MARYLAND
Chamber of Commerce

Via Electronic Mail

November 18, 2024

Maryland Department of Labor
Division of Family and Medical Leave Insurance
1100 N. Eutaw Street
Baltimore, MD 21201

Re: Comments regarding published FAMLI regulations

Dear Secretary Wu:

Founded in 1968, the Maryland Chamber of Commerce is the leading voice for business in Maryland. We are a statewide coalition of more than 7,000 members and federated partners working to develop and promote strong public policy that ensures sustained economic health and growth for Maryland businesses, employees, and families.

We appreciate the opportunity to provide the below comments on behalf of our members. Keeping in mind the length of the draft regulations document, the complex nature of the FAMLI program, and the quick turnaround for public comment, the below comments are aimed at providing clarity and reduced administrative burden for Maryland's employers.

Chapter 01 General Provisions
.01

B. **(12)** The proposed regulations should be amended to require a covered employee to have worked a certain amount of time for the employer prior to being eligible for benefits. Amending the regulations to require a covered employee to meet a certain time threshold with an employer would comply with state law. Further, the change would protect employers from burdensome leave requirements at the start of the employment period.

(43) This definition of wages does not address how severance pay is subject to the law. Are contributions taken from severance pay? Does severance pay count as wages toward an employee's benefit calculations and how would this pay be treated if a former employee signs a release?

Chapter 02 Contributions
.02

A. Creating a separate online account is a cumbersome requirement that has created significant issues in other jurisdictions like Delaware. Rather than forcing employers to

open new accounts with the state, which requires new portals and authentication, the regulations should be amended to leverage existing employer data with the state.

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B. As drafted, this provision is so broad that it will undoubtedly raise legal questions regarding whether the work of employees from other states or independent contractors who travel into Maryland are covered by the law. The definition of employment varies across states and determining which test applies will create significant compliance issues. Additionally, the proposed regulations do not define the term "incidental," which means that employers will be left to make unilateral determinations on a case-by-case basis.

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A. The regulations should only count employees <u>within</u> the state. By counting employees outside of Maryland to determine whether an employer must make contributions, MDOL is creating financial disparity between employers based on employee location instead of programmatic impact. For example, an employer with 50 employees in another state but only a handful in Maryland has less impact on the FAMLI program than an employer with only 10 employees located solely in the state. However, that employer with 10 employees solely located in Maryland would not be required to contribute to the FAMLI program while the employer with only a few in Maryland would.

.07

A. As drafted, this provision holds an employer immediately and irrevocably liable for an act that could be a simple mistake. The proposed regulations should be amended to, at minimum, provide a cure period for the employer to rectify a mistake instead of rendering the employer liable and only providing an exception if the employer is unable to meet payroll requirements during the following six pay cycles.

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A. **(3)** While allowed for in statute, using audit authority to look for violations outside the scope of delinquent contribution violations is egregious. We urge MDOL to remove this as a form of penalty.

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B. In the case of contribution overpayments, multiple items of feedback should be considered:

1. The burden of contacting a former employee to return their contributions should lie with the state, not the employer. This is the standard procedure for other benefit programs such as unemployment insurance. Placing the burden on the employer creates a variety of other problems.

2. If the burden were to rest with the employer, a timeline for how long the employer must attempt to contact the former employee and by what methods needs to be specified. Further, if the former employee cannot be reached and the stated timeline has expired, those contributions should/would be considered unclaimed property and would likely need to be remitted to the Comptroller and could not simply be claimed by the FAMLI division. This process is standard in many other sections of state law.

Chapter 03 Equivalent-Private Insurance Plan

As a broad point, the Chamber would like to point out that the presented draft regulations do not contemplate any process for allowing/approving private plans which may be self-insured (benefits and claims paid directly by the employer) but administered by an outside third-party entity (an insurance company). This scenario is allowed for in most other states that have adopted FAMLI style programs, but these regulations appear silent on how those situations would be managed.

.03

B. As a point of clarity, does this section mean that an employer would have to pay benefits to an employee out of their plan if that employee became eligible for benefits under a previous state plan? The regulations do not lay out a right of reimbursement for an employer in these instances. If a new employee was eligible under a previous employer in the state plan, it should be made clear that they should file for benefits under the state plan, not the private employer plan.

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E. The EPIP application fee should be set at a flat rate for all applications. Differentiating between employer sizes and commercial versus self-insured styled plans is confusing and lacks policy rationale. Commercially available plans would have already been pre-approved by MIA as meeting the division's requirements, making these rubber stamp applications and employers seeking to self-insure shouldn't be penalized with a maximum application fee simply for pursuing the plan that best fits their needs. A flat application fee is standard in most other states, we strongly suggest Maryland adopt the same.

I. Without a change in EPIP administration protocols or plan benefits, requiring an annual application due 90 days before a current EPIP expires is an egregious burden. This requirement would seemingly have small businesses caught in a never-ending turnaround cycle of tracking and submitting applications and fees in a nonstop process. **An annual fee of $1,000 for a small business with a self-insured plan is an absolute non-starter for owning and operating a small business in Maryland.** The Maryland

Chamber suggests requiring a new EPIP application every three years unless there is a change in benefits or administrators/administration protocols.

