comments. The Department finds that the statute does not require a private plan to provide 12 weeks of leave in order to be substantially equivalent. The Department finds that the requirement that a private plan provide at least 10 weeks of leave to be substantially equivalent is consistent with the language and the intention of the statute.

Round 1 comment summary: Commenter 181 requested clarification of claim ownership when an employee on leave moves from one employer to another, either between private plan employers or between private and state plan employers.

Round 1 response to comment: Claim facts, including ownership, are set on the date of either application or leave beginning, whichever is earlier. The employer of record on that date is the employer that owns the claim. The Department made no changes in response to the comments in rule.

Section XIII(D)(2)(d)

Round 1 comment summary: Commenters 061and 181 note the reference to section II(B) appears incorrect.

Round 1 response summary: The Department corrected the reference to section III(B) in the second proposed rule.

Section XIII(D)(3)

Round 1 comment summary: Commenter 061 asked the Department to clarify the application of this section.

Round 1 response summary: The Department made no changes in response to the comment, finding that the language in the rule is sufficiently clear.

Round 1 comment summary: Commenters 258, 267 and 268 ask the Department to clarify that a private plan does not meet the requirements unless it provides at least twelve weeks of leave in a benefit year and mirrors the family member relationships set forth in the statute. This comment was reiterated in Round 2.

Round 1 response to comment: In the second proposed rule, the Department added a provision in Section XIII(D)(2)(c) that 10 weeks of leave may constitute substantially equivalent plan. The Department cited 10 weeks from the Maine Family Medical Leave Act (26 M.R.S §844) to ensure familiarity and consistency in similar leave laws in Maine. The Department finds that the requirement that a private plan provide at least 10 weeks of leave to be substantially equivalent is consistent with the language and the intention of the statute.

Round 1 comment summary: Commenters 258, 267, and 268 suggest that the Department include all private plan criteria set forth in the statute to avoid confusion.

Round 1 response to comment: The Department did not make the requested change since the rule is sufficiently clear and consistent with statute.

Round 2 comment summary: Commenters 060 and 503 stated that the requirement of a substantially equivalent plan to provide a monetary greater than or equal to that of the State plan is contrary to the intent of the law

Round 2 response to comment: The Department makes no changes in response to the comment in rule. The Department finds that calculating the monetary requirement using the formula established in rule is consistent with the law. No comments were offered in the first round regarding this suggestion.

Section XIII(D)(4)(c)

Round 2 comment summary: Commenter 061 suggests that the provisions that includes the ability to have a different lookback period should clearly explain how the provision would be applied.

Round 2 response to comment: The rule is sufficiently clear and is intended to provide discretion in the public plan. The Department made no change.

General comments pertaining to substitution of private plans:

Round 1 comment summary: Commenters 041 and 248 asked the Department to allow employers who give generous paid time off or other benefits like short term disability to be considered as an acceptable private plan substitution.

Round 1 response to comments: The Department made no changes as this conflicts with statute that notes that private plans must be fully or self insured, must provide coverage of benefits irrespective to length of employment with the employer, and must provide for all leave types.

Round 1 comment summary: Commenter 267 suggested that the Department incorporate all grounds for revocation of a private plan substitution that are included in the statute. Additionally, the commenter suggested the rule require employers to provide employees notice whenever there is a material change, revocation, withdrawal or approval of a private plan.

Round 1 response to comment: The Department made no changes as the rule is sufficiently clear.

Round 1 comment summary: Commenter 133 provided a comment as the criteria established for private plans are clear and recommended should not be changed.

Round 1 response to comment: The Department acknowledges this comment and makes no changes in response to these general comments, but makes specific changes described herein.

Round 1 comment summary: Commenter 137 suggested the Department adopt in the rule another provision in Section XIII(D) that a plan provided by an employee leasing company, if approved as substantially equivalent, can apply to all client companies of the employee leasing company.

Round 1 response to comment: The Department clarified in second draft proposed rules in the definition of Employer that in the case of Employee Leasing Companies that the client company is considered the employer for the purposes of the program. As such, each client company will need to apply for a private plan substitution using the process noted in rule.

Round 2 comment summary: Commenter 131 encouraged the Department to expedite approval of private plan applications.

Round 2 response to comment: The Department intends to review private plan applications as quickly as possible.

Round 2 comment summary: Commenter 063 suggested to the Department to adopt rules to address when an employer has a merger/acquisition. The commenter recommended that on the effective date of the corporate change, the acquired employees are automatically covered under the existing policy. The employer should just notify the Department at least 30 days in advance.

Round 2 response to comment: This is a material change to a plan that the employer would need to notify the Department of in advance to receive approval.

Round 2 comment summary: Commenter 168 suggested the Department develop a checklist that will assist both the state plans and employers with approved private plan substitutions with objective criteria to determine undue hardship claims.

Round 2 response to comment: The Department made no changes as it determined the provisions in the rule are sufficiently clear.

Round 2 comment summary: Commenter 311 posed a question to the Department about how an employer should hold withholdings if an employee is no longer with an employer.

Round 2 response to comment: The Department makes no changes in the second proposed rule as it finds that the rule is sufficiently clear. The withholding of employee's contributions does not change in the employee's last paycheck after an employment situation.

Section XIV: Returning From Leave

Factual and policy basis: This section of the rule implements 26 M.R.S §850-J regarding job restoration of an employee to their position after the completion of leave. This section also clarifies enforcement of the protection from retaliation of an individual exercising any rights under the Paid Family and Medical Leave law. This section incorporates by reference Federal Family and Medical Leave standards related to equivalent positions.

Section XIV (A)

Round 1 comment summary: Commenters 139, 140, 142, 151, 178, 196, 205, 208, 232, 253, 258, 267, 268, 275 suggested that the Department remove the word "consecutive" from this section. Commenters 140, 142, 151, 178, 253, 275, added that using the word "consecutive" may negatively impact workers who work seasonal or part-time jobs and who do not work consecutive schedules. Commenters 232, 258, and-268 elaborated adding the word consecutive goes beyond the intent of the law.

Round 1 response to comment: The Department makes no changes as the rule reflects an appropriate balance between the needs of workers and employers and is consistent with both similar Maine laws and other states' PFML programs.

Round 1 comment summary: Commenter 125 suggested clarification of the meaning of the word consecutive.

Round 1 response to comment: The Department makes no changes as the rule is sufficiently clear.

Round 1 comment summary: Commenter 160 suggested that the Department change the 120-day threshold for job restoration to 365 days.

Round 1 response to comment: The Department makes no changes as the 120-day threshold is set by statute and the Department has no authority to change it by rule.

Round 1 comment summary: Commenters 198 and 268 suggested that the Department clarify the definition of "a position with equivalent employment benefits, pay and other terms and conditions of employment." The commenter suggested that the employer should return the employee to the position prior to taking leave unless an undue hardship exists.

Round 1 response to comment: The Department makes no changes as the rule is sufficiently clear.

Round 1 comment summary: Commenter 233 asked the Department to clarify the requirements for job restoration for an employee who was employed less than 120 days before commencing leave.

Round 1 response to comment: The Department makes no changes as the statute and rule are sufficiently clear that an employee who has not been employed for at least 120 days does not have the right to be restored to their previous position.

Round 1 comment summary: Commenter 267 suggested the Department remove references to the federal FMLA as the commenter does not believe it was the intent of the statute to have these provisions apply.

Round 1 response to comment: The Department makes no changes as the Department finds that it is helpful and reasonable to align Maine rules with comparable existing federal standards.

Round 1 comment summary: Commenter 280 recommends an employee who takes leave without notice should not be guaranteed job protection.

Round 1 response to comment: The Department made no changes in rule as the suggestion conflicts with the statute.

Section XIV(B)

Round 1 comment summary: Commenter 198 suggested that the Department clarify or revise the provision regarding the effect of leave on initial probationary periods. The commenter believed this provision is not accurate for employees that are under a collective bargaining agreement.

Round 1 response to comment: The Department makes no changes in response to the comment as the rule is sufficiently clear that the employer is permitted to toll an initial probationary period but is not required to do so.

