Maine Hospital Association

MAINE'S LEADING
VOICE FOR HEALTHCARE

June 10, 2024

Luke Monahan, Director

Paid Family and Medical Leave Program

50 State House Station

Augusta, ME 04333-0050

Director Monahan,

Please accept these comments on behalf of the Maine Hospital Association.

The Maine Hospital Association (MHA) represents all 36 community-governed hospitals including 33 non-profit, general acute care hospitals, 2 private psychiatric hospitals, and 1 acute rehabilitation hospital. In addition to acute-care hospital facilities, we also represent 11 home health agencies, 18 skilled nursing facilities, 19 nursing facilities, 12 residential care facilities, and more than 300 physician practices.

Our members employ approximately 30,000 workers in Maine and each of our members will qualify as a large employer under the statue; as such, they are directly impacted by the law and the rule.

Here are our comments.

1. ***The rule as drafted needlessly harms employers who wish to provide paid FMLA benefits pursuant to a private plan.***

Section XIII of the rule (page 16) outlines the process and criteria for employers' to provide the paid FMLA benefit pursuant to a private plan. In fact, it appears to be the most extensive part of the draft rule.

Subsection A(2) bars employers from submitting applications until January 1, 2026, 18 months from now.

It further artificially delays any approval until April 1, 2026.

The clear effect of this delay is to obligate employers who are going to use the private option to pay into the state program for 18 months even though they are not going to use the state program.

At a rate of 1% of employee wages, hospitals statewide will be paying $3 million per month in taxes into the state. Many of these hospitals will want to utilize the private option. Forcing hospitals to pay approximately $50 million into a state program they won't use is incredibly unfair and senseless. There is no justification for the delay in reviewing applications except for the purpose of grabbing money from these employers.

MHA Request(s):

- Our first request is that you open the application process within 30 days of the adoption of this rule.
- Our second request is that for any employer who has submitted an application, there is no obligation to remit tax payments pending a decision. (Obviously, any employer whose application is ultimately rejected should be obligated to remit payments, including any back payments to January 1, 2025.)
- Our third request is that if the state can not accept applications prior to November 1, 2024, employers should be allowed to file a Letter of Intent to substitute a private plan and that upon submission of such a Letter of Intent, there is no obligation to remit payments until the application period opens. (Again, any employer whose application is ultimately rejected should be obligated to remit payments, including any back payments to January 1, 2025.)

Many hospitals currently utilize private plans for the state unemployment insurance program and workers compensation program. They have track records of responsible stewardship of these state benefit programs and will undoubtedly be able to do so for the paid FMLA benefit.

The state is going to collect payments for 16 months prior to benefits being paid in order to allow the state to build a reserve fund. This makes sense. Employers who are intending to substitute a private plan should be given the same option. Forcing them to pay this tax denies them that opportunity.

2. ***The rule as drafted neglects to provide notice to employers of decisions by the FMLA Administrator regarding applications for benefits.***

Section VI (H) of the rule (page 8) provides employers with notice than an employee has filed an *application* for benefits.

Section VII details the various notices provided to the applicant regarding the decision of the Administrator to approve or deny the application.

However, it provides no copies of these decision notices to the employer. It should be obvious why employers should be provided any notice of the decision.

MHA Request(s):

In Section IV (B) and (C), employers should be provided copies of the notices that are provided to employees.

In Section IV (D), employers should be given both notice of any appeal of a denial and notice of any subsequent decision.

3. The employment protections for employees should be narrowly limited in a unique circumstance.

Section XIV provides employment protections for employees who return from work following the taking of leave. We have no general objection to this provision.

However, two other sections combine to create a potential unfair hardship on employers.

First, Section IV(A)(2) allows employees to submit an application for benefits up to 90 days AFTER leave has begun.

Second, Section V has a general obligation on employees to provide 30 days ADVANCE notice of the intent to take leave, EXCEPT in emergency circumstances in which case notice must only be provided "as soon as is feasible."

