July 9, 2024

William Moore
Minnesota Office of Administrative Hearings
600 North Robert St.
P.O. Box 64620
St. Paul, MN 55164-0620

Re: Comments on Proposed Rulemaking Governing Minnesota Paid Leave

Dear Mr. Moore,

Our organizations represent tens of thousands of employers and workplaces across the state of Minnesota. These are businesses of all shapes and sizes, in all parts of the state, who provide good-paying jobs to hundreds of thousands of Minnesotans. Our members work hard to care for their employees and communities.

We appreciate the opportunity to respond to the Minnesota Department of Employment and Economic Development's (DEED) Request for Comments regarding certain elements of the Minnesota Paid Leave Program (Revisor's ID Number R-04846). This letter also responds to requests for comments found in DEED's Paid Leave Rulemaking Listening Session guides, published in June and July of this year.

This mandate is unprecedented in scope and cost, and simple, clear, and cost-effective implementation is imperative for employers and employees alike.

DEED Request for Comments (OAH Docket 25-9044-39758)

Issue 1. Rules to further define terms, including "health care provider." With regard to "health care provider," we believe the list of providers enumerated in the Minnesota Paid Leave Law is sufficient and expansion is unnecessary. *Minn. Stat. 268B.01, Subd. 24 (1)*. The department should only deviate from the statutorily enumerated list of providers to conform with the definition used in the federal Family and Medical Leave Act (FMLA) (29 CFR 825.102), which is known to both employers and employees who are subject to or covered by FMLA.

In rulemaking, DEED should further clarify that, where documentation from a health care provider is necessary to support an application for benefits, the documentation must be provided by a health care provider acting within their scope of practice.

Issue 2. Rules to identify what serious health conditions and other events are prospectively presumed to constitute a seven-day qualifying event.

Applicants should provide proof of a serious health condition or other qualifying event from a health care provider acting within their scope of practice. In order to deter and prevent fraud, the department should not propose or adopt rules establishing presumptive conditions for any qualifying event.

When determining whether a qualifying event has met the seven-day threshold, the department should create a form and process in rules for an applicant and defined provider acting within their scope of practice to provide the necessary documentation on a case-by-case basis.

DEED should take this opportunity to clarify in rules how the state's Sick and Safe Time (SST) mandate will interact with Paid Leave, and whether Paid Leave payments and time will be reduced by the amount of SST used during the Paid Leave claim.

Issue 3. Rules governing procedures for appeals of determinations.

Simplicity and familiarity is important for both employer and employee. To the extent they are relevant and practical, the department should follow established administrative hearing procedures for existing programs (e.g., Unemployment Insurance).

Issue 4. Rules to set out the process for documenting safety leave.

The department should adopt rules defining the term "qualified person" in section 268B.06, subd. 3, as amended by Laws 2024 Chapter 127. We recommend adopting the following definition:

> ***Qualified Person.*** *"Qualified person" means one of the following persons with knowledge of the need for safety leave which may prevent the individual from participating in certain employment activities: an attorney representing the applicant or a family member of the applicant, an employee of a law enforcement agency, an employer or workplace supervisor of the applicant, an employee of a sexual assault or domestic violence services or counseling agency, or professionals from whom the applicant or recipient has sought assistance for abuse that gave rise to the need for safety leave.*

These criteria are similar to the acceptable documentation necessary to obtain a family violence waiver under the Minnesota Family Investment Program. *Minn. Stat. 256J.545.* However, we do not believe the underlying statutory language in section 268B.06 permits the department to adopt language similar to paragraph (c) in section 256J.545.

Listening Session: Seasonal Employment, Opting-In

When creating a definition of receipts in the seasonal employment context, DEED should consider receipts based on individual business segments or the entirety of the business, whichever the business chooses. Many businesses operate certain segments year-round while operating other hospitality-oriented

segments on a seasonal basis. When a business segment qualifies as seasonal employment, but the entire business does not, the business segment qualifies under the definition of seasonal employment.

As an example, a small resort may offer canoe or kayak rentals to guests during warmer months but not in the winter. Likewise, a lodging establishment or restaurant may operate and staff other recreational amenities, food service, and other business segments on a seasonal basis. The intent of the statutory language is clearly for these segments to be considered seasonal and covered under the exemption.

