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February 9, 2023

VIA FIRST CLASS MAIL & EMAIL: (PFML@Delaware.gov)
Christopher Counihan
Division Director, Division of Paid Leave
Delaware Department of Labor
4425 North Market Street, 4th Floor
Wilmington, DE 19802

Re: FMLA Draft Regulations

Dear Director Counihan:

The Delaware State Chamber of Commerce ("DSCC") asked that I work with their members to provide the Delaware Department of Labor ("DDOL") with what we hope will be accepted as meaningful feedback regarding the draft regulations concerning the Healthy Delaware Families Act (the "Act"). DSCC's ability to deliver a comprehensive response is meaningfully limited by the small amount of time afforded for feedback. Nonetheless, we hope you will accept what we provide with that in mind. DSCC's evaluation continues, and we are certain that feedback from members will continue to flow and evolve, and DSCC reserves that right to take any formal position, from the organization's perspective, regardless of the views shared today.

That said, this letter presents some high-level observations, requests, and/or concerns. The attachment to this letter provides some regulation-specific observations, requests, and/or concerns. From my own perspective, I note that my own firm is a small business. I am called upon frequently to help small employers in Delaware navigate both Delaware and federal laws such as the Family and Medical Leave Act ("FMLA"). I have significant experience navigating employment laws and regulations, as I represent both employers and employees. While I appreciate the enormity of your task, and with no disrespect intended, I find the law and existing draft regulations to be extremely daunting and difficult to use, ultimately culminating in less clarity than is desirable about the full measure of employer obligations. In short, the law and regulations present a substantial burden as to both learning and implementation, with the "how-to" and "what must I do" frequently very unclear.

These are but some examples:

- Explain how employers are to handle their salaried (often "exempt" under the Fair Labor Standards Act) employees—including reporting hours on reports that are required, *etc.* Especially for professional employees, many employers offer formal or at least informal flex time or simply trust that employees work enough. They do not track the hours of their exempt employees, and it would be an extreme disruption to business—both administratively and regarding morale—to require it. Regulations should, in every respect, better contemplate the "professional" employee, and seek to minimize disruption to private business operations.
- Explain when, if, and how part-time status factors into all provisions of this new law—including determining numerosity, *e.g.,* if an employer has only 25 part-time employees, is numerosity met for caregiving and medical leave? What if some of those work one day a week from home in another State? Regardless of the second question, many employers feel it is unfair/ unreasonable to treat an employer having only 12 full-time equivalents the same as an employer having 25 full-time employees. Many feel regulations should define "employee" based on full-time status, and perhaps integrate concepts of "full time equivalent" (a/k/a "FTE"). This is done, for example, in the Affordable Care Act ("ACA"). A thoughtful definition of part-time could be proposed, but we note that 30 working hours is often used to draw a line for part-time work.
- Explain how owner-employees are to be treated in all respects. Examples include, but are not limited to, members of limited liability companies, professional corporations (*e.g.,* with attorneys, doctors, *etc.* both owning and being employed); partnerships, *etc.* These owners often are also "employees" both statutorily and otherwise, even though they are owners—many times receiving a W-2, but sometimes receiving a K-1. Owner-employees should not be treated as employees for any purposes, including counting numerosity (*i.e.,* the 10 and 25 employee thresholds), reports data, eligibility for any aspect of "employee" entitlements/rights, *etc.*
- The in-state versus out-of-state hours issue is going to prove to be an extreme challenge for employers. It is going to be an extreme challenge to determine what is meant to be counted as "work" hours for all counting purposes (*i.e.,* so that overpayment is not made on account of considering wages earned outside of Delaware, and so benefits are not overpaid based on wages earned outside of Delaware). Consider overnight travel, donning/doffing, wait-time, simply working from home, working while traveling between states, *etc.* Provide better explanation and guidance. Employers should not be put at risk on such issues that require judgment calls. Ample new liability is being created while the difficult task of administering eligibility and pay determinations is being forced onto the shoulders of employers, *e.g.,* rather than the DDOL taking on the responsibility. Some method of DDOL determining when and what hours should be considered (without employer liability for the judgment calls) should be created.

- Same as previous bullet, but as to predictable scenarios arising from working from home, telecommuting, mobile working, traveling for work, *etc.* Employers will have many questions for which there appears to be no answers. At a minimum, representative scenarios should be presented to provide guidance regarding how to treat such cases, including, for example, for determining numerosity (*i.e.,* the 10 and 25 employee thresholds), reports data, calculating benefit amount (*i.e.,* average weekly wage), *etc.*
- A well done (including widely broadcast) campaign should be initiated to all, especially small employers about all January 1, 2024, deadlines set forth in Draft Reg 3.1.1.1 (to reduce the amount of leave that must be provided), 16.1.1 (opt-out), 16.4 (self-insured plan opt-out), 16.4.1 (surety bonds), and 16.5.1 (grandfathering).
- Since all burden of determinations is being shifted onto employers, with risk accompanying that, and nuanced law and regulation making likely that there will be innocent non-compliance (*i.e.,* due to understandable ignorance of all requirements or different interpretations), at every opportunity, employers should be given a regulation-based guarantee that they will be deemed in compliance (*e.g.,* of notice requirements) if DDOL forms are used. Thus, such forms should be made to include all notices required by the law or regulations—e.g., a notice of rights and responsibilities form should include notice that benefits are taxable. Essentially, DDOL should help employers by drafting DDOL-approved policies, forms, *etc.* that capture every notice obligation, and the regulations should state that use of the forms shall be considered conclusive evidence of compliance with notice requirements.
- Employers should be afforded more benefit of the doubt as to inevitable instances of non-compliance. This law and the regulations are tremendously nuanced and not at all intuitive. The regulations read as very foreboding and punitive. That erodes confidence from employers that the DDOL means to be supportive of business, and understanding of the challenges of it.
- As stated in more detail in the attached document, under the Regulation 16 sections, there are concerns about whether very small employers are given sufficient options to have private plans, and the methods for approving such plans – especially for employers with fewer than 100 employees and who might not meet the requirements for grandfathering.
- Provide more detail and clarity regarding options such as "private plans" and "grandfathered" plans. Employers should be given VERY clear options; and easy-to-use opportunity for employers to try but fail at grandfathering but still have time to pursue other options, rather than going directly into the fund. Relatedly, the regulations do not provide sufficient clarity regarding options or time to pursue them. The lack of sufficient options for employers to continue their own, generous leave programs with their employees, which they have shouldered the burden of for many years despite no requirement to do so (which includes many small employers), frustrates many, as does the unclear and seemingly deficient options and process to opt-out of the State program. Employers and employees

alike desire greater clarity and greater ease to remain outside a State-run system of tax and spend.

- Many employers have done away with "paid time off" programs that distinguish between "vacation" and "sick." Many allow a generous amount of PTO. Better explain how such PTO will be evaluated for purposes of DDOL making determinations about grandfathering.
- Several attorneys experienced with laws and regulations have found this law and its draft regulations to be extremely difficult to digest, understand, and apply, *e.g.,* testing them against predictable questions ranging from grandfathering scenarios, numerosity counting in various scenarios, analyzing eligibility in various working scenarios, *etc.* Particularly in the definitions, the regulations should delete every effort to quote, summarize, or paraphrase definitions as defined under FMLA. It adds to the density—making the regulations harder to use, despite it being likely that the opposite was intended. It also creates a situation where definitions may become outdated over time or even create ostensible (or actual) inconsistencies with federal law, *e.g.,* due to imprecise or incomplete language in the regulation. A suggested edit, therefore, is to search out every instance of "[a]t the time at which these regulations are written" (appearing 11 times) or "[a]t the time of writing this regulation" (appearing at least twice),and delete what follows. See e.g., 1.2, 1.3, 1.4, 1.6.1 and 1.6.2, 1.8, 1.9, 1.11, 1.12, 1.14, 1.15, *etc.*
- Regulation-specific feedback is attached under Tab 1 to this letter.