Section XIV(C)

Round 1 comment summary: Commenter 117 asked the Department whether the employee may receive the full 12 weeks of benefits if the employee notifies the employer in writing that they do not intend to return to their job at the end of their leave. Commenter 159 suggested that the Department clarify whether an employee that provides notice in writing of their intent to not return to their job after taking leave will be still entitled to weekly benefits under paid family and medical leave.

Round 1 response to comments: In the second draft of rules, the Department clarified in Section IV that a covered employee must be employed when applying for leave or taking leave to receive benefits and will continue to receive benefits. The right to continued benefits changes only if the employee actually separates from employment. The Department makes no changes in response to these comments.

General comments regarding returning from leave

Round 1 comment summary: Commenter 060 suggested that employers should not be obligated to restore an employee to work if the employee is (1) absent from work 30 days or longer (2) when the employer is not given notice from any source and (3) the employer has re-filled the position with another employee.

Round 1 response to comment: The Department makes no changes as the obligation to restore an employee to work is set by 26 M.R.S. section 850-J and the Department is bound by the statute.

Round 1 comment summary: Commenters 125, 140, 142, 151, 178, 196, 198, 205, 232, 253, 258, 268, 275 and 278 suggested the Department add additional language into the rule to provide greater protections for employees from retaliation for using paid family and medical leave.

Round 1 response to comment: The Department makes no changes in response to this comment as the protections from retaliation are set by 26 M.R.S. section 850-J, and the Department is bound by the statute.

Round 1 comment summary: Commenters 178, 268 and 275 suggested that the Department require that an employer restore an employee to the position held by the employee prior to taking leave rather to an equivalent position unless the employer can demonstrate an undue hardship.

Round 1 response to comment: The Department makes no changes in response to comment as the suggestion would conflict with 26 M.R.S §850-B in that an undue hardship finding is not required.

Round 1 comment summary: Commenter 181 suggested that the Department incorporate provisions similar to the Federal Family Medical Leave Act such as provisions related to employers ability to recoup the cost of the employee's portion of their health insurance while they were on leave.

Round 1 response to comment: The Department made no changes as the employer may make health insurance deductions after reinstatement of an employee after leave subject to State and Federal law. The employer should follow their normal practice.

Round 1 comment summary: Commenter 249 suggested that the rule should include a provision allowing a staffing company opportunities to accommodate a returning temporary employee after the assignment has ended as well as a provision that clients of staffing companies to refuse to restore a temporary worker returning from leave if the client determines that doing so would disrupt their optimal operations.

Round 1 response to comment: Employees of a temporary staffing agency must be restored to an equivalent position, with equivalent benefits, pay and other terms and conditions of employment, with that staffing agency. This does not necessarily require restoring the employee to the same position with the same client agency. No further changes are made to the rule.

Round 1 comment summary: Commenters 178 and 275 suggested that the Department should restrict an employer to returning an employee to their original position when returning from leave unless the employer can demonstrate that it would be an undue hardship to do so and therefore the employer must return the employee to an equivalent position. Additionally, they suggested a return to an equivalent position as opposed to the original positions be subject to appeal rights.

Round 1 response to comment: The Department makes no changes in response to comment as the suggestion would conflict with 26 M.R.S §850-B in that an undue hardship finding is not required.

Round 2 comment summary: Commenter 060 suggested that employers should not be obligated to restore an employee to work if the employee is (1) absent from work 30 days or longer (2) when the employer is not given notice from any source and (3) the employer has re-filled the position with another employee.

Round 2 response to comment: The Department makes no changes as the obligation to restore an employee to work is set by 26 M.R.S. section 850-J and the Department is bound by the statute.

Round 2 comment summary: Commenter 063 suggested that the Department clarify that the protections of the Maine Paid Family and Medical Leave Program do not apply if and when an employee does not comply with an employer's established policies for providing notice of leave.

Round 2 response to comment: The Department makes no changes in response to this comment as the suggestion is inconsistent with 26 M.R.S. section 850-J.

Section XV-Appeals

Factual and policy basis: This section of the rule sets forth an appeals process under 26 M.R.S §850-K regarding appeals and the process for an aggrieved party to request an appeal. The appeals process explains the reasons an aggrieved party may seek an appeal, notice requirements and the decision-making process for Hearing Officers regarding appeals.

Section XV(A)

Department Findings: In the final rule the Department added clarifying language to Section XV(A). The Department made changes to the appeal rights throughout the rule to ensure consistency in language and application and to provide clarity as to when the appeal period runs.

In the final rule, the Department clarified that an appeal must be made within 15 business days from the date the decision is issued. In the interest of due process, the Department also added a good cause provision for requests to appeal that are filed late. Additionally, the Department clarified the standard for good cause for both a late application for benefits and request to appeal by adding a definition of "good cause" to Section I of the rule.

Round 1 comment summary: Commenter 061 suggested the Department add a time limit for requesting an appeal.

Round 1 response to comment: In the second rule proposal, the Department made changes, as described in the Department Findings above.

Round 1 comment summary: Commenters 129, 134, 140, 144, 151, 178, 181, 185, 198, 205, 208, 219, 242, 253, 258, 267, 268 and 275 suggested the Department add to the list an aggrieved party should be allowed to appeal an undue hardship claim from an employer regarding the employee seeking to schedule leave. Commenter 059 suggested that the Department allow an employer to appeal a schedule set by the Administrator following a finding that the claim of undue hardship is reasonable.

Round 1 Response to comments: In the second proposed rule, the Department added undue hardship as a reason an aggrieved party may seek an appeal.

Round 2 comment summary: Commenters 205 and 258 provided a positive comment that allows an appeal for the finding of unreasonable undue hardship.

Response to comments in round 2: The Department acknowledges the comments and makes no additional changes as a result.

Round 1 comment summary: Commenter 134 suggested that assessments imposed by the Department should be subject to appeal.

Round 1 response to comment: In the second proposed rule, the Department added that any fine or penalty imposed, including fines related to late or non-payment of premiums, may be appealed.

Round 1 comment summary: Commenters 178 and 198 encouraged the Department to allow an employee to file an appeal with the Department if the position they return to is not equivalent to the position before taking leave.

Round 1 response to comment: The Department did not make any changes in response to comments as this is outside the Department's authority to allow an appeal on this issue.

Round 1 comment summary: Commenters 160, 178, 181 and 198 commented or had a question regarding the right to appeal decisions made by employers with private plans. Commenter 181 suggested that an employee should first file an appeal though the process outlined by a private plan. Commenter 063 suggested to the Department to require employees in a private plan must first ask for reconsideration through the insurer before going to the Department.

Round 1 response to comment: In Section XIII.D.2.f., the Department set forth an internal reconsideration process as a minimum requirement for a determination of substantial equivalence, in order for a private plan to be approved. If the private plan upholds the denial of benefits after reconsideration, an individual can seek an appeal to the Department.

Round 1 Comment Summary: Commenters 139 and 196 encouraged the Department to affirm that employees have the same right to appeal a finding by the Department equal to what an employer has.

Round 1 response to comment: The rule provides appeal rights to an aggrieved party, which may be either the employer or employee. No further changes were made to the rule.

Round 1 Comment Summary: Commenter 275 encouraged the Department to create better access to allow hearings to be remote.

Round 1 response to comment: The rule provides that hearings may be conducted by telephone or by video conference. No changes are made to the rule, as none are necessary to address this concern.

Round 2 Comment Summary: Commenter 267 suggests the time period for filing an appeal be changed to 30 days. Additionally, the commenter asks the Department to clarify the date from which the deadline is measured and to add a good cause provision for any untimely appeal.

Round 2 response to comment: The Department did not change the timeframe in the final rule as the 15 day standard reflects an appropriate balance between the interests of workers, employers and administrative feasibility. The Department did clarify how the appeal time period is set consistently throughout the rule as 15 business days from the date the decision is issued. Further, the Department added a good cause provision in the interest of due process, incorporating the same good cause standard as used throughout the rule.

Round 2 Comment Summary: Commenter 267 suggests the rule be revised to make it clear that only employees can appeal benefits decisions, fraud determinations, and denials of a waiver of overpayment of benefits.

Round 2 response to comment: The Department made no changes since the rule is sufficiently clear.