A fact pattern for this type of situation is an out-of-state emergency for someone without family. It is possible that the employee is simply not able to provide advance notice and may not do so for weeks or for a period of up to 90 days after the emergency.

This is an unusual situation.

From the employer's perspective, however, an employee did not show to work for weeks and never called.

This is a very common situation in some industries and some jobs. Employers have no choice in these situations but to move on from such an absent employee without fear of reprisal if the employer had re-filled the position.

<u>MHA Request(s):</u>

Section XIV should be amended to remove job protection for any employee who is:

(i) absent from work for 30-days or longer;

(ii) and for which the employer has no notice (from any source) explaining such absence; and,

(III) the employer has in fact re-filled the position with another employee.

Obviously, the circumstance where the absence is due to an emergency and the employer has no notice as to why from at least 30 days will be unusual. Nevertheless, the rule should anticipate such a situation.

Otherwise, for EVERY absence without notice, the employer will be forced to keep the job unfilled for at least 90 days. That is unreasonable.

4. ***The affinity provisions require further work.***

The law allows employees to take "family" leave for non-family members if there is an "affinity" relationship that is like family.

MHA Request(s):

- First, the rule should provide substantially more guidance on what an affinity relationship is or is not.

By comparison, the rule allows employers to claim an "undue hardship" in some circumstances. Section V of the rule goes into great detail about what employers must do to show undue hardship and provides a 9-part "non-exhaustive list of factors that may be considered."

No such list of factors is provided for the nebulous "affinity" relationship. There should be.

- Second, applications for family leave to care for an affinity member should not be less comprehensive than that for family members.

Section VI outlines the application requirements. Everywhere there is a requirement related to a family application, there should be a corresponding requirement for affinity members.

For example, subsection (A)(8) reads:

"8. Documentation from a health care provider of the family member's serious medical condition if seeking family leave."

It should be amended to read:

"8. Documentation from a health care provider of the family or affinity member's serious medical condition if seeking family leave."

- Third, affinity members should be obligated to verify the affinity relationship.

Subsection (A)(4) requires the applicant to provide information designating an affinity relationship. However, the rule requires nothing from the affinity member. The person being described as an affinity must be obligated to sign a statement

- Fourth, affinity members should be included in the authorization statement provisions in Section B.
- Fifth, an affinity member should only be allowed to have one "family" caregiver at a time. That is, 5 people shouldn't be allowed to take family leave to care for an affinity member at the same time.

5. ***The rule neglects to implement the statutory requirement that employees must be "unable to work" as a result of their serious medical condition if taking medical leave.***

Section 850-B of the paid FMLA law outlines eligibility for leave. It reads:

"3. Medical leave eligibility. A covered individual with a serious health condition that makes the covered individual unable to work is eligible for medical leave."

No provision in the rule operationalizes the requirement that the individual is unable to work.

MHA Request(s):

In Section VI(H), employers should be asked if there is "reasonable employment" (as that term is used in the workers compensation program) that is available to the employee given the employee's medical condition for consideration by the Administrator.

6. *The penalty for failure to remit the paid FMLA tax is arbitrary and unreasonable.*

Section XI outlines the penalty for failure to remit the paid FMLA tax. It reads that failure to remit premiums "in whole or in part" shall result in a flat penalty of 100% of the total amount due for the quarter – not the balance due.

For example, if an employer pays 2% of the total amount owed, it must pay a penalty of 100% of the total amount due for the quarter.

If an employer pays 98% of the total amount owed, it must also pay a penalty of 100% of the total amount due for the quarter. This makes no sense.

MHA Request(s):

First, the penalty amount should be capped at the amount owed.

Second, just as the Administrator has discretion to impose penalties on employees for *fraud*, the Administrator should have discretion when imposing penalties for mistakes by employers.

Thank you for accepting the comments of the Maine Hospital Association. I am happy to discuss these issues further at your convenience.

Respectfully,

Jeffrey Austin

Maine Hospital Association