DSCC would like to be a partner with DDOL in forming regulations that will minimize the harm done to businesses. DSCC realizes the task here is not to revisit the law. If given reasonable opportunity, my hope is that DSCC can be used to help DDOL produce regulations that will be informative and helpful (and less burdensome on businesses), as this new law is learned, implemented, and administered. Everything submitted is in that spirit.

Sincerely,

/s/ Timothy M. Holly

Timothy M. Holly

Enclosure

cc: Via Email: (Mike Quaranta MQuaranta@dscc.com; Tyler Micik: tmicik@dscc.com)

TAB 1

REGULATION	MEMBER FEEDBACK
Global	As noted in the letter attaching this chart, this law and its draft regulations has proven extremely difficult to digest, understand, and apply, *e.g.,* testing them against predictable questions ranging from grandfathering scenarios, numerosity counting in various scenarios, analyzing eligibility in various working scenarios, *etc.* Particularly in the definitions, the regulations should delete every effort to quote, summarize, or paraphrase definitions as defined under FMLA. It adds to the density—making the regulations harder to use, despite it being likely that the opposite was intended. It also creates a situation where definitions may become outdated over time or even create ostensible (or actual) inconsistencies with federal law, *e.g.,* due to imprecise or incomplete language in the regulation. A suggested edit, therefore, is to search out every instance of "[a]t the time at which these regulations are written" (appearing 11 times) or "[a]t the time of writing this regulation" (appearing at least twice) and delete what follows. See *e.g.,* 1.2, 1.3, 1.4, 1.6.1 and 1.6.2, 1.8, 1.9, 1.11, 1.12, 1.14, 1.15, *etc.*
1.1	This definition is used only once (in Reg. 15.0, where it appears poised to be defined differently than in the definition). Drop the regulation definition and just flesh it out in Reg. 15.
1.2	See global comment from above. The words "application year" appear only once in the regulations – when being defined, with only one of three options being a "calendar year." That begs the question if/when other aspects of the definition of "application year" matter. The confusion makes administration more difficult and more likely to cause honest error. Notwithstanding the apparent flexibility stated in 1.2, the regulations restrict an employer to using only a calendar year. Indeed, the words "calendar year" appear in the regulations 14 times. "Benefit year" (nowhere defined) appears in the code 4 times while appearing nowhere in the regulations. If employers are given flexibility in defining "application year," DDOL should explain how an employer establishes such and uses such while abiding by requirements imposed on them.

	See also 3.1 below.
1.3	See global comment from above. The content of 1.3 appears to pull from Fact Sheet #28C. But does it quote it in full? Is all authority interpreting and applying it quoting it? This is an example of the point made in the global comment. Why not simply say it means what it means under FMLA, leave it at that, and thus make the regs easier to read and more timeless and less susceptible to challenge?
1.5	Both the law and the regulations make it very difficult to determine if/when an employer has obligations under this law, *i.e.,* which workers must be counted when determining numerosity (*i.e.,* the 10 and 25 "employee" threshold). See also below regarding 1.6. Many entities would prefer to opt-out (and would at least rather be only as "in" as absolutely required), and the regulations should provide guidance and clarity that gives businesses maximum choice on the subject, by being clear about who must be counted. It would be very helpful to have a few illustrations that contemplate common scenarios (*e.g.*, a small Delaware workforce that includes some working from home—some from their Delaware homes and some from their PA/MD/NJ homes – with some scenarios resulting in 10 "employees" and some not; same scenario as before but with size ebbing and flowing over various periods of time; very large employers with only a few physically working in DE, perhaps from an office on the one hand or from home on the other hand). Counting employees and their time working in Delaware presents risk both in over counting and under counting. DDOL should help ease that risk by providing useful tools and clear information. It would be helpful if regulations would provide a checklist for determining if a person is an "employee," and provide that a

	determination reached through use of such creates a presumption of accuracy, with a high burden of proof for anyone challenging the conclusion reached if the checklist is used. Perhaps the tool, articulated in the regulations, is a DDOL form that employer and employee must sign that checks certain requirements. Such tools should not be made mandatory, but incentive provided for using such.
1.5	Clarify how it impacts numerosity counting (*i.e.*, for the 10 and 25 employee thresholds) for an employee to not work primarily in Delaware. The provisions regarding reclassifying an employee seems backwards. Is it meant to state that an employer may reclassify an employee who previously primarily reported for work at a worksite in DE, provided they work at least 60% of their work hours at worksites that are not in Delaware? If the current wording is as intended. Clarify what is meant by "at one worksite in Delaware" (*e.g.*, what if they work at multiple worksites)? In general, it would be helpful to explain when and how an employer may reclassify an employee when they do NOT "report" "primarily" for work at a worksite in DE. Why isn't the threshold 51% not in Delaware? Does using 60% open the regulations up for challenge? Is an employer meant to be in violation if reclassifying an employee who works 59% at one worksite in Delaware? What if the employee works 60% at multiple worksites in Delaware? The regulation's statement regarding how to determine whether an employee's "particular work hours or wages were earned in Delaware" is difficult to understand. Employers will not understand from the law or regulation how to make critical

	determinations. Further/ different clarification would be helpful. It is unclear what is meant by "wages was withheld from the Employee's paycheck as in-state . . . . by the Delaware Department of Finance's rules or regulations." Small employers would greatly benefit from more help than this to determine how to count their workers in any number of circumstances, and what that headcount means in terms of actions needing to be taken. It is unduly burdensome to small employers to try to develop a mastery of difficult nuance such as this. Guidance and help in the regulations would be appreciated. It would be helpful to have clarity about how to treat "owners" (*i.e.,* those who are members of an LLC or partners) but who also have income from the company.
1.6.1	See global comment from above. Better describe when and how the "integrated employer" status issue matters under Delaware's law. The term is not in the law. It is only used in the regulation when defining the term itself. If it is meant for purposes of determining numerosity (*e.g.,* for the 10 and 25 employee thresholds), explain that. Explanations such as this might prove helpful to employers: "When determining if an entity must comply with this law due to having at least 10 or 25 employees, the entity must consider not only the employees reporting primarily in Delaware whom that employer recognizes as employees of that employer, but also whether other employees (whom also report primarily in Delaware) whom the employer regards as working for a different employer are part of one 'integrated employer.' As such, the numerosity (*i.e.,* 10 or 25 employee thresholds) can be met through an 'integrated employer' analysis. The test for 'integrated employer' set forth in the FMLA shall apply for this purpose."
1.6.2 and	See global comment from above.

1.6.3	See above but as applied to "successor employer" and "joint employer." Nether term is used in the law or regulations except in the regulation's definition. Provide an explanation of why it matters.
1.6.3	Typo: "an employee and 2 or 5 more"; delete "or 5" Why include detail of a "joint employer" if it does not apply? It seems confusing to define it and then say it doesn't apply.
1.8	See global comment from above.
1.9	See global comment from above. More consistently use either FMLA or "Family and Medical Leave Act." Here, perhaps opt for "FMLA."
1.10	Rather than the word "defined," does the word "used" make better sense? Or perhaps say: "'Line(s) of Coverage' means the following four different types of leave that are authorized under the Act."
1.11	See global comment from above. Do you intend to have the word "means" after "Parent"?
1.12	See global comment from above. The sub-numbers (*e.g.*, 1.11.1 et seq.) appear in need of edit (*e.g.*, 1.12.1).
1.13	There appears to be a typo of "FMLA. FMLA leave." Greater clarity should be provided that imposes duties on an employee, because employees should not be impowered to make running the business harder by refusing to follow completely reasonable policy that manages the workforce, including absences – which already is a massively difficult task for many employers. Specify that employees are required to provide notice in the manner as required by the employer as set forth in any other lateness/ absentee policy; or some such thing that makes clear that employers are within their right to require compliance with their notice policies. Even FMLA permits/ requires this.