J. **(f)** The burden of reporting the issuance of a replacement bond should only lie with the surety company. A double notice requirement is unnecessary. Further, the surety bond requirement, in addition to the high annual fees established in the proposed regulations, is both administratively and cost burdensome compared to other jurisdictions.

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B. In lieu of a one-time extension that the Department *may* extend upon request, we suggest adding a *definitive* cure period to this provision, like in other sections of the code, so that an employer does not have their EPIP terminated for something that can easily be remedied.

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B. This section states that an employer's EPIP enrollment may be terminated by the Division when the Division determines that terms or conditions of the plan have been "repeatedly or egregiously violated" in a manner that necessitates termination. Those terms must be defined as they are used as the trigger to terminate an employer's EPIP. Is "repeatedly" defined as more than once, or a three-strike rule? Does it apply to a failure to adhere to the same type of violation repeatedly or a series of violations instead? What type of violation would constitute an "egregious" violation (e.g., failure to pay benefits amounting to thousands of dollars, failure to make timely benefit determinations that exceed one week or 30 days, etc.)?

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A. **(d)** We encourage the division to make collecting contributions and holding them in escrow optional. This is commonly allowed for in other state FAMLI plans and it can be cumbersome for employers to return contributions to employees after the fact. In lieu of collecting and holding contributions in escrow, can the employer sign an agreement to pay the full amount of the backed contributions to the state plan if their EPIP is not approved?

Chapter 04 Claims

.04

A. This provision should be amended to clarify that an employee must complete the claim application prior to taking leave. As drafted, the proposed regulations may result in employees taking leave without notifying an employer due to the belief that an application can be filed after the leave is taken.

B. **(7)(a)** The proposed regulations should be amended to provide employers with more than 5 business days to respond to notice of a submitted claim. Large employers with numerous managers across the state need additional time to relay and process information. Additionally, 09.42.04.08(a)(1)(e) of the proposed regulations would require employers to notify employees when the employer knows that an employee's leave or leave request may be eligible for FAMLI. Unless the proposed regulations are amended, the overly expedited response times and knowledge requirements found throughout the proposed regulations will create significant liability and compliance issues for employers and the Department.

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B. **(2)(b)(i)** The regulations stipulate that, where an employee is taking FAMLI leave to care for a family member and the family member dies, the benefits continue for an additional 7 days – which effectively provides bereavement leave that is not one of the specified reasons for leave under the FAMLI law.

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A. The draft regulations are silent on what information the employee must provide to establish that adequate notice has been given to the employer for intermittent leave. This must be addressed to avoid future issues.

We recommend changing the 5-business day response time requirement to 10 days to accommodate situations where an employer's staff members assigned to this role may be out on approved leave. 5 business days is quite short and staff coverage and oversight might become a challenge.

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B. **(2)(b)(ii)** This requirement should be flipped in that the burden should be placed on the employee to demonstrate that they gave the employer adequate notice of intent to take intermittent leave. Why would the employer be required to prove to the division that they did not receive adequate notice of an employee's intention to take intermittent leave?

(2)(b) Unless the employer first notifies the FAMLI division, the proposed regulations appear to prohibit an employer from enforcing their absence policy when an employee fails to provide reasonable and practicable prior notice to the employer. This is an untenable requirement for employers that will waste time and resources in situations where an employee has failed to comply with the law. Further the proposed regulations provide no timeline or process for what actions must or may occur after notice is provided. Finally, the proposed regulations provide no deadline requirement for the FAMLI division to respond to an employer's notice, meaning that employers may be

left with little or no ability to enforce attendance policies for prolonged periods of time in cases where an employee has willfully failed to comply with the law.

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A. **(1)** This provision should be amended to require the first payment at the next regularly occurring pay period since employers utilize varying pay cycles and many employers utilize payment in arrears models.

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A. The ability of employers to challenge fraudulent applications for benefits is quite limited. Pursuant to the proposed regulations, employers have 5 days in which to respond to an application. While the regulations do stipulate that an employer may provide relevant information after that 5-day period, if that information would result in a revocation of benefits, the employee is still entitled to the benefits already received. 09.42.04.11 clarifies that job and anti-retaliation protections do not apply once fraud is "proven," however, there is no clarification of what that standard means or timeline for how long that might be – meaning that an employer may be required to continue active employment for an employee that is knowingly engaging in fraud until the Division says otherwise.

While the draft regulations permit an employer to request additional information where an employee's use of intermittent leave is inconsistent with the leave approval, there is no provision for an employer to request additional information in response to an initial notice of the need for leave, which may be necessary to establish fraud. Moreover, the absence of dispute resolution and enforcement sections is troubling.

The Maryland Chamber of Commerce appreciates your consideration of these comments, and we look forward to working with the Department to ensure that the regulations are workable for employers. Should you have any questions or require additional information, please contact Grason Wiggins at gwiggins@mdchamber.org.