Section XV(F) Notice of Hearing

Round 1 Comment Summary: Commenters 061,148, 164, 171 and 181 and 227 commented that 5 days' notice to relevant parties regarding any appeals that are question is insufficient and does not allow the parties time to prepare. The commenters suggested extending the notice of a hearing from 5 days to 15 days.

Round 1 response to comment: In the second proposed rule, the Department extended the notice to the parties from 5 days to 10 days balancing the interest of administrative efficiencies of the Department in processing appeals and the ability of all parties to prepare for an appeal.

Round 2 Comment Summary: Commenters 178 and 198 suggested to the Department to reinstate a prior provision of the proposed rule to allow a notice of appeal back to 5 days rather than 10 days. The concern was that employees may not be able to access benefits while they are waiting for an appeal.

Round 2 response to comment: The Department will retain the allowance of 10 days for notice of appeal to balance the interest of all parties.

Section XV(G)

Round 1 comment summary: Commenters 061, 148, 181 and 224 commented that the Administrator submitting documents to the Hearing Officer relating to the issue on appeal and any reconsideration decision 5 days in advance of the hearing is insufficient time. The commenters did recommend a time it should be extended for the Department's consideration.

Round 1 response to comments: In the second proposed rule, the Department modified the timeline of appeals to provide for documents be provided 5 days after notification as opposed to 5 days prior to hearing.

Section XV(I)

Round 1 comment summary: Commenter 164 commented that the Department does not provide information in the rule on when the parties that will be notified and suggested the employer also be notified of the decision made by the Department on items that were appealed.

Round 1 response to comment: The Department made no changes as it finds that rule is sufficiently clear that parties involved in the appeal will be notified of the outcome.

Round 1 comment summary: Commenter 061 suggested the rule set a time limit within which the decision must be issued.

Round 1 response to comment: The Department made no changes as the rule is sufficiently clear. The Department will issue decisions on appeals as expeditiously as possible, but declines to set a time limit.

Section XVI-Advisory Rulings (Section added in second proposed rule)

Factual and policy basis: This section is required under 5 M.R.S §9001(4) to establish a process for requesting an advisory ruling regarding the applicability of any statute or rule administered by the Paid Family and Medical Leave Program. In the second proposed rule, the Department added this section to the rule to comply with existing law on advisory rulings.

Section XVI(A)

Comments received in round 2: Commenters 061 and 257 offered a comment pertaining to the Advisory Rule section and expressed concern that advisory rulings offered by the Department may lead to binding decisions on employers without going through the formal rulemaking process. The commenters suggested this provision be removed.

Round 2 response to comments: The Department makes no change as a result of these comments as the Administrative Procedures Act requires a process for requesting an advisory ruling.

(f) **Department Finding**: In the final rule, the Department fixed a technical error and changed the word "Commission" to "Department."

General comments pertaining to Advisory Rulings:

Round 2 comment received: Commenter 168 offered several questions regarding the process for the Department to issue advisory rulings, regarding whether the rulings are made public, due process for the parties involved, and whether all parties involved in an advisory ruling must consent to a review. In addition, concern was expressed about the findings being made by the Department that do not provide due process considerations afforded to the parties involved in the matter.

Round 2 response to comment: The Department made no changes as this section complies with the requirements of the Administrative Procedures Act governing advisory rulings.

Round 2 comment received: Commenter 267 provided a positive comment regarding section XVI and encouraged the Department to retain all sections without changes.

Round 2 response to comment: The Department made no changes to this section in final rule.

Round 2 comment received: Commenter 311 offered a suggestion to the Department to amend all areas of this section this section to say "Advisory Opinions" rather than "Advisory Rulings" as it will be consistent with language used by the United States Department of Labor.

Round 2 response to comment: The Department uses the term "Advisory Rulings" because that is the term in Maine's Administrative Procedures Act.

Commenter Key[1][2]

Commenter #	Name	Organization
AC 1	No name provided.	No organization provided.
AC 2	No name provided	No organization provided.
AC 3	No name provided	No organization provided.
AC 4	No name provided	No organization provided.
AC 5	No name provided	No organization provided.
001	Brian Murph	Burger King
002	Gary Smith	Wealth Smith Financial Planning
003	Kevin Plowman	Plowman Construction
004	Tim (no last name provided)	No organization provided
005	Nicholas Consoles	The Financial Group
006	Sandra Brackett	RSU 14
007	Vanessa Bissell	Highroller Lobster Co
008	Dr. Christine Blake Smith	Portland West family practice
009	Michael D. Kapalan	UPS
010	Field Glover	Nichols Plumbing and Drain Cleaning
011	Jen Goddard	No organization provided
012	Linda Chisholm	No organization provided
013	Jen Horton	The Holy Donut
014	Jackie Curtis	No organization provided
015	Kelsey D	No organization provided
016	Brice Caswell	No organization provided
017	Suzanna Gallant	Lewiston Public Schools
018	Ted Pitas	American Carpentry Service
019	Kevin Platukis	Cross Insurance
020	Glenn Tulloch	Varney Benefits Advisors
021	Lucille Hood	Hood Farm LLC
022	Richard Hackel	No organization provided
023	Holly Roberts	York Region Chamber of Commerce
024	Grant Byras	Soleras Advanced Coatings
025	Stephanie Morse	United Insurance
026	Ramsey Lafayette	Norseman Resort
027	Mary Cote	Bowdoin College

[1] * In the commenter key indicates commenters unintentionally received two commenter numbers.

[2] Number 177 was not assigned to a commenter.

028	Jennifer Gosselin	No organization provided
029	Jeannine McDonald	Saddleback Ski ops
030	Stacey Lynn Morrison	Ganneston Construction Corp
031	Laurel J Bouchard	LBouchardLLC.com
032	Rebecca Vigue	ROS, LLC
033	Rhyne Robidoux	Ellsworth-Bucksport Dental Associates
034	Nicole Vachon	Kennebec Dental Excellence
035	Tracey Higgins	Ganneston Construction
036	Liz Allen	Roman Catholic Bishop of Portland, Maine
037	Maine Eye Center	Maine Eye Center
038	Kelly J Landry	Everett J Prescott, Inc.
039	Jill Rivas	Crooker Construction
040	Susan Norton	First National Bank
041	Gretchen Gardner	Brewer School Department
042	Christine Welch	Damariscotta Veterinary Clinic
043	Mark Zajkowski	Oral Surgery Associates
044	Russell Young	Russell Young LLC
045	Natasha Winslow	RSU 50
046	Gerry Ouellette	Maine Commercial Tire
047	Alanna Stetson	No organization provided
048	Alicia F Boulette	Quinn Hardware CO INC
049	Diana Nelson	Black Fly Media
*050	Christy Occhiena	Vertex Inc
051	Dale Carrier	Sea Dog Brew Pub South Portland
052	Tim Longstaff	National Distributors Inc.
053	Michelle Brackin	Biddeford and Dayton Schools
054	Raleigh Hudson	Obsidian HR
055	Rebecca J Kord	No organization provided
056	James Cox	Old Farm Christmas Place and Old Farm Store, LLC
057	Jade Stuart	No organization provided
058	Ryan (no last name provided)	No organization provided
059	Krysta West	Maine Forest Products Council
060	Jeff Austin	Maine Hospital Association
061	Patrick Woodcock	Maine State Chamber of Commerce
062	Lisa Harvey McPherson	Northern Light Health
063	Umberto Speranza	Unum
064	Amy Carson	D. A. Carson Carpentry Inc.
065	Lori Lefferts	Skills
066	Robin Saindon	Bangor Housing