1.14	See global comment from above. This is an example of the regulations appearing not particularly employer-friendly, *i.e.,* effort is made to quote from FMLA regulation where it communicates circumstances when it imposes a burden on employer, but similar effort is not made to quote from FMLA regulations (such as 825.115) where it provides equally important limitations, *e.g.,* defining when "continuing treatment" exists. As applied to this section 1.14, the same point exists as to regulation 825.114 and 885.113(d) (clarifying in the federal regulations but omitted from the state regulations that "Ordinarily, unless complications arise, the common cold, the flu, ear aches, upset stomach, minor ulcers, headaches other than migraine, routine dental or orthodontia problems, periodontal disease, etc., are examples of conditions that do not meet the definition of a serious health condition and do not qualify for FMLA leave"). Rather than picking and choosing pieces of the nuance of federal law definitions, see the global comment set forth above. However, if effort is made to summarize existing law to describe when coverage might apply, it seems only balanced to also summarize limitations, where coverage might not apply.
1.15 Siblings	There appears to be two 1.15 sections. The first is in all bold, perhaps in error.
1.15 Spouse	See global comment from above. Is the word "means" missing after "Spouse"? Isn't 1.15.1 and 1.15.2 redundant with 1.15 appearing immediately before those subsections? Why the redundancy, which tends to cause confusion.
2.1	This section could benefit from some material editing. Rather than "Employer Eligibility" it seems more appropriate to say, "Covered Individuals." Perhaps there is effort to spin the program as something good for employers, but the "benefits" that are subject to "eligibility" are "employee" benefits – not employer benefits. The effort to summarize in this section seems prone to confuse, e.g., certain exceptions and nuance make the first sentence arguably not entirely accurate. At a

	minimum, consider "All the employees of an employer may be eligible for aspects of coverage under this Chapter, upon . . ." The term "if they achieve" seems odd. Perhaps ". . . upon the Employer qualifying as an "Employer" (e.g., employing at least 10 "Employees" during the previous 12 months." The term "threshold number" is used only once – when the term is established. Even if the current language is kept, consider deleting that, as it seems unnecessary and perhaps even confusing. An example of nuance that might exist making 2.1 potentially appear in conflict with other regulations is that "opt-outs" are not addressed in 2.1. The primary concern being identified here is that the effort to summarize might serve to confuse.
2.1.1 and 2.1.2	It is not at all clear in the law that the word "entirety" in the regulations is a correct statement of the law. Some read the law as requiring at least 10 employees in each of the previous 12 months, and if even one month in the past 12 months was under 10 employees, the law does not apply, *i.e.,* the law does not apply until a full 12 months at 10 or more employees has occurred. Some may challenge the appropriateness of the framing of 2.1.1 as essentially stating that a employer is subject to the provisions of "this Chapter" (which you might consider framing as "the Act" or vice versa throughout) if, at any time in the past 12 months, they have ten employees, and are only not subject to the law if/when a full 12 months passes of being below 10. The same points apply to both sections.
2.1.2	See above. At least consider changing "ten or more (but fewer than 25)" to "more than nine".
2.1.3	See above, which applies also to 2.1.3. As also stated above, some likely will argue that it is contrary to the language of the Act for an employer with 25 employees in month 1 but who drops to 1 employee in month 2 (and stays that way for 11 months) to be fully liable and subject to all the provisions of the Act for the 11 months where they have 1 employee only. What happens when that one employee needs intermittent leave?

	Guidance on this is required even assuming the law is as the regulations state.
2.1.4	Where in the law is this aspect of notice required? How does regulation 10.0 give guidance on this aspect of notice? This requirement seems to exceed what the law requires in 3710. It is predictable that innocent violations will occur due to (though some may give less grace for it) reasonable ignorance about when and what notices are required. A notice not stated in the law as required should not exist in regulation as required. At a minimum, consider moving 2.14 to Regulation 10.
2.1.5	This regulation is difficult to understand. Should it cross-reference 3705(k) in the code and Reg. 5.11? Should "Waiver" be defined (or use "waiver")? The word is used 31 times but I don't think ever defined. Perhaps include the link to the form promised in Reg. 5.11? Explanation would be helpful regarding whether a person subject to a waiver counts when determining when an employer is deemed to have reached the applicable threshold (*i.e.*, 10/25), including for purposes of "rising above" a numerosity threshold. As stated above, more generally, tools (like a checklist that affords some protection from after-the-fact second guessing) for counting would be very valuable to employers . . . and help avoid deterring businesses from opening or continuing operations here.
2.2	Insert a space before 3702. The imposed burden of proof ("credible, objective evidence that would reasonably support") seems to far exceed the statutory language of "has reason to doubt." The employer must pay for the second opinion, so the evidentiary threshold should be much lower. Moreover, this State-created plan has essentially delegated to the Employer the entirety of the burden of making important qualification decisions, so the State should not load employers up with risk for merely doing their job. The regulations should keep the requirement as passed by the

	General Assembly – "reason to doubt." There is just too much room for those not saddled with the burden of making decisions to second guess "credible" and "objective" and "evidence" and "reasonably." If those words are to be used, DDOL should at least state what it considers sufficient. But the bar should not be set higher than the law.
2.3	Since the regulation states who must pay for the first two opinions, the regulation should state who pays for the third opinion. It seems the law requires it to be at the expense of the employer or private plan.
2.4	See 2.2 above. The evidentiary standard here (*i.e.*, "a sworn affidavit of a direct witness to an event that brings the seriousness of the health issue into doubt") is not what federal law or the Act requires, *i.e.*, "a reasonable basis." The elevated evidentiary burden is inappropriate. Sometimes, mere change in circumstances from a certification is recognized as adequate under federal law. Sometimes a mere social media post or pattern of request (e.g., every Friday before a holiday weekend) fuels "reasonable basis." DDOL should not require more than such reasonable basis. If the regulation is going to summarize the Act, it should include the exception to the limitation on the ability to require recertification, *i.e.*, if the provider requires it.
2.5	Unhelpful ambiguity is created by saying "the employer may be" essentially liable for discrimination and retaliation by requiring recertification. Recertification requirements often are routine, *e.g.*, where intermittent leave is consistently taking longer than a doctor's note required. It seems inappropriate to view routine requests for recertification as something to deter and hint at it being an act of discrimination or retaliation for doing it. If DDOL is going to demonize recertification practices, greater clarity should be provided about what "may be" viewed as the type of wrongful "routine" recertification requirement versus completely valid, yet perhaps still "routine" requirement. As a starting place, does the DDOL consider the standard practice of requiring everyone to recertify every 30

	days to be discriminatory or retaliatory? If so, isn't that inconsistent with the express allowance for recertification? It seems unnecessary and unjustified risk is created that deters employers.
2.6	Since the Act imposes a requirement ("shall require" support), the least burdensome the requirement the better in terms of options that fulfill the requirement. DDOL should provide additional examples of what "may" be required by the employer so that more options, endorsed by regulations (and thus not susceptible to criticism or challenge by employees), can be considered as circumstances are deemed to warrant it. This will reduce risk for employers, providing much-needed reduction of the new risk being created by the mandates of this Act. If "may include" is meant as a cap for what an employer may require, DDOL should be clearer about that, as some employers may wish to require more or different (and their existing systems may even be set up to require something different). Delete ", as the Department may determine"
2.7	An edit appears in order, including by using the active voice: "If an Employee makes a false claim about being a parent or child . . ." Is "parent or child" too narrow? What about "spouse"? Or even broader family leave situations?
3.1	See 2.5 above. The law uses the words "application year." Should "consecutive 12-month period" be "application year"? Better address this issue. The words "elect to return" seems to not sufficiently capture the full measure of employers' rights to time a return in a manner that meets the needs of the business, *e.g.,* another person may have been hired to fill-in during the stated (and approved) duration of leave. Better communicate the power an employer has as to timing of an early return. That might help control time and expense on claims about a dispute concerning that issue.