Similarly, the statutory language ("an individual who is employed for no more than 150 days during any consecutive 52-week period in hospitality by an employer…") means an individual can be a "seasonal employee" by virtue of either working in a qualifying hospitality role/business segment for any covered employer or for a covered employer who is a qualifying hospitality business in its entirety. *Minn. Stat. 157.15.* DEED should adopt rules reflecting this understanding of the statutory language.

For documentation, DEED should require the employer to state gross receipts in whichever six month segments the employer chooses for the relevant business segment or the business in its entirety. In saying "any six months," the statute is clear that months need not be consecutive. Seasonality is not defined and can mean different things to different types of businesses, with some experiencing summer on/winter off seasonality and others experiencing seasonal revenue dips in the fall and spring.

DEED should verify a covered employer's receipts through state tax records, payroll records, and other nonpublic government-held or public data.

Lastly, DEED should count 150 days in the seasonal employment context based on an employee's status. For example, full-time salaried employees should be counted based on consecutive business days. However, because they can have irregular schedules and go long stretches between shifts, hourly workers should be counted based on hours worked. For instance, a four-hour shift worked by an hourly worker should count as half a day toward the 150 day threshold.

The law expects employers and DEED to be able to measure Paid Leave usage in various small increments, so this should not pose an added burden.

Listening Session: Intermittent Leave, Role of the Employer, Covered Employment

Intermittent Leave. For the definition of "reasonable effort," DEED should also include language from FMLA regulations: "the employee must make a reasonable effort to schedule the leave so as not to disrupt unduly the employer's operations."[1]

For the definition of undue hardship, DEED should follow the United States Department of Labor's definition of the same term in the ADA context: ""Undue hardship" means significant difficulty, including accommodations that are overly extensive or disruptive, or which could impact the actual running of a business."[2] At a minimum, DEED should add to the proposed definition that the term undue

[1] 29 CFR 825.203

[2] United States Department of Labor, "Job Accommodations," https://www.dol.gov/general/topic/disability/jobaccommodations, accessed 7/3/2024

hardship also includes significant added expense, significant disruption to other employee's schedules, or significant disruption to the operation of the business.

Since the Paid Leave Law's intermittent leave requirements are generally based on the federal Family and Medical Leave Act, when adjudicating disputes between employers and employees on intermittent leave, DEED should follow FMLA guidance and court precedent for employers who are subject to FMLA.

DEED should give added deference to small businesses due to the burden imposed on small employers with fewer than 50 employees who are not subject to FMLA and are not familiar with its requirements. Small employers will face higher initial and ongoing compliance costs with Paid Leave, and accommodating intermittent leave requests poses unique burdens for small workforces - particularly in locations where worker scarcity already makes it difficult to keep doors open. For small employers, the burden to show intermittent leave does not pose an undue hardship should fall on the applicant.

Role of the Employer. For proof of compliance with the Paid Leave law's notice requirements, we believe the proposal is a good first step but DEED should require an applicant to provide the department with a copy of the notice provided by the employee to the employer(s). For verbal notice only, the employee may attest to having provided it. In both circumstances, we agree with the proposal for DEED to share the proof or attestation with the employer as a necessary means of verifying compliance.

As a consequence for failing to comply with required notice requirements, DEED should adopt a rule that withholds the full amount of paid leave benefits for the first seven days of any claim with a duration longer than 14 days. If the claim is 14 days or less, DEED should withhold 50 percent of the total benefit.

On employer notification, we support DEED's proposal to provide notice to employers throughout the application and approval process. We recommend the notice be provided in real time whenever possible and the department should prioritize developing an electronic means of transmitting this information between the division, the applicant/employee, and employer(s). Examples of an effective government-employer communication system include the Federal Motor Carrier Safety Administration's (FMCS) interactive program for Drug & Alcohol Clearinghouse reporting for CDL drivers to facilitate communication with the employee as well as the employer.[3]

On information sharing with the employer, we support the five data points enumerated by DEED in this listening session guide and encourage the department to also share the general category of leave requested by the employee, whether it's medical, bonding, family, safety, or qualifying exigency. Sharing the type of leave requested may help an employer aid in fraud prevention or abuse of the program without compromising the applicant's privacy or running afoul of state or federal data regulations.