067	Michael Allen	Winterport Boot Shop
068	Heather Perry	Gorham School Dept
069	Donna Cassese	Sappi
070	Rep. Austin Theriault	Maine Legislature
071	Kimberly Chonko	Kid O'Therapy LLC
072	Kurtis Mello	Lewiston
073	Robert L. Carey	Maine Bureau of Insurance
074	Charles Vadakin	No organization provided
075	Dana Guillereault	No organization provided
076	Tim Walton	CIANBRO
077	Stephen Lowit	Fabian Oil Inc
078	Tim Fitzgerald	Industrial Packing, Inc.
079	Emelle Ferland	Ganneston Construction
080	Paula Goode	Comfort Keepers
081	Jaimie Worster	Camden National Bank
082	James Bruen	No organization provided
083	Robin Wood	Reed & Reed, Inc.
084	Michelle Paules	Acadia Benefits
085	A Listener	No organization provided
086	Amy Bundt	Maine Special Education/Mental Health Collaborative
087	Kristy Kilfoyle	Camden Public Library
088	Anonymous	No organization provided
089	Lisa Horn	Province Automation
090	Kathleen Wade	No organization provided
091	Lauren Gallant	Eastern Area Agency on Aging
092	Fran Beaulieu	Town of Old Orchard Beach
093	Carol J Rand	WT Rand Transport LLC
094	Frank Kolovic	Sol Prop
095	Elaine Kantrowitz	ADP
096	David Paul Henry	No organization provided
097	Greg Soutiea	Craignair Inn by the Sea and The Causeway Restaurant
098	Dale Joyce	No organization provided
099	Jason Clay	Governor's Restaurant & Bakery
100	Kara George	Town of Thomaston
101	Shannon Ball	Paid Leave Oregon
102	Sarah Kramlich	Garmin International
103	Ann M Brett	Norway Savings Bank
104	Comment	No organization provided
105	Bobbie Kallner	University of New England
106	Kaitlynn Bonne	Mutual of Omaha

107	Jennifer Fleck	Knitwit Yarn Shop
108	T Brooks	UK
109	Cori Cantrell	Maine State Parent Ambassador
110	Shauna MacDonald	Machis Savings Bank
111	James Robbins	Robbins Lumber
112	Laurie Skalski	Spectrum Healthcare Partners
113	Tim Robinson	Drover True Value
114	Gina Rutledge	MetLife
115	Paid Family and Medical Leave Benefits Authority	No organization provided
116	Kate Dufour	Maine Municipal Association
117	Heather Ulmer	No organization provided
118	Stacy Mannke	Assistance Plus
119	Casey Cramton	Dead River Company
120	Aspen Ruhlin	Mabal Wadsworth Center
121	Michael Christensen	No organization provided
122	Maria Fox	Murray Plumb & Murray
123	Interested Party	No organization provided
124	Abigail OConnell	Sun Life
125	Kimberly Simmons	No organization provided
126	Wendy Estabrook	L.L.BEAN
127	Jason Lowit	Maine Radiator
128	Stacy Andrews	Motivational Services
129	Lacey Donle	No organization provided
130	Marysol Negretti	Wright-Pierce
131	Melanie Tinto	WEX
132	Alice Olcott	No organization provided
133	Lindsay Bourgoine	Revision Energy
134	Eamonn Dundon	Portland Regional Chamber of Commerce
135	Nacole Palmer	Maine Gun Safety Coalition
136	Jennifer Buckingham	Northeast Society for Human Resource Management
137	Tim Graham	National Association of Professional Employer Organizations
138	Lori Welty, Patricia Zuniga	FINEOS
139	Lauren Jacobs	No organization provided
140	Catherine Buxton	Peer Workforce Navigator Project
*141	Christy Occhiena	Vertex Inc
142	Rose Barboza	Black Owned Maine
143	Kimberly Jenkins	Hollywood Casino Hotel & Raceway
144	Constance Adler, MD	Grandmothers for Reproductive Rights

145	Sen. Mattie Daughtry and Rep. Kristen Cloutier	Maine [34] Legislature
146	Unicorn LLC	CFO Accounting
147	Meghan Gardner	No organization provided
148	Nicole Pellenz	Maine Water Utilities Association (MWUA)
149	Adam Bloom-Paicopolos	Alliance for Addiction and Mental Health Services, Maine
150	Lisa Roye	OHI
151	Josie Phillips	No organization provided
152	Vivian Walls	Walls TV and Appliance
153	Michael Allen	Maine-ly Red Wing Inc.
154	Mary Cote	Bowdoin College
155	Interested Party	No organization provided
156	Amy Madge	No organization provided
157	Dana Doran	Professional Logging Contractors
158	Samantha Paradis	No organization provided
159	Katrina Meade	Wright-Pierce
160	Pete Plummer	Woodfords Family Services
161	Christopher Babigian	PrismHR
162	Jessica D Linzer	No organization provided
163	Gary Friedmann	No organization provided
164	Katie Fulham Harris	Maine Health
165	Bill Thornton	Thornton Bros
166	Kurt Shoemaker	NPRC
167	Lisa Margulies	Planned Parenthood of Northern New England
168	Sarah Montgomery	ACLI
169	Maria McCabe	Legal Momentum
170	Marya Goettsche Spurling	No organization provided
171	Cathy Callahan	Mardens
172	Christine Watson	No organization provided
173	Susan Wood	State Sand and Gravel
174	Jill M McKenney	Brighter Heights Maine
175	Todd Goodwin	John F. Murphy Homes, Inc.
176	Kim Daigle	CU Insurance Solutions
178	Adam Goode	Maine AFL-CIO
*179	Melissa Martin	MECASA
180	Laura L Cordes	MACSP (Maine Association for Community Service Providers)
181	Daris Freeman	Unum

182	Melinda Ward	OHI
183	Tim Curtis	Somerset County
184	Tania Gardiner Hassard	Gardiner Eyecare
185	Gia Drew	Equality Maine
186	Gregory Nemi	No organization provided
187	Barbara Lovejoy	Elevator Evolution, LLC
188	Ben Hawkins	Maine Health Care Association
189	Elise Baldacci	Maine Credit Union League
190	Darryl Wood	LEAP, Inc.
191	Ryan Gallant	Gallant Therapy Services
192	Kim McLaughlin	Independence Advocates of Maine
193	Heidi Mansir	Uplift, Inc.
194	Fawn Palmer	Hope Association
195	Evan LeBrun	Mainers for Working Families
196	Preston Van Vliet	Family Values At Work
197	Chantel King	Danforth Habilitation Association
198	Grace Leavitt/Jan Kosinski	Maine Educational Association
199	Sara Ratcliffe	Home Care & Hospice Alliance of Maine
200	Deborah Petrin	No organization provided
201	Melinda Kinney	Martin's Point Health Care
*202	Amanda Johnson	Somic America Inc.
203	Cheryl (no last name provided)	No organization provided
204	Tim Walton	Maine Aggregate Association
205	Cate Blackford	Maine Peoples Alliance
206	Jovin Bayingana	Quality Care Access LLC
207	Rep. Michael Sobolski	Maine Legislature
208	Emily Follo	No organization provided
209	Jill M McKenney	Brighter Heights Maine
210	Stella Frank	Twomin, LLC
211	Lisa Willette	Legends Residential Care
212	Kate Emery McCarthy	Birth Roots
213	Dianne L. Cote	Personal Onsite Development
214	Grace Daphnia	Southern Maine Worker's Center
215	Sydney Avitia-Jacques	Southern Maine Worker's Center
216	Dorothea Kerry	Maine Chapter, American Academy of Pediatrics
217	Curtis Picard	Retail Association of Maine / Maine Grocers and Food Producers Association
218	Debora Riley	State Sand & Gravel, Inc.
219	Bre Danvers-Kidman	MaineTransNet
220	Lynn Augustine	Creative Options

221	Ronny Flannery	Southern Maine Worker's Center
222	Erin Dodge	No organization provided
223	Ruby Parker	AARP
224	Jon Fitzgerald	BIW
225	Rita Furlow	Maine Children's Alliance
226	Kathy Kilrain del Rio	Maine Equal Justice
227	Dominik Kolodziejczyk	ShelterPoint Life Insurance Company
*228	Melissa Martin	Maine Coalition Against Sexual Assault
229	Brendan M. Wolf	Woodland Pulp, LLC
230	Jeffrey Neil Young	Solidarity Law
231	Tim Ouellette	No organization provided
232	James Myall	Maine Center for Economic Policy
233	Patricia Rumsey	Androscoggin Bank
234	Brenda Alden	No organization provided
235	Janet M Duncan	No organization provided
236	Lili Simmons	No organization provided
237	Susan Morrison	No organization provided
238	Rachel P. Riendeau Caughey	Southern Maine Workers Center
239	Sarah Tewhey	Maine Doula Coalition
240	Timothy Ouellette	No organization provided
241	Jack Bjorn	Eaton Peabody
242	Bridget Sakowski	No organization provided
243	Robert Swindlehurst	Commonsense Housing
244	Sally Wagley	No organization provided
245	Andrea Mancuso	Maine Coalition to End Domestic Violence
246	Olivia Pennington	Maine Family Planning
247	Andrew (No last name provided)	No organization provided
248	Kendra Amaral	Town of Kittery
249	David Clough	Maine Staffing Association
250	David Clough	NFIB Maine
251	Matthew Wellington	Maine Public Health Association
*252	Amanda Johnson	Somic America, Inc.
253	Ruben Torres	Maine Immigrants' Rights Coalition
254	Paul R. Wainman	Hancock Lumber Company, Inc
255	Brianna Keefe-Oates, PhD	No organization provided
256	Leigh Ann Snyder	Kennebec Behavioral Health
257	Nate Cloutier	Hospitality Maine
258	Catie Reed	Maine Paid Leave Coalition
259	Jill Walsh	Haley Ward, Inc.