	Shouldn't this be edited to have benefits payments cease as of the last day of leave? Does this regulation mean to communicate that there will be times that employees get both their normal pay from their employer upon their return AND leave benefits from DDOL, *i.e.,* during the overlap period following an early return and before the every-other-week period ends? How is this to be handled? Create some tool that automatically helps employers with administration. For example, when the employer approves a request, they enter the date in a DDOL data field, and they automatically get emails from DDOL about what they must do (notices, etc.), and a clock starts that will automatically alert an employer in the subsequent 24 month period, what the employee has left as available for leave—*i.e.,* for non-parental leave, a total of 6 weeks in a 24-month period and only one start/stop event in that time unless "intermittent" – so a subsequent effort to approve leave might present an automatic ineligible message. Employers are going to find navigating all of this VERY difficult. They will need meaningful help, and after-the-fact criticisms are NOT what the business community (or even employees) need. Help with compliance and execution, please.
3.1.1	Should "consecutive 12-month period" be "application year"? See 2.5 and 3.1 above.
3.1.1.1	Delete the words "for the" after "12 weeks to 6 weeks"? A robust campaign should be implemented to advise ALL small employers (under 25 employees) of the January 1, 2024, deadline to reduce leave obligations, because this is a huge burden on small businesses and could crush them. Clarify if an employer with less than 25 employees as of 1/1/24 who elects this (with notice) can remain only obligated to pay the ½ no matter how their numbers grow through the end of 2030.

	What happens if an employer is under 10 as of 1/1/24 (the deadline to elect and provide notice) but then grows above 24 as of 1/1/25. Doesn't the code contemplate that 3703(f) is available even to them? A mechanism should exist for very small employers who might not even have this on their radar to benefit from 3703(f) if they grow. Regarding "If the Division receives a complaint that the changes where discriminatory" – what changes is DDOL talking about? And what "changes" are considered problematic? Wouldn't a "change" be in the direction of expanding coverage back to the full 12 rather than the lesser 6 weeks? So how would a claim of such a "change" ever be discriminatory? To the contrary of the sentence referenced above, DDOL should have a regulation that informs employees that they have no discrimination or retaliation claim when an employer has elected this reduced leave and the larger leave isn't provided. It might help reduce time consuming and expensive claims. Doesn't 3703(f) actually contemplate small employers becoming eligible for the reduced leave in any five-year block when THEY start to be obligated under 3702? What does "the start of benefits" in 3703(f) mean? Whose start? The program's start; or the employer's introduction into the world of responsibility? The regulations seem to have an interpretation of that; but is that what the law contemplates? Perhaps elaborate (maybe cross-reference) what is meant by "grandfather" of PTO plans that pre-date July 2022. *i.e.,* Reg. 16.5.1 In general, this seems to deter employers form electing a burden-easing option. Why?
3.1.2 first	There are two 3.1.2 regulations. Is this meant to be numbered 3.1.1.2?

	Bold "Family caregiving leave"? Change "however" to "However"? What is the rational for the "However" sentence? While benevolent, the use of employer-funded tax to pay for what amounts to bereavement compensation does not seem consistent with the limitations of the law and the stated purposes of it. Some may consider it an abuse of the fund and contrary to the purpose of the law to pay out up to 7 days AFTER the medical need for care ends. Since the justifying reason for the leave ends, the employee must return, true? If they don't, they risk *lawful* termination, true? If the employee returns (thus restoring employer pay), are they getting double paid for "bereavement"? How is providing ongoing benefits after the actual need for *medical* leave justifiable, given the plain language of the law—it feels like a very back-ended way effectively to effectuate a bereavement leave tax?
3.1.2 second	There are two 3.1.2 regulations. Many read 4703(a)(2) merely to set a cap of 6 weeks in a non-intermittent leave situation. Thus, and consistent with 3703(c), isn't it true that, once a person applies for leave covered under 3703(a)(2), no matter it's length, with the exception of intermittent leave, it is lawful—indeed expected-that the applicant will be automatically denied if they took any 3703(a)(2) leave in the prior 24 month look-back period? 3703(c) appears to say that figuring out aggregated leave amount during the look-back period really only comes into play in the intermittent leave context. Whether right or wrong, better explanation of all of this would be valuable.
3.2	The regulation is confusing especially when effort is made to apply it to the first sentence of 3703(b). Isn't the law that where 2 parents are concerned, they only get 12 total weeks collectively in any rolling 12-month period? DDOL should

	confirm how the second sentence of Regulation 3.2 is meant to impact the first sentence of 3703(b), if at all. It seems that the regulation is meant to apply where the two employees at issue are not both parents. Please clarify/confirm. When not parents, it seems DDOL is saying that the amount of leave is NOT as limited as it is for 2 parents, *i.e.,* the aggregate amount for non-parents is NOT reduced like for parents. Please clarify/confirm. Rather, this regulation merely limits WHEN (not HOW MUCH) non-parents can take off. Please clarify/confirm. In short, better explanation is needed because a labyrinth of law and regulation is being created that cannot easily be deciphered, e.g., different types of leave provide different durations of leave and different rules apply depending on whether co-parents or just other family members. It can be predicted to cause great difficulty, especially for small businesses that often already struggle to staff and run operations. DDOL should provide a flow chart that captures all the rules & exceptions, including the "as permitted under 3706" language of 3703(c), which results in clear conclusions about what actions are required to be taken under the scenarios flowing through the chart.
3.3	Does the 5-day requirement require some specific process/ action of approval or denial? Internally? Reported to the employee? Reported to the DDOL? What is the finish line for compliance? See comments to 3.3.2 below.
3.3.1 and 3.3.2	Consider aligning the language structure to match each other, *e.g.,* must vs. shall, and word order. It will help minimize arguments about different meanings being intended. Is the 3-day timeframe the one where the employer must notify both DDOL and employee? See comments to 3.3 above.

4.1	Much more clarity is needed regarding how to calculate the amount of benefits . . . including when it is $0, e.g., due to 3703(c). Is it accurate to say that, where a benefit is due, the weekly amount will be the lesser of: (a) full wage; (b) $100; and (c) 80% of average wage – but all subject to a $900 cap, and such is pro-rated for less than a full week. The part about below $100 is very confusing. How can it be both "below $100" and "over $100"? What is meant is not clear. Clarify how all of this is supposed to work for a salary employee, especially when the minimum increment of leave is used (*i.e.,* 1 hour). Many employers don't even know such employees' hourly pay rate. Through use of the active voice (as opposed to passive voice), consider being very clear about who actually pays an employee, *i.e.,* where their check comes from. This isn't clear until p. 27 (Reg. 11.3). While perhaps clear to others, many readers of both the code and the regulation will not quickly find that answer. It should be easier to determine. The seemingly obvious question is actually quite illusive to answer by pointing to code or regulation.
4.2.1	Clarify that from each employer's perspective, the fact that an employee has multiple jobs must not enter into consideration or impact the decision . . . if that is the intent.
4.2.3	Explain if/when/how the State would be the payer on "multiple claims." Why not give similar flexibility when someone other than the state is the payer on multiple claims?
4.3	See global comment. Seemingly a work in progress, this provision is very unclear. Explain clearly if, when, and how "FICA limits" will further complicate an already very complicated program.