On the proposed fraud reporting safe harbor rule, we appreciate the intent behind the inclusion of 'sincere' as a qualifier and do not support intentionally inaccurate reporting. However, we encourage DEED to remove the 'sincere' qualifier as it adds unnecessary ambiguity and may deter an employer from making a legitimate report or providing useful information for fear of incurring litigation. Rather, DEED

[3] https://clearinghouse.fmcsa.dot.gov/

should adopt separate language specifically addressing and providing consequences for intentionally inaccurate reporting.

Covered Employment. On eligibility for remote work employees, DEED should not move forward with this proposal and should provide additional guidance on what it seeks to accomplish before formally proposing a rule on this topic. Further, DEED should avoid expanding program eligibility due to the volatility of the program's finances and increased costs for employers and workers.

Listening Session: Employment Protections, Benefit Payments

Employment Protections: DEED should adopt a rule establishing the reasonable period of time to fulfill the requirement for reinstatement in Sec. 268B.09, Subd. 6 (b)(2) is the earlier of thirty (30) days from the date of reinstatement or seven (7) days from the date at which the class, training session, or other educational opportunity is first available to the employee.

Further, DEED should specify that, unless the employer funded the cost of such training or education prior to the leave, the employer is under no obligation to fund the cost of the training or education necessary for a paid leave applicant to obtain reinstatement under Sec. 268B.09.

DEED should adopt rules clarifying that an employer may, without risk of incurring any penalty, do the following:

- require an employee returning from a leave of 30 days or more provide notice to the employer of the employee's intent to return from leave no later than 14 days prior to their date of return;

- require an employee who is returning from leave provide a statement that the employee is physically able to perform the functions of the position to which the employee is returning; and

- present an employee returning from leave with alternative reinstatement scenarios, including the option for the employee to return to a different position, shift, or alternate schedule.

These proposed rules are necessary to allow employers to smoothly reintegrate an employee who had taken leave with as little disruption to other employees and business operations as possible. As with the FMLA regulations the first two proposals are intended to emulate, the rules should specify reinstatement is at the discretion of the employer for an amount of time equivalent to the period the employee failed to comply with notice requirements without sufficient reason.[4]

Listening Session: Modification, Overpayments

Modifications: DEED should adopt rules requiring applicants seeking to extend or expand an application for or existing leave to provide evidence of the need and eligibility for extended or expanded leave that is

[4] 29 CFR § 825.311-313

substantially similar to the initial application for leave. DEED must verify this information to the fullest extent possible and, as appropriate, approve or deny the modification.

For both an initial request for leave and notification of a request for modification, DEED should clarify that: (1) the notification obligation is to both the department and the employer; (2) the amount of advance notice required as part of that obligation; (3) and how this interacts with FMLA. Where possible, the department should seek to synthesize these requirements to avoid unnecessary confusion.

We believe that employers should have an active role in the process for requests to modify leave. Where ending a leave early involves reinstatement of an employee to a prior position, we support DEED's proposal to require a minimum notice for ending a leave prior to the date. However, we believe the minimum notice should be tied to the original or modified length of a claim.

If leave is for 30 days or less, notice should be provided a minimum of seven days prior to the early return date. If leave is for more than 30 days but less than 90 days, notice should be provided a minimum of 14 days in advance. If the leave is for 90 days or longer, notice should be provided a minimum of 21 days prior to the early return date. As noted above, an employer should be able to require a minimum 14 days' advance notice of intention to return regardless of the circumstance.

The rule should specify that it shall be the employer's sole discretion of whether to reinstate the employee prior to the end of the approved claim end date and to what position the employee is reinstated prior the end date of the approved claim end date.

DEED should adopt rules requiring that an employee provide notice of a request to modify a leave to the employer(s) and DEED should notify the employer immediately when a modification request is filed with the department.

Overpayments: DEED's rules regarding recovery of overpayment should impose no obligation on an employer to facilitate notification or the collection of an overpayment. Notification and collection of the overpayment should be handled between the department and the applicant. As part of an application for benefits, DEED should include a required acknowledgement from the applicant (e.g. check box; signature) that the state will collect any potential overpayments directly from the applicant and that collection of overpayment creates no obligation on the part of and is not the fault of the applicant's employer(s), if any.