260	Alexander Price	Maine Jobs Council
261	June Tait	Scarborough Physical Therapy
262	Glenn Adams	Sargent Corporation
263	Bridget Quinn	AARP Maine
264	Adelia Soremekun	The Jackson Laboratory
265	Ray Nagel	Independence Association
266	William Fletcher	Maine Community College System
267	Cassandra Gomez	A Better Balance
268	Destie Hohman Sprague	Maine Womens Lobby
269	Elizabeth M Wilkins	No organization provided
270	Sarah Marble	The Guardian Life Insurance Company of America
271	David G Cole	American Forest Management, Inc.
272	Joshua Steirman	Maine Bankers Association
273	Annie Watson	Maine Dairy Industry Association
274	Ashley Bjornson	Waypoint Maine
275	Nat Baldino	The Center for Law and Social Policy (CLASP)
276	Thomas Brown	Automobile Dealers Association INC
277	Scott Ferguson	Maine County Commissioners Association/ Maine Association of County Clerks, Administrators, Managers
278	Debbie Laurie	City of Bangor
279	Aimee Adams	Home, Hope and Healing
280	Andrew Blanchard	Hamilton Marine Inc.
281	Lynne Choate	Cives Steel Co New England
282	Christopher Hyfield	Prescott Metal, Inc
283	Rosalie Grondin	Northwood Manor
284	Kerry Hoyt	Site Structures Landscape
285	Catherine Teixeira	No organization provided
286	Steven Knowlton	Northeast Truck
287	Sherry Moody	Mid-Coast School of Technology
288	Chris Cluff	Paper Trails
289	Al Michel	No organization provided
290	Leah Johnson	No organization provided
291	Mary Sedlock	No organization provided
292	Colby Morrell	Uniship Inc.
293	Donna Zdanis	Downeast Community Partners
294	Carrie Kipfer	Lincoln County Government
295	Shad Hall	No organization provided
296	Todd MacDonald	No organization provided
297	Zip Weeman	Maine Conveyor Inc.
298	Corey Staples	Diesel Fuel Systems
299	Mark Curtis	Gorham Sand & Graval, Inc.

300	Kevin Stine	PTE Precision Machining
301	Amanda Linton	Edgar Clark & Sons Inc.
302	Robert Fogg	Q-Teams, Inc.
303	Julie Schafer	2 Unique LLC
304	Daniel Morris	Kennebec Equipment Rental
305	Timothy C Dumont	KennebecBuilders Inc.
306	Karlene Maine	Heartwood Kitchen & Bath
307	Shirlene Lindsey	Town of Dixmont
308	Tanya Philips	Blethen Tax & Accounting Inc.
309	Tracey Benson	Paws Applause
310	Ashley Sabine	No organization provided
311	Michelli Rivera	Alliant Insurance Services
312	Terence K. Gray, DO	Maine Comprehensive Pain Management, PC
313	Donald Curtiss	No organization
314	Jed Whiting	Stratton Lumber Inc
315	Eleanor Villforth	No organization provided
316	Jeffery Adams	No organization provided
317	Ann Harris	No organization provided
318	Scott Beauregard	Kyocera-AVX
319	Shaun Donnelly	No organization provided
320	Jennifer Belanger	No organization provided
321	Patrick Driscoll	Driscoll Diesel LLC
322	Mandy Rae Fitzgerald	No organization provided
323	Amy Larkin	No organization provided
324	Audra Cowperthwaite	No organization provided
325	Cassie Nedwell	No organization provided
326	Shauntez Williams	No organization provided
327	Julia Fusari	Tyler Technologies, Inc
328	Courtney Chasse	Hope and Justice Project
329	Rebecca Austin	Safe Voices
330	Laurel Tarbell	No organization provided
331	Amanda Cost	Partners for Peace
332	Emily Follo	No organization provided
333	Emily Ingwersen	Ginger Hill Design + Build
334	Marty Wilson	No organization provided
335	Ella Cressy	Town of Denmark
336	Rebecca Laliberte	Mount Pleasant Dental Wellness
337	Tobin Williamson	No Organization
338	Joya Maynard	Waldo County Technical Center
339	Belyse Ndayishimiye	No organization provided
340	Liz Kovarsky	No organization provided

341	Jeff Toorish	No organization provided
342	Natalie Allen	No organization provided
343	Katheryn Casale	No organization provided
344	Joan Bromage	No organization provided
345	Thom Courtney	No organization provided
346	Judith Sides	No organization provided
347	Katharine Man	No organization provided
348	Laurent And June Hourcle	No organization provided
349	Otrell Mcdaniel	No organization provided
350	China McHold	No organization provided
351	Rania Campbell-Bussiere	No organization provided
352	Maxine Collins	No organization provided
353	Kathleen Conrad	No organization provided
354	Gwendlyn DeYoung-Reynolds	No organization provided
355	Anna Dembska	No organization provided
356	Helen Boucher	No organization provided
357	Katherine Charbonneau	No organization provided
358	Steve Linnell	No organization provided
359	Samuel Dahlin	No organization provided
360	John and Elizabeth Reinsborough	No organization provided
361	Kathryn Bourgoin	No organization provided
362	Elizabeth Park	No organization provided
363	Olivia Simpson	No organization provided
364	Gloria Clarke	No organization provided
365	Catherine Barnes	No organization provided
366	Christopher Proulx	No organization provided
367	Lynn Kovitch	No organization provided
368	Joseph Mailey	No organization provided
369	Cathy Roberts	No organization provided
370	Thomas Chase	No organization provided
371	Cindy Julian	No organization provided
372	Eleanor Weisman	No organization provided
373	Sara Wilder	No organization provided
374	Judy O'Keefe	No organization provided
375	Kelly Rand	No organization provided
376	Christy McCaw	No organization provided
377	Sarah Baker	No organization provided
378	Jonathan Hopps	No organization provided
379	Nikki Williams	No organization provided

380	Sara Fawcett	No organization provided
381	Almyra Hornberger	No organization provided
382	Stephen Beckett	No organization provided
383	Jennifer McCann	No organization provided
384	David Travers	No organization provided
385	Robert Bushover	Bushover's Biologicals
386	Diane Fitzgerald	No organization provided
387	Fred Kimball	No organization provided
388	Jane Wesinstein	No organization provided
389	Rina Rengouwa	No organization provided
390	Lili Joseph	No organization provided
391	Deb Williams	No organization provided
392	Susan McGovern	No organization provided
393	Anna-Sophie Poost	No organization provided
394	Kermit Smyth	No organization provided
395	Deirdre Smith	No organization provided
396	Lindsay Pesner	No organization provided
397	Erin Daly	No organization provided
398	Dillon Clair	The ERISA Industry Committee
399	Heather Spalding	Maine Organic Farmers and Gardeners Association
400	Carrie Mead	No organization provided
401	Karin Vannostrand	No organization provided
402	Virginia Lopez-Anido	No organization provided
403	Nancy Earle	No organization provided
404	Jeremiah Stevens	No organization provided
405	Sonja Gerken	No organization provided
406	Kate Beever	No organization
407	MaryAnn Larson	No organization provided
408	Daniel W. Walker	Maine Independent College Association
409	William Brewster	No organization provided
410	Gail Shields	No organization provided
411	Ellie Autumn	No organization provided
412	Kristen Erickson	No organization provided
413	Cass Barnard	No organization provided
414	Julia Ruth	No organization provided
415	Roger Pierce	No organization provided
416	Chris Fontes	No organization provided
417	Sam Feldman	No organization provided
418	Nan Smith	No organization provided
419	Jennifer Reynolds	No organization provided
420	Phil Bailey	No organization provided