4.4	"benefits will be calculated only on the basis" is confusing. Is the following true and correct; if not explain: "tax earned and payable by employers to the DDOL, to fund any paid Family Medical Leave insurance program benefits, shall not be earned or payable for any wage earned outside of the State of Delaware; tax is only earned and payable for such on wages earned inside the State of Delaware; and benefits shall only be paid by the DDOL based on wages earned inside the State of Delaware." A lot of more help is needed for employers to know how much they will need to pay in tax, and for employees to know who much they can expect to get in benefits – because it is VERY unclear when and how "wages earned within the State of Delaware" is meant to be determined in myriad predictable working situations. DDOL should provide this help/guidance.
5.1	A better summary of what exactly gets taxed and does not get taxed would be very useful. Employers will struggle to determine this based on the law and draft regulations. It seems that only opt-in payments are not a tax. If "contributions" was chosen for optics reason, but we mean "tax" when we say "contribution," it would be helpful simply to say "tax" (instead of "contribution"). Without that clarification, this is confusing. Payroll people will struggle with keeping everything straight. Push back the contribution due dates to align with unemployment insurance. Ideally push it back to April 15; and allow 15-day grace period at the end of each quarter. Many employers need that time to get their books in order and to ensure the most accurate reporting/payment. It is very important to give some breathing room for businesses who have new and substantial burden. Why use "Grace Period" instead of "grace period"?
5.2	Are these "contributions to the Fund" different than the aforementioned "taxes"? Just say "taxes"—even if unpopular.

	Avoid ambiguity at all costs. Some employers will think they only need to pay on employees who used leave. Make clear that isn't the case. The report obligation in the middle of 5.2 is VERY burdensome. The law requires payment of the taxes. DDOL is requiring the onerous reports. Why? Ease burden wherever possible. Don't enhance burden. Delaware, including DDOL through these regulations, is making it increasingly difficult to do business in Delaware. It is self-defeating to do so. Proceed with caution. And ease employer burden, please. How is an employer supposed to handle the required report as it pertains to FLSA exempt (*e.g.,* salary basis) employees for whom hours are nearly never recorded? For example, consider a physician or attorney employee. How is the employer supposed to parse various common scenarios in determining whether income "arose from" hours inside versus outside of Delaware? What determines inside versus outside (*e.g.,* remote work either sitting in DE or in MD/PA/NJ)? What about mobile employees not in one place who travels for work across state lines? If employers are being shouldered with the burden of administering this program, at least provide guidance and protection for their best efforts. This system is shaping up to be a liability cornucopia. Help ease it, please.
5.2.1	"Shares" is confusing. Clarify that the regulation is talking about the employer paying the full amount of the tax, including the amount required of employees for their share of the cost of the tax. Regulations should make clear that it is the program that is causing the burden on employees, not the employer (even though Delaware is giving the "opportunity" for employers to shoulder the full weight of the program alone).
5.2.2	What does it mean that the notice goes "to all affected employees"? If a split is established as a matter of policy before a need for leave even arises, are there any "affected

	employees"? Who are the "affected" employees in that scenario? Does the "affected employees" notice requirement mean only to apply when a trend has been established of some split (with some on leave with that split) and then that trend is changed, making the "affected" only those on leave? Very unclear. Typo: "filed" should be "file." What exactly is being required to be filed – the notice that the employer has chosen to be nicer than the law requires? Why create the extra issue and liability? With extra liability created for improper notice, why would any employer ever deviate from the 50/50? If DDOL wants to incentivize employers to not reduce the employee's wages (*i.e.*, to shoulder more of the burden itself), don't impose yet more risk by creating notice obligation. Won't an employee see it anyway in payroll information (*i.e.*, less rather than more being withheld)? Confirm that the choice to require employees to fund 50% of their cost does NOT give rise to any claim for violation of the Wage Act (even though arguably at least somewhat for the employer's "benefit"). Consider DDOL Reg. WP101. Give employers some regulation-based affirmative defense in any Wage Act claim as it pertains to this withholding, even if some error is made, because it is only fair since this new situation is being imposed on employers.
5.2.2.1	This limitation on changing is unreasonable. Why would an employer ever deviate from the 50/50, only to get locked into that? Business need flexibility to change. At least allow maximum flexibility to adjust how extra generous an employer chooses to be. Locking an employer into their generosity seems unjustified. And what of an employer, mid-year wanting to do an employee a favor by agreeing to shoulder some of their

	50%? Is that employer forbidden (hands tied) from being more generous? How is the first leave need of the year handled? Does that lock in the split?
5.2.2.3	Doesn't this impact the "affected employees" issue in 5.2.2? Should this be deleted and clarification simply provided in 5.2.2? What does "properly noticed" mean?
5.2.2.3	What does it mean: "designation that such voluntary plans are premiums"?
5.3	Is "following information, itemized by employee" limited to those employees to whom leave benefits were paid? If DDOL means every employee, why?
5.3.3	How to handle hours for those for whom hours are not tracked (*e.g.*, exempt)? Consider physician or attorney professionals, for example. Does the report contemplate data for weeks during leave only? What weeks?
5.3.4	Provide greater clarity what exactly DDOL is requiring, *i.e.*, what it means specifically by "FICA wages." Perhaps distinguish what would be wrong versus what is right (*e.g.*, 401(k) being in the calculation). How does this work for an owner of an entity? Explain how this works for "profit sharing" vs. 401(k) contributions. DDOL should share at least some of the burden here and provide a little help by providing calculator tools that perform all necessary calculations and affords protection for employers who use it (*i.e.*, immunity from a claim of doing it wrong)?
5.4	Should "combination" be "contribution"? Perhaps change to "The contribution rates for medical leave benefits for 2025 onward shall be tracked . . ." Is "medical leave benefits" the right phrase? Do you mean "tracked" or "reported"? Is the point that employers can learn from some specified place what the yearly contribution rate will be?

5.6	Is a "contribution" really "earned"? Is it a "deduction" or a "withholding"? Perhaps consider in connection with DDOL Wage Payment Act regulations. Is the issue that an employer is only being allowed to withhold from an employee's wages in the pay cycle in which compensation is paid for leave pay? It is unjust that DDOL has the right to seek overpayments (*e.g.*, for unemployment) but employers are being forbidden from the same relief. The "one bite at the apple" is an unfair framing of the issue. This program no welcome by many employers (and employees) in the first place, and the withholding isn't some boon for the employer. We are talking about an employer merely easing some of the burden being imposed on it, which hardly feels like a bite of an apple. The phrase might be edited. Consider word choice with "deduction" and "withholding" any legal significance DDOL might think the word usage involves.
5.8 5.9 5.10	"Unless otherwise provided by the Act" – when and how does the Act otherwise provide? It seems like DDOL might know the regulation potentially over-reaches? Doesn't the 3705(i) directly speak to this – "may not be required to remit." Explain the stated empowerment here.
5.11	Is this better worded using a "neither" "nor" structure? What exactly does "permanent basis" mean, especially as it pertains to "at will employment" or a contract of employment that provides for a fixed duration, perhaps with renewal rights? Is this "wavier" meant to be conclusive evidence subject to some high standard of review to deem it invalid? It should be. The word "reasonably" opens Pandora's Box of second guessing. What is "this plan"? Will there be a link to the "Waiver of Coverage form"?