Listening Session: Small Employer Assistance Grants

DEED should adopt rules requiring notice of the small employer assistance grant program to eligible small businesses electronically and through the mail, in concurrence with an existing notice provided by the department (e.g., notice of PFML tax rate, Unemployment Insurance communications, etc.) or from another department (e.g., Minnesota Revenue tax notification, Minnesota Department of Labor and Industry license renewal, etc.).

Further, DEED should also consider, on a quarterly basis, setting aside a minimum amount of grant funds for applicants located outside the seven-county metro to better ensure geographic parity.

Listening Session: Private Plans and Claims Administration

Claims Administration. DEED should further define clause (8) in the definition of "family member." *Minn. Stat. 268B.01, Subd. 23*. Given the severe and pervasive history of public program fraud and abuse in our state[5,6,7], we encourage the adoption of the following to ensure this provision is not abused by unscrupulous actors:

> ***Part 4308.XXXX. DEFINITIONS***. *The following terms used in parts XXXX to XXXX have the meanings given here.*
> *Subp. 1.* ***Applicant.*** *"Applicant" means an applicant for paid leave benefits to provide family care.*
> *Subp. 2.* ***Family Care.*** *"Family care" or "family care leave" has the meaning given in section 268B.01, Subd. 22.*
> *Subp. 3.* ***Individual.*** *"Individual" means a person whom the applicant intends to provide family care using paid leave benefits.*
> *Subp. 4.* ***Longstanding.*** *"Longstanding" means a period of more than three years prior to the submission of an application for paid leave benefits.*
> *Subp. 5.* ***Paid Leave Benefits.*** *"Paid leave benefits" means benefits provided under Minnesota Statutes, chapter 268B.*
> *Subp 6.* ***Proof of personal relationship.*** *"Proof of personal relationship" means one or more of the following documents or items that demonstrate a longstanding relationship between applicant and individual: (i) a photograph featuring the applicant and individual where a timestamp is visible, that is accompanied by metadata showing the date the photograph was created, or other proof of the date the photograph was created; (ii) phone or message records between the applicant and individual; (iii) dated bills for utility service, household service, personal service, or other dated invoice or contract for goods or services in the name of the applicant and individual, (iv) a legal document that was signed by a notary public or officer of the court, or (v) a comparable document or item as determined by the commissioner. In no case shall an attestation from the applicant, individual, or both be considered proof of personal relationship.*
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> ***Part 4308.XXXX. Family Care Benefits.*** (a) *An applicant for family care leave must demonstrate a longstanding relationship between the applicant and an individual using proof of personal relationship.*
>
> *(b) The commissioner shall require an applicant to submit one or more proofs of personal relationship as part of an application for family care leave. An applicant shall also submit a copy of the applicant's and individual's unexpired government-issued identification, social security card, visa, or other government-issued document with the application. Whenever practicable, the commissioner shall also use state records to verify the identity of the applicant and individual.*

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[5] Minnesota Office of the Legislative Auditor, "Minnesota Frontline Worker Pay Program Performance Audit," 6/11/2024

[6] United States Department of Justice Press Release, "U.S. Attorney Announces Federal Charges Against 47 Defendants in $250 Million Feeding Our Future Fraud Scheme," 9/20/2022

[7] Minnesota Office of the Legislative Auditor, "Special Review: Child Care Assistance Program: Assessment of Fraud Allegations," 3/13/2019

Similar proof of personal relationship criteria can be found in visa guidelines issued by United States embassies.[8] It is imperative that DEED, at a minimum, use all available resources to verify the existence of the individual for whom the applicant is taking leave to care and the eligibility of the condition or circumstance that gave rise to the need for care.

We support DEED's proposal to require proof of necessity from a health care provider in order for two applicants to take leave to care for the same family member. However, the rules should allow for approval of leave for a second applicant only for the minimum period of time required to complete specific activities where more than one person is needed.

In order to reduce and deter fraud, DEED should consider adopting rules that establish an independent third party medical examiner to verify the need for all applications for caregiving leave.

[8] See, e.g., U.S. Embassy in the Dominican Republic, "Submitting Appropriate 'Proof of Relationship'," 7/31/2023, https://do.usembassy.gov/submitting-appropriate-proof-of-relationship/