421	Cassidy Jones	No organization provided
422	Gary Mcgrane	No organization provided
423	Kate Mcpherson	No organization provided
424	Brenda Cartwright	No organization provided
425	Christine Bennett	No organization provided
426	Beverly Feldt	No organization provided
427	Harlan Baker	No organization provided
428	Janice Kendrick	No organization provided
429	Jan Baker	No organization provided
430	Andres Llorente	No organization provided
431	Ivy Moser	No organization provided
432	Martin Lang	No organization provided
433	David Jolly	No organization provided
434	Adrienne Powers Johnson	No organization provided
435	Christopher McKinnon	No organization provided
436	Jessica Eller	No organization provided
437	Jane Scease	No organization provided
438	Shyla B Yerxa	No Organization
439	Savannah Mirisola-Sullivan	No organization provided
440	Sam Tracy	No organization provided
441	Jacob Gamache	No organization provided
442	Susan Feiner	No organization provided
443	Sandra Phoenix	No organization provided
444	David Wadstrup	No organization provided
445	D Gordon Mott	No organization provided
446	Dean Corner	No organization provided
447	Mary Duffy	No organization provided
448	Jeffery Reynolds	No organization provided
449	Steve Bailey/Eileen King	Maine School Boards Association/Maine School Superintendents Association
450	Stephen Lumbra	Lumbra Hardwoods Inc.
451	John Minahan	No organization provided
452	Victoria Bernard	No organization provided
453	Marianne OConnor	No organization provided
454	Joan Richert	No organization provided
455	Amy Larkin	No organization provided
456	Michael Fasulo	No organization provided
457	Hamda Ahmed	No organization provided
458	Deborah Showalter	No organization provided
459	Randi Smith	No organization provided

460	Peg Hoffman	No organization provided
461	Daniel Faraone	No organization provided
462	Kevin Sullivan	No organization provided
463	Linda West	No organization provided
464	Susan Barnard	No organization provided
465	Robin Steinwand	No organization provided
466	Annie Ropeik	No organization provided
467	Janet Kuech	No organization provided
468	Noreen Mullaney	No organization provided
469	Robert Gordon	No organization provided
470	Anne Keith	No organization provided
471	Betsy Oulton	Maine Local Government Human Resources
472	Kaitlyn Payne	No organization provided
473	Valerie Lovelace	Chaplaincy Institute of Maine
474	Jeannie Tapley	Maine Potato Board
475	Ben Roberts-Pierel	No organization provided
476	James McCoy	No organization provided
477	Ian-Meredythe Lindsey	Majesco
478	Mary Ellen Randall	No organization provided
479	Lucy Atkins	No organization provided
480	Brad Sherwood	No organization provided
481	Bryan Wells	No organization provided
482	Stacie Field	RSU 16
483	Dorothy Lippencott	No organization provided
484	Jan Wilkinson	No organization provided
485	Leah Kovitch	No organization provided
486	Susan D'alessandro	No organization provided
487	Patrick Eisenhart	No organization provided
488	Ed Hunt	No organization provided
489	Layne Gregory	No organization provided
490	Judith Long	No organization provided
491	Valerie Dornan	No organization provided
492	Brien Carleton	No organization provided
493	Janet Clough	No organization provided
494	Connie Netherton	No organization provided
495	Tim and Theresa Burch	No organization provided
496	Sidney Pew	No organization provided
497	Susan Drucker	No organization provided
498	Rori Knott	No organization provided
499	Vanessa Newman	No organization provided
500	Shawne McCord	No organization provided

501	Vanessa Erickson	No organization provided
502	Donna Blanchette	No organization provided
503	Scott Ballard	Maine Health

MAINE STATE CHAMBER of COMMERCE

Comment #C1 - PH

EXHIBIT 3

TESTIMONY OF PATRICK WOODCOCK
PRESIDENT AND CEO OF THE MAINE STATE CHAMBER OF COMMERCE
PROPOSED RULES FOR MAINE'S PAID FAMILY AND MEDICAL LEAVE
JUNE 10, 2024

Commissioner Fortman, Director Monahan, and Deputy Director Parson, my name is Patrick Woodcock, and I am President and CEO of the Maine State Chamber of Commerce. Thank you for allowing comments to address the proposed rules for the Paid Family and Medical Leave law that was passed in 2023. The Maine State Chamber of Commerce and the entire business community looks forward to collaborating with the Maine Department of Labor to make a PFML program work for employers and employees alike. While the Maine State Chamber has many concerns with this proposed rulemaking which will be submitted in writing before the July 8th deadline, I would like to raise three major concerns during the timeframe allotted today.

One of the major concerns the Maine Chamber of Commerce has with the proposed is the place Private Plans have within these proposed rules, specifically the Private Plan timeline in relation to declarations and contributions. Within the proposed rules, Private Plan declaration would start on January 1st, 2026, with plan approval by the Maine DOL being no earlier than April of 2026. The impact of that timeline is catastrophic for employees and employers who were not anticipating being subject to these contributions given the legislative discussions, the process in other states, and based on the basic logic that this program would not be punitively funded by those very employers and employees who have developed their own paid family and medical leave program.

Specifically, the results from this proposal is that for 16-20 months both employers and employees will pay into a fund that they will not receive the benefit of if the employer elects to seek a private plan from the start. The fiscal burden on these businesses and employees can result in millions of dollars in tax. The Chamber requests that in order to alleviate the unnecessary burden, the Maine DOL rules mirror what Massachusetts, Connecticut, and Oregon developed in implementing their programs. In all three states, there was a period during the implementation that allowed "declarations" effectively an assertion from an employer to opt out before contributions started. We suggest that Maine follows suit, having private plan declaration start prior to January 1, 2025 and ideally on October 1st, 2024 to allow employers and employees alike to avoid a tax for a plan they may never receive benefit.

The second concern the Chamber has is that the proposed Rules outlining the Undue Hardship provision is not only in contradiction with the statute. The statute states "Use of such leave must be scheduled to prevent undue hardship on the employer as reasonably determined by the employer." As outlined in the proposed rules, the Department states that the burden of proof to prove that there is undue hardship. The plain reading of the statute is that it is the business that makes this determination – not the DOL. We recommend that DOL completely overhaul this

section to be compliant with the law. Specifically, there should be enumerated reasons for businesses to be able to reasonably assert hardship, including, but not limited to, 1) Specialized Role at the Company; 2) Ability to Find Substitute Employee if Unemployment Rate at or below 5 percent in the County of the employee; and 3) Seasonal Worker from June-August.

The third concern the Chamber is raising today is the issues within Section VII, which involves the notification. Based on the proposed rules, there is only a notification to the employee of the acceptance or denial of benefits and does not include the employer. This opens up the potential for miscommunication and potential fraud if there is not transparent communication to both the employee and employer. Ideally, this notification would come from the 3rd party administrator, which would ensure the benefit has been accepted and is legitimate. In conjunction, proposed language also states the department "may" demand repayment by the employee if there is a misuse, abuse, or fraud of the program. There should be repayment of any fraud of the program to protect the integrity of the program. The DOL should include clear and concise guidelines to notify employers along with employees and make repayment back into the fund mandatory.

As stated previously, the Maine State Chamber of Commerce and the rest of business community wants to be collaborative in this rule making process to ensure both the employers and employees can utilize methods of leave that accommodates the childcare and medical care of family and loved ones. We do think that Maine can successfully implement a PFML that works for those employees, and works for the Maine business community.