	Why is the "substantial and variable reason" and "reasonable proof" standard enjoyed by DDOL here not a higher burden like that imposed on employers (*e.g.*, an affidavit or credible, objective evidence that would reasonably support)? Employers should not be tasked with harder evidentiary standards than DDOL deems reasonable for itself.
5.12	Better explain this waiver of "employee's portion of the tax for prior quarters"; and why waive it for employees but not employers? What "tax" is being discussed here?
5.14	What is "the required payroll Contribution"? Is this referring to some retroactive payment or prospective payment. Better explain what is meant to happen if some waiver is revoked. When does what happen?
5.15	What is DDOL's evidentiary standard for its "determination"? What is meant by "willfully false"? What constitutes an "instance"? Meaning each waiver?
5.16	Should the word "Repeal of Waiver" be "Revocation of Waiver"? Isn't the revocation automatic on filing? If so, then "deductions from wages" could begin upon filing of the revocation, right? Is the "adopted" form going to be linked?
6.0	Some form of undue hardship regulation that limits intermittent leave desperately is needed AT LEAST for those with fewer than 50 employees. If an employer has 10 employees on 1/1/2025 but drops to 3 employees thereafter, they are on the hook for intermittent leave under 3702(a)(1), right? Especially very small employers can't afford to be forced to employ a FT-needed employee on a PT basis. The tools promised are critical. Small employers will need a lot of help building compliance programs that answer critical questions and tracks time and tells what must be done next. They often can't afford experts to learn and advise them.
6.1	Perhaps include a word of caution that less than one hour leave issues might nonetheless exist under federal law. Do not further complicate the Delaware law though. The one hour minimum is itself burdensome enough under a paid leave situation.

6.2	"both in increments of full days" seems in need of edit. These "tools" are going to be essential to helping businesses navigate this labyrinth of risk.
7.1	Shouldn't the word "or" be "and"? It should be made clear that, even if the employee pays their part of the employer's tax but not their share of medical premium, their health insurance coverage lawfully can cease. Where "refer to definition in FMLA regulations" is written, strongly suggest not making the regulations more dense by quoting pieces or entire sections of FMLA law. See global comment above.
8.0	Consider whether any regulations are NEEDED. The definitions in the statute already define retaliation to include interference. The regulations just add to bulk in some cases. As stated in the global comment, advise against trying to paraphrase or cherry pick only portions of FMLA regs and guidance on interference. It is a nuanced area of the law. Cherry picking federal authority on the topic could create inconsistences, which disrupts business.
9.1	3709(a)(3) seems to impose a burden on an employer RE matters that the employer has control over, yet the regulation brings even more into it, making an employer have some notice duty pertaining to payments the employer does NOT have control over. WC should not be brought into the scope of 3709(a)(3), making it yet another employer problem to address.
9.2.1	Comments reserved for developed version. Consider easing employer burden, not expanding it. The law requires notice of the requirement. Keep it simple. Not nuanced and easy to miss some wrinkle lurking in regulations. DDOL could HELP small businesses by offering a form of policy that helps the employer avail themselves of as many rights to lessened burden as the laws and regulations allow, including, in such policy, some statement that fulfills the "written notice" deemed necessary under 3709.

9.2.2.1	How does WC and State FMLA work in situations where either WC or State FMLA is self-funded? What about when one is self-funded but the other isn't?
9.2.2.2	Clarify any upward limit of what employers may require employees to use – more than 75%? Up to 99%? The word "all" in 3709(a)(3) seems to suggest it can be up to 99%. Also clarify if the intent here is to REQUIRE employers to charge at least 75% of PTO banks for FMLA leave. This is a deviation from federal FMLA so it is noteworthy.
9.3	Consider defining FICA earlier in regulations since it is used twice earlier and once later.
10.0	Include words, "if any" when applicable to employer duty to send to email. Since DDOL is requiring employers to send to work email, clarify that any time spent dealing with FMLA leave issues is not time worked for purposes of wage earning under DE law (*e.g.,* for earning wages, whether minimum wage or otherwise). Many employers try to avoid using employer provided email systems for things that are not part of work. Law requires notice of "amount of benefits." Some read that as meaning the amount left in the bank for leave availability. Does DDOL interpret that differently? The regulation requires "approved amount of payment." Isn't determining the amount of payment an issue for DDOL's determination, not the employer? Why would the employer's duty to provide notice include an issue that the DDOL must determine? DDOL should create some Delaware version of a "Notice of Rights and Responsibilities" form that fulfills all requirements and have a regulation that makes use of that form de facto fulfill requirements of 3710. In stating the "amount of payment," what exactly is meant?

	DDOL should help employers by having tools that automatically calculate the "amount of payment" once an employer enters data in fields in a program created by DDOL. This needs to be made user friendly. It is complicated by in-state vs. out of state, period of time for calculating average wage, etc. Mind typos: "I" before "provide; "thorough" should be "through" etc. Regarding no cause of action: Is the intent for the failure to provide a notice to NOT give rise to a DE interference (type of retaliation) claim? Does this mean to imply the DDOL thinks Employers are the ones sending employees benefit payments? It sure sounds like it. Yet 9.2.2.1 says "The Department will pay the . . . benefits."
10.4	Reserve comment for completion of draft of reg.
11.1.1	More of an issue for employees than small businesses. But this seems harsh in the real world where the circle of help a person has might be small. The spirit seems right. But does it work in the real world? Also, is this meant to create new types of claims in Chancery?
11.3	Clarify it is employees who have the burden as to "[n]ew requests" (not employers). State how the person with the burden is to know what day constitutes "two days before." How are the requests made? To the employer or to DDOL? Will employers still have their five days to adjudicate and three days to inform? Employers often need "need to be nimble" (*e.g.*, business needs could be heavy requiring attention to tasks requiring a small staff to dedicate all attention to a "fire of the day").

	Consider an employee on intermittent leave taking an hour off here and there, but the need turns into 3 hours here and 2 hours there. How does 11.3 come into play in that evolving and fluid need situation?
11.4	Avoid duplication of the law in the regs. Only include what is new. This is all too dense. The "in other words" sentence clarifies very little but does a nice job of illustrating the gnarly nest that exists. The "ten days" piece and the "no limit to the time" piece makes very unclear when the 60 days period ends. Limitations periods should be clear. This is not.
11.6	Consider simply adopting all unemployment process and procedure for this process and procedure. Don't make it different. Everyone will lose the ability to have informed attorneys help them if a whole new system with different rules is adopted. IAB and UIAB are already separate animals. Don't make this a third. But note that the use of non-attorneys is regarded as a problem with the UIAB procedure, by many. Clarify if employers are restricted from having a non-attorney speak for the employer (including introduce evidence and examine witnesses). Maximum flexibility should be afforded, as employers should not need to hire a lawyer to operate, regardless of the wisdom of doing so. RE the "An employee in any Board proceeding ay file" paragraph: Caution against motion practice. But at least make it so employers also can file a motion. "The Board permit" paragraph. So may or may not? Unclear. More comments to be provided depending on how regulation is drafted. See first comment to this 11.6 above.
12.0	Reserve comment for completion of draft of reg.