MAINE
STATE
CHAMBER
of
COMMERCE

EXHIBIT
4

The voice of Maine business

July 8, 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 proposed rules relating to the Maine Paid Family and Medical Leave ("PFML"). The Maine Chamber of Commerce is a statewide organization consisting of more than 5,000 small and large businesses and is the largest employer group in the state 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 implement this program under significant time pressure with financial contributions commencing in less than six months. At the same time, as outlined below, the Maine State Chamber of Commerce believes the rules must be overhauled to be consistent with the statute and there are numerous areas in the proposed rules that require clarification. Specifically, the utilization of private plans for compliance, a major discussion point during the legislative process and integral to other state plans, is subverted by the rules that will cause enormous financial hardship in a matter of months on businesses and employees alike. Furthermore, the hardship provision is inconsistent with the statute by undercutting a key role of the employer in determining a reasonable hardship. These two provisions are fundamental to the Maine PFML statute and must be overhauled in the rules.

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 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 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...*
>
> *4. An approved substitution shall take effect on the first day of the first quarter following approval of the application. The employer is responsible for premiums provided under the Act and this rule until the effective date of substitution." (Sec. XIIIA1,2,4 emphasis added).*

The proposed rule on employer substitution of private plans 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 delays the submission of applications for private plans until January 1, 2026 and further delays the approval of private plans until April 1, 2026 or beyond. The proposed rule, in effect, requires employers to remit premiums to the fund for at least 15-18 months 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 15–18 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 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.

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)). The analysis of the Takings Clause is the same under both the Maine and United States Constitutions. *Bell v. Town of Wells*, 557 A.2d 168, 177 (Me. 1989).

In the proposed rule, 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 15-18 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).

Courts have recognized that "[a] governmental body has an obvious interest in making those who specifically benefit from its services pay the cost...." *Massachusetts v. United States*, 435 U.S. 444, 462 (1978). As such, "a reasonable user fee is not a taking if it is imposed for the reimbursement of the cost of government services." *United States v. Sperry Corp.*, 493 U.S. 52, 63 (1989). Under the proposed rule, all employers are required to remit premiums to the Fund regardless of whether they ever use or benefit from the Fund. Thus, on its face, the proposed rule runs afoul of the Takings Clause.

In contrast, under the statute, the Administrator (Section 850-A(1)) is tasked with determining the amount it expends on the administration of private plans on an annual basis. Employers offering private plans will then be required to reimburse the Administrator for the costs of administering those private plans and the Administrator will transfer those payments to the Fund. Section 850-H(7). This provision is not subject to constitutional challenge because it is merely a reimbursement of the cost of government services.

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." *Armstong 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." *Sperry Corp.*, 493 U.S. at 60. 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 United States Supreme Court has repeatedly found unconstitutional takings where a targeted exaction bears no reasonable relationship to the service or benefit the government seeks to fund. *See, e.g., Webb's*, 449 U.S. at 163 (holding county clerk's retention of interest on an interpleader fund was an unconstitutional taking where the exaction was "not reasonably related to the costs of using the courts"); *Brown v. Legal Foundation of Washington*, 538 U.S. 216, 235 (2003) (holding that requirement to pay interest on attorney IOLTA accounts to foundation providing legal services to the needy was an unconstitutional taking).

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.

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). The analysis of the Equal Protection Clause is the same under both the Maine and United States Constitutions. *State v. Chapin*, 610 A.2d 259, 261 (Me. 1992); *Blount v., Dept. of Educational and Cultural Services*, 551 A.2d 1377, 1385 (Me. 1988).

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.

According to the tenets of the equal protection clause, "all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985). Importantly, "[t]he Equal Protection Clause safeguards not merely against such invidious classifications as race, gender and religion, but any arbitrary classification of persons for unfavorable governmental treatment." *Hayden v. Grayson*, 134 F.3d 449, 453 n. 3 (1st Cir. 1998); *see also, e.g., Alleghony Pittsburgh Coal Co. v. Cty. Com'n of Webster Cty., W. Va.*, 488 U.S. 336, 345 (1989) ("The equal protection clause...protects the individual from state action which selects him out for discriminatory treatment by subjecting him to taxes not imposed on others of the same class."). Like the Takings Clause, the Equal Protection Clause requires a

rational relationship between the classification at issue and the end the government seeks to achieve. *Plyler v. Doe*, 457 U.S. 202, 216 (1982); *Pearson v. Fair*, 935 F.2d 401, 411 (1st Cir. 1991). In addition, the relationship of the classification to its goal cannot be so attenuated as to render the distinction arbitrary or irrational. *Cleburne*, 473 U.S. at 446. In other words, when the government singles out a class of individuals for unfavorable governmental treatment, it must have a legitimate basis for doing so.

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.

The Department has expressed concern about appropriately financing the Fund. In fact, there is a statutory mandate to conduct an actuarial study of the solvency of the Fund by February 1, 2026. Section 850-P. This is certainly an appropriate governmental concern and a legitimate basis for exploring other funding options or ways to reduce or eliminate costs associated with the Program. However, this concern is not a legitimate basis for forcing a group of employers who will not use or benefit from the Fund to foot the bill.. To the extent that the proposed rules are intended to discourage private plans by making them financially disadvantageous, such intent only serves to underscore that the proposed rules exceed the Department's authority and are constitutionally invalid.

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. The concept and analysis of substantive due process are the same under both the Maine and United States Constitutions. *Penobscot Area Housing Development Corp. v. City of Brewer*, 434 A.2d 14, 24 n. 9 (Me. 1981); *Mahaney v. State*, 610 A.2d 738, 742 n. 4 (Me. 1992).

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). Although the government has a fair amount of latitude when it comes to economic regulation, due process demands a "'reasonable fit between governmental purpose ... and the means chosen to advance that purpose.'" *Reno v. Flores*, 507 U.S. 292, 305 (1993); *Concrete Pipe and Products v. Construction Laborers Pension Trust, 508 U.S. 602, 641 (1993).* 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. 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

1. Section V-Notice and Undue Hardship

a. *"An employer claiming an undue hardship with respect to the scheduling of foreseeable leave has the burden to prove the undue hardship. '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 not be considered reasonable unless the following are established:*

1. The employer provided a written explanation of the undue hardship to the employee;

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, subject to the approval of the employee's health care provider." (Sec. VC5)

The 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 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 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 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).

b. *"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." (Sec. VD)*

This provision also 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 as set out in subparagraph C. 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).

In addition to being contrary to the statute, subparagraph VD renders subparagraph C completely obsolete. There are situations where a requested leave could result in an undue hardship regardless of how much advance notice is provided. Notice does not negate undue hardship, and the statute does not support the conclusion that it does.

c. *"In reviewing whether the employer's determination of an undue hardship was reasonable, all facts and circumstances surrounding the determination shall be considered by the Department pursuant to the process set forth in Section VI of this Rule. The following is a non-exhaustive list of factors that may be considered:*

1. The nature and extent of the claimed undue hardship and its impact on the employer;

2. The nature of the impact of the claimed undue hardship on the employee;

3. The size of the employer;

4. The nature of the industry involved;

5. Any employer policies relating to use of leave, scheduling of leave and/or notice;

6. The amount of notice provided by the employee;

7. If less than 30 days' notice was provided by the employee, any facts relating to the lack of reasonable notice;

8. The nature and extent of attempts that were made between the employee and employer to schedule the leave so as to avoid the undue hardship;

9. Whether the employer provided notice to the employee of the ability to apply for paid family and medical leave at or about the time the employee gave the employer notice of their intent to schedule leave for a qualifying reason." (Sec. VE)

This section is also completely unsupported in and conflicts with the statute. There is no statutory authority for the Department to second guess an employer's finding of undue hardship. Moreover, the complexity of the process and criteria outlined completely eviscerate the ability to use an undue hardship defense.

In addition to being contrary to the statute, Section 5, 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 completely re-written 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; and 3) the employee is a seasonal worker taking leave from June-August.

Ultimately, a more effective solution is to pass a statutory amendment that removes 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 TDITCI (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. 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 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. IA5)*

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 VIIID4c), 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. IA9)*

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.

The proposed rule defaults to a 40-hour schedule for all "salaried" employees. The term "salaried" is vague and can mean different things to different employers. Many employers have salaried non-exempt employees (although they pay overtime if the employee works more than 40 hours in a week). If the intent is to refer to employees who are exempt from the overtime requirements of the Fair Labor Standards Act, that should be clearly stated to avoid confusion. The proposed rules should also include an exception for part-time exempt employees. An employee's scheduled workweek should not default to 40 hours if they work less than 40 hours. This change would be consistent with the approach taken by other paid family and medical leave programs.

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. IA22)

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 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, some employers may not respond if the employee is part-time since the employer will know that more time will come out of the entitlement than should be deducted.

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." (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. A 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 potentially qualifying under ME PFML, particularly for employees who are eligible for job protection under the law. We recommend amending this requirement to align to the FMLA, which permits an employer to require an employee to comply with the employer's usual and customary notice requirements, provided there are no extenuating circumstances preventing the employee from doing so.

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 leove 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 haurs 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 haurs." (Sec. IIIB5)*

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. *"The 12 weeks of aggregate leave taken under this Act may be reduced by any leave taken under 29 U.S.C. § 2611 or leave under 26 M.R.S. § 844 that was not taken concurrently with leave under this Act, except that time taken under 29 U.S.C. § 2611 or 26 M.R.S. § 844 prior to May 1, 2026 will not result in such a reduction.: (Sec. VIB2)*

The statute provides that "Leave taken under this subchapter *runs concurrently* with leave taken under the federal Family and Medical Leave Act of 1993, 29 United States Code, Section 2611, et seq., and under subchapter 6-A." Section 850-B (11) (emphasis added). Since the statutory scheme requires ME PFML to run concurrently with FMLA and ME FMLA, the language of this proposed rule should be changed to align with the statute and clearly indicate that the ME PFML entitlement "will" run concurrently with FMLA and ME FMLA instead of "may" run concurrently. That will be advantageous for employers and employees since it will be more precise and will set appropriate expectations for employees.

The rule should also be clarified to confirm the statutory intent that even if an employee does not file for ME PFML, leave under FMLA and ME FMLA for a qualifying reason will count against the ME PFML entitlement. Moreover, the process for getting information to the department about qualifying leave that was taken should be clarified and applied consistently in order to prevent impermissible stacking of leave. Massachusetts has a similar provision, and employer feedback suggests that the state has been very inconsistent in applying the provisions relating to other forms of leave that should be deducted from the MA PFML entitlement.

The Department should also clarify the impact of leave taken for a qualifying reason by employees who are either not eligible for or who have exhausted FMLA or ME FMLA. For example, if an employer provides a 12-week paid parental leave for an employee with 6-months tenure, the employer should get "credit" for providing that leave and be allowed to count it against ME PFML if the employee refuses to file for ME PFML benefits. A contrary result may lead employers to refrain from providing benefits to employees that are not legally mandated if the employee will be allowed to stack those benefits with ME PFML.

2. *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. (Sec. VIB3)*

During Authority meetings, there has been discussion of increasing the number of affinity relationships beyond one per benefit year. To do so would exceed 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.

The final rules should also clarify when and how an employee designates an affinity relationship and outline a process to be followed if an employer doubts the validity of a leave request to care for an individual who is alleged to be an affinity relationship. Although Section VI specifies that the employee must provide information designating an affinity relationship when the application for leave is filed, it does not indicate the type of information that must be provided or whether there are any limits to the ability to designate someone as an affinity relationship. Employees should be required to attest to the relationship so that if the employer discovers that the employee engaged in fraud, there is a record memorializing what the employee indicated.

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.

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

1. *"Requested information and documentation may include, as applicable to the type of leave requested... Proposed scheduling of leave, including the first day of missed work and the expected duration of leave..." (Sec. VIA6)*

The proposed regulations do not specify how the department will obtain information regarding whether the employee gave appropriate notice of the need for leave to the employer, as well as whether the employee worked with the employer to agree on an intermittent/reduced schedule. The final rules should address both of these issues.

2. *"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. 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).

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 in the week." (Sec. VIIIC1)*

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.

2. *"For any week in which a covered individual is on family leave or medical leave, the covered individual's Weekly Benefit Amount must be reduced by the amount of wage replacement that the*

covered individual receives from a government program or law, including but not limited to unemployment insurance, workers compensation, other than for compensation received under 39-A M.R.S. § 213 for an injury that occurred prior to the family leave or medical leave claim, and other state or federal temporory or permanent disability benefits laws, or from an emplayer's permanent disability program or policy for the same week." (Sec. VIIIC1)

The term "employer's permanent disability program or policy" is not defined. This needs to be clarified and defined.

3. *"The cavered individual's Weekly Benefit Amount is not subject to reduction by any of the fallowing:*

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. VIIIC2)

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 X-Premiums

1. *The employer size for the purposes of determining premium liability for calendar year 2025 is determined by the number of covered employees employed for the employer in the State of Maine on October 1, 2024. The number of employees includes full-time, part-time, seasonal employees and temporary employees. On October 1, 2025, and October 1 of each year thereafter, the employer shall calculate its size for the purpose of determining premium liability for calendar year 2026 and each calendar year thereafter. (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. The term "temporary employee" is not defined. The term should be defined to exclude temporary employees employed through an employment agency since those employees are maintained on the payroll of the agency, counted by the temporary agency for purposes of the agency's premium liability and provided benefits through their employment with the agency.

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 following the close of the quarter shall be assessed a penolty 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.

J. Section XIII-Substitution of Private Plans

1. *"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. XIIIA6)*

The term "material change" is too broadly defined. The final rules should provide more clarity regarding how the term will be interpreted.

2. *"An employer with an approved substitutian must submit to the Department cantribution reports for each employee on a quarterly basis online, pursuant to section X of this rule of this rule." (Sec. XIIIA10)*

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) af this Rule need not be met..." (sec. XIIID2)

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. XIIID3)

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.

K. Section XV-Appeals

1. *"A Notice of Hearing must be issued to the appealing party, and to the extent applicable, the covered employee, the employer and the Administratar at least five (5) business days before the date of the hearing.*

G. The Administrator must submit documents to the Hearing Officer relating to the issue on appeal and any reconsideration decision 5 days in advance of the hearing. Such documents shall be provided to all parties. The Administrator is not required to appear at the hearing, unless directed to appear by the Hearing Officer." (Sec. XVF and G)

There is nothing in the statute that mandates the timelines outlined in this proposed rule. Notice should be given further in advance than 5 days before a hearing. 5-day notice will be insufficient opportunity to prepare. The rules are silent on the time for the covered employee and employer to submit documents to the Hearing Officer. Five (5) days is an insufficient amount of time for the Administrator to submit documents to the Hearing Officer since that may be the same day as notice of the hearing. That will not provide sufficient opportunity for the parties to review the documents and prepare for the hearing.

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. The time limits for requesting an appeal and for decisions to be made on appeals.

J. 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.

K. 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.

L. 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?

M. The specific requirements of medical certifications, including confirmation that an employee is incapacitated from work and daily activities due to a covered medical condition.

MAINE
STATE
CHAMBER
OF COMMERCE

COMMENT #061

EXHIBIT
5

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. XIIIA1,2,4 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." *Armstong 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; 30 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 VIIID4c), 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. IIIB5)*

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. IVA4)."*

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. VIIIC1)*

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. VIIIC2)

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. XIIIA3) *"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. XIIIA6)*

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. XIIIA10)*

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. XIIID2)

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. XIIID3)

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.

CERTIFICATE OF SERVICE

I, Joshua D. Dunlap, hereby certify that an electronic copy of this this Appendix was served upon counsel at the address set forth below by email on the date of filing and a hard copy will be served by first class mail, postage-prepaid once the clerk has accepted the format pursuant to M.R. App. P. 8(b)(5).

Nancy Macirowski, AAG
Anne Macri, AAG
Office Of Maine Attorney General
6 State House Station
Augusta, ME 04333-0006
anne.macri@maine.gov
nancy.macirowski@maine.gov

Dated: March 26, 2025

/s/ Joshua D. Dunlap
Joshua D. Dunlap, Bar No. 4477
Pierce Atwood LLP
Merrill's Wharf
254 Commercial Street
Portland, Maine 04101
jdunlap@pierceatwood.com
(207) 791-1100

Attorney for Appellants