13.0	Change "employees? And employers?" to "all parties." Since so much is on an employer's shoulder, why not give the employer the same incentive? Use some carrots. There are a lot of sticks. Whichever group is to receive this incentive, we urge clear and broadly communicated information to inform on this. Employers—especially smaller employers—will need resources to help them know how to correctly gather and input appropriate data and what procedure to follow to calculate the bottom line of what is owed in tax, *etc.* Valuable assistance would be tools that provide automated prompts and reminders for when things are due. Automate this for employers as much as possible. This applies both to the day-by-day determination of how to process and handle claims AND for determining how much is owed in tax for this program.
14.0	Clarify if the words "at the time of filing" can mean "when the employer provides its determination." If "at the time" means something sooner, DDOL should create something like a "Notice of Rights and Responsibilities" form that specifies on its face when it should be provided and include in language whatever DDOL views as fully meeting the employer mandatory "advise" (a/k/a notice) requirement that lurks in this section in some form so the requirements of 3714 are automatically fulfilled if the DDOL form is used. Something on the same form that is used in approving any benefits. Employers are going to innocently violate the law a lot, I predict. There is a TON of technical compliance requirements tucked here and there (*e.g.*, not all notice requirements appear in the notice section).
16.0 16.1	Start with an introductory sentence that gives clarity that the DDOL apparently entertains three different types of private plans: (1) those issued by insurance carriers; (2) those insured privately by the employer; and (3) those not insured but

	grandfathered. Clarify when and how each regulation in Reg. 16 is meant to apply to each of the 3 different types of private plans. Some might argue that this is not a sufficient list—that the code confers a right to have a private plan even if not insured or meeting grandfather requirements. True that DDOL disagrees? The regulation should make effort to make sense out of 3716(a)(1)b. It is required of a private plan but its meaning is unclear, *e.g.,* what is meant by (a)(1)b, beyond what is set forth in 3716(a)(1)a; what is meant by "in the aggregate" in that context, and how does 3703(d) have anything to do with such maximum number of weeks?
16.1.1	Typo: 3716(1) is not a section. Mean 3716(a)? Doesn't' the code's Jan. 1, 2024, deadline only apply to 3716(e) (*i.e.,* "this subsection")? Three months between availability of a form (10/1/2023) and due date (1/1/2024) is not reasonable, particularly with holidays. Businesses are likely to need more time to avail themselves of this, because it presents as a complicated insurance issue, and wheels often necessarily turn slowly because several players are involved. My guess is that insurance companies are working franticly on this, but unsure of that. And that is just the first step, then employers need to know about this option (and MANY definitely do NOT). Then, the employers and the insurance companies need to work out all the details. This just takes more time than is being given. What happens if an "employer group" is under 25 employees as of 1/1/24 (the deadline to opt-out and provide notice), nonetheless has what it takes to opt-out (except meeting the1/1/2024 date), and then grows above 24 employees before 1/1/2031? Shouldn't a mechanism exist for very small employers who might not even have this on their radar to benefit from 3716 if they grow?

	The term "benefit year" is used 4 times in 3716(a)(1). Other times "calendar year" or "application year" is used. What does "benefit year" mean? The term appears nowhere in the draft regs.
16.4	Typo: 3716(2)(a) is not a section. Doesn't' the code's Jan. 1, 2024, deadline only apply to 3716(e) (*i.e.,* "this subsection")? See related notes in 16.1.1. Clarify that the 100-employee limitation is not meant to apply to grandfathered policies, which need not have been insured at all. Some employers will read the regulations and conclude that if they are under 100 employees, they cannot qualify as a "private plan" authorized by 3716. Is that DDOL's intent? If so, some will argue that is not consistent with rights under 3716. This section is confusing. "Self-insured plans" sounds like employers will have the option of relying only on themselves, and not using any outside insurance. Is that an option or not? In the context of "self-insured plans," what is meant by "employer groups"? Is this an option for a single employer that wants to self-fund? If so, which regulations apply to such single employer "private plans"? Doesn't this 100-employee threshold discriminate against very small employers who might not have had a policy that meets the grandfathering requirements, perhaps in contravention of the right that exists under 3716? Some may argue that the unrestricted discretion by the DDOL to grant an exception to those it deems "able" and to have "administrative capacity" does not cure what some may argue to be a deprivation of an employer's right to have a private plan. Regardless, explain how the DDOL will go about granting waivers based on its determination of ability to demonstrate administrative capacity to adequately manage. That seems

	rather fraught with opportunity for bias/prejudice or otherwise unrestricted power. RE the mandatory quarterly (April) reports, how are employers to handle salaried (non-hourly) employees. Many don't know the hours worked, and nobody has ever cared or needed to know.
16.4.1	The "Therefore, for self-insured . . ." paragraph seems better suited to begin with "Example: For a self-insured . . .". Same as 16.4. Why only "employer groups" having 100? Many may argue that the law affords a right for a private employer to have a private plan in additional circumstances even when grandfathering doesn't apply. It is unclear what is meant in terms of the "contribution amount" as applied in 16.4.1. Perhaps does this mean the bond amount? As with every other instance where wage amount matters, clearer guidance is needed about how to determine what wages must and must not be considered (*e.g.*, in-state wages).
16.4.2	Typo: "of?" Formatting seems off. Check for typos (*e.g.*, ". . . provision of? an approved . . .") Replace "beats" with "exceeds" Regarding the bond, can't more time be built in, so that an employer can get affairs in order AFTER hearing that it has been denied or not? There should be a gap of time, so unnecessary expense isn't incurred. DDOL should provide a pre-approved form of self-insured plan that at least illustrates what will pass DDOL's scrutiny.

	Provide and include a link to the form of certification/attestation expected. Regarding the sentence starting with "If, at any time, the Department finds": a system of notice and opportunity for cure (a/k/a due process) should be afforded. The limitation of amending only at the beginning of the year is too restrictive. Employers often need to be more nimble than that, especially very small employers. For the "proposed changes" to any self-insured plan, can DDOL at least provide a date by when it commits to getting to the required approval? Can the limitation that changes "can only be made at the beginning of the year" at least be changed to "can only go into effect at the beginning of the year"?
16.4.3 first	There are two 16.4.3 sections. Regarding the "self-insured plan claims fund": Is the amount required to be held in reserve: 900 X 12 X 8 = $86,400/ 2 = $43,200? If not, what? How does this work for an employer with only 25 employees? It forces them to set aside enough for ½ of its workers to all be out at once. It makes the option unachievable for a small employer. How is this amount reasonable since many have STD plans and protection exists through the insurance product? This all seems excessive and unfair, especially where many smaller employers have chosen to be very generous for many years, despite any requirement.
16.4.3 second	There are two 16.4.3 sections. Regarding the "audits": The wording of the 24-hour "must make available" requirement seems rather unreasonable, where penalties exist for non-compliance but simple due diligence, perhaps consultation with professionals to assist, etc. will predictably be needed to collect,

	review, and prepare responsive information. "Any information" regarding "any issue" is a VERY broad thing to expect employers to have the ability to fulfill a 24-hour demand. DDOL should think of its own ability to turn around complicated requests, and give similar courtesy to employers—especially small employers. DDOL should at least afford weekday hours. And a few BUSINESS days is much more reasonable. Implying criminal culpability for what might well be simple error seems heavy-handed. DDOL should soften some, recognizing that honest mistakes will happen as a massive new program is implemented—including where the law and regulations are not clear. There will be trial and error. The State has an interest in protecting its business community too, or there will be no jobs for people to work, because business will leave and new businesses won't be attracted. There will be a cost to a heavy-handed DDOL. What will be deemed "excessive" and "mis-adjudication" for purposes of this perceived criminal culpability?
16.5	Typo: There is no 3716(2)(e). Mean 3716(e)? Should the 7/1/2022 date be 5/10/2022? Employers will be fine having the later date. In recognition that this law will be a massive disruption to businesses and a huge burden, especially on small businesses, this section should be as accommodating as possible for employers to get their policies and practices grandfathered. Unclear what "risk transference provisions" is meant to mean – discrimination and retaliation/interference claims? Should "defined only in through the terms" be edited? "Employee Handbook plans" is in quotes. Recognizing that the regulations say "including but not limited to," the regulations

	should clarity that paid leave policies and practices qualify for this grandfathering even when not in a "handbook." Many (perhaps especially smaller) employers simply have policy collections, sometimes not even under a single cover. And many more still rely on policy as proven by practice—not written policy. How will policy-by-practice be handled? Will employers with such "policy" have a shot at grandfathering? It seems to many that the Code contemplates ongoing rights of small employers to have generous policies and opt-out of the program – even if under 100 employees. Regulations should provide more options for small employers.
16.5.1	Can any employer with less than 25 employees as of 1/1/24 who elects this (with notice) remain grandfathered no matter how their numbers grow through the end of 2030? What happens if an employer is under 10 as of 1/1/24 (the deadline to elect and provide notice) but then grows above 24 employees before 1/1/2031? Shouldn't a mechanism exist for very small employers who might not even have this on their radar to benefit from 3716 if they grow? Employers would benefit from much greater detail and clarity on the issue of private plans versus grandfathered plans. Employers should be given VERY clear options; and opportunity should be provided for employers to try but fail at grandfathering but still pursue other options than going into the fund. The regulations do not provide sufficient clarity on options or process simply to continue being very generous with its employees, outside of the State system.
16.5.2	Typo: "Provides?" Should the 7/1/2022 date be 5/10/2022? Employers will be fine having the later date. This section should be fleshed out more, as many employers will be interested in exploring their options here, and the

	regulation could be helpful if clearer. Also, the more lenient this grandfathering can be the better. Regarding the affidavit and the requirement to attach a copy of a plan: What if an employer had a well-established practice that it can prove was consistently implemented but it was not in writing. They can't produce a copy of the plan as required by regulations. Will the absence of the plan de facto disallow grandfathering? Or can an employer put into writing what their practice (and thus "the benefits in existence"), even though it had not been in writing until submission? We note 3716(e) says "benefits in existence" (not plans in writing in existence). The sentence with the typo of "provides?": In addition to the typo itself being edited, can this be better explained? If a small law firm, for example, gave all attorneys 12 weeks of parental leave, but did not do so for assistance, would the plan be grandfathered? This regulation can seem internally inconsistent on the point of how many lines of coverage had to be available, and to how large of a group it had to be available. Similar to the "provides?" sentence, the sentence beginning with "Alternatively, an employer's existing PTO benefit plan" should be fleshed out, and perhaps the "provides?" sentence and this sentence can be combined into a provision that clearly states the exceptions. The "maximum of xx days or more of combined Paid Time Off at full salary" should be fleshed out. This sentence will prove very important for employers to understand. It is widely regarded as a great start to a fair regulation that allows employers who have been generous to continue giving their employees what has worked for everyone involved for sometimes a very long time. This regulation should strive to allow for minimal disruption. Regarding the additional requirement that the "PTO benefit plans must provide [the two bullet points]" – what if a plan is silent on "regardless of the parent's sex or gender or marital status" but has NEVER been applied in a way that

	"discriminates" on such issues? There will be employers that simply have a policy applicable to ALL employees but has never sought to say that it doesn't apply "regardless" of such issues. Will the policy pass grandfather or not if silent? Regarding the last sentence, won't some grandfathered plans meet the criteria to be grandfathered but still warrant and maybe even require editing? If changes cannot be implemented until "approved in writing" by DDOL, doesn't that create a window of potential tension?
16.5.2.1	Change "better" to "more"
16.5.2.2	The last sentence does not make sense. The DDOL should want to encourage positive changes that provide more coverage than previously provided. DDOL should only prohibit decreasing benefits. DDOL approval should not be required for positive changes/ increased benefits. All DDOL approval process throughout the regulations should have detailed process and procedure specified or cross-referenced if there is one elsewhere, and a specific timeframe should be detailed for DDOL act, because employers need to know about approvals in advance of deadlines. Unfettered decision making makes running a business impossible.
16.5.3	Is this saying that if an employer has a STD policy that covers all employees for only their own disability, and disability is defined as required by the carrier (with such definition varying widely between policies), and such provides for 60% wage replacement for 4 weeks, would it fail on account of it not giving 4.5 weeks of coverage? How are STD elimination periods treated? They often run up to 15 days (sometimes shorter). Will an elimination period be fatal to grandfathering? Consider multiple scenarios involving elimination periods (*e.g.,* PTO theoretically would have covered it but the employee used all PTO so some of the elimination period is unpaid), and provide guidance.

	Same as above, but an employer pays for an extra week after STD ends, would that make it eligible for grandfathering? In other words, can benefits be cobbled together to fulfill the requirement? If all the employer has is the STD but only for own disability, is that okay (even though the other 3 categories of leave were not provided? If that plan is grandfathered, that only applies to the line of coverage that is grandfathered, right? What of the other lines of coverage required by the law? Those would still have to be given, and all requirements (including the taxing, the reporting, and the payment from the fund) would apply, is that right? In other words, is this a line of coverage by line of coverage grandfathering? 3616(b) indicates the answer to the last question is "yes." In general, private plans simply needs to be better fleshed out so employers can better understand their options, or at least the professionals guiding them can.
17.0	Are the 50% employee contributions still able to be withheld from wages even though "premiums" and not "taxes"? Confirm that withhold of the 50% from employee pay is for the employee's benefit and is NOT deemed a violation of DE law or DDOL regulation on the Wage Act (even though arguably at least somewhat for the employer's "benefit"). Consider DDOL Reg. WP101. Clarify the opt-in is a line of business by line of business decision; not all or nothing.
18.0	Provide some language that an employer who uses a form meant to provide notice shall be conclusive evidence that notice was given. Give some sort of protection and assurance that will urge employers to use the forms, *i.e.*, it comes with DDOL

	stamp of approval. Perhaps, like FMLA, don't NEED to use form, but there is benefit in doing so.
18.2	Consider not framing anything in a way that appears that the DDOL is conferring on itself powers in addition to those given to it. Some might argue that is unconstitutional. Consider if the "as the Department determined" and "random basis" standards. How confident is DDOL that it meets constitutional rigor? Regardless, might the DDOL demonstrate a little less off-putting power (thus perhaps being more appealing to citizens and those who might do business here) by at least articulating a "reasonable belief" standard. Regardless, what exactly is meant by examining an adjudication claims application?
18.3	Is this saying the DDOL maintains that it could show up first thing in the morning on Tuesday if it gave notice one minute before noon on Monday, for example? Some might argue the employer has the statutory right to more notice ("after 1 days' notice" is in 3718(d)(1)). DDOL should give employers not less than 8 business hours.
19.0	Some will argue the interpretation is excessive of the law that was passed. Some will argue "failing to file reports" (plural) is, in the code, one violation. Much less harsh penalties should be created through regulation. By way of example only, a very small employer with 25 part-time employees on January 1 and only 5 part-time employees every other day of the year is prone to myriad violations simply out of ignorance during those months. That employer could easily miss 4 quarterly payments believing itself not to be covered. $20K could break the back of a very small business.
	See also cover letter accompanying this chart.

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