# Regulatory Flexibility Analysis and Impact Statement Form For Proposed New and Amended Regulations Affecting Small Businesses or Individuals 

## Introduction

Beginning January 1, 2016, agencies submitting proposed new or amended regulations that affect small businesses or individuals are required, under the new Regulatory Transparency and Accountability Acts of 2015 (see 80 Del. Laws, c. 112 and 113), to submit a Regulatory Flexibility Analysis (RFA) and a Regulatory Impact Statement (RIS) with the proposed regulation to the Registrar of Regulations (see 29 Del.C. Ch. 104).

This RFA and RIS form is intended to benefit the small businesses and individuals impacted by proposed regulations by ensuring a reasonable level of consistency in the formatting of RFAs and RISs across different agencies and regulations.

State agencies proposing new or amended regulations that are substantially likely to impose additional costs or burdens on small businesses ${ }^{1}$ or individuals ${ }^{2}$ must submit a Regulatory Flexibility Analysis (RFA) and a Regulatory Impact Statement (RIS) to the Registrar of Regulations, with the proposed regulation. For agencies proposing amendments to existing regulations, the promulgating agency shall only be required to complete the RFA and RIS for the proposed amended portion of the existing regulation, and not for the entire existing regulation.

## What is a Regulatory Flexibility Analysis (RFA)?

In each RFA, an agency must consider, where applicable, lawful, feasible and desirable, specific methods of reducing the burdens of the regulation on individuals and/or small businesses, including: (1) establishing less stringent requirements and deadlines; (2) establishing performance standards to replace design standards; (3) exempting individuals and small businesses from all or part of the regulation; and (4) examining other ways to accomplish the regulation's purpose, while minimizing the impact upon individuals and/or small businesses.

## What is a Regulatory Impact Statement (RIS)?

Among other things, each RIS must (1) describe the purpose of the regulation; (2) identify the individuals and/or small businesses subject to it; (3) provide an estimate of the potential costs of compliance; and (4) describe any less intrusive or less costly alternative methods of achieving the purpose of the regulation. In addition, the Act further enhances transparency by requiring the Registrar of Regulations to transmit regulatory impact statements to the appropriate standing committee of the General Assembly.

[^0]Agencies, Boards, and Commissions: please fill out this form when proposing new or amended regulations for the purpose of informing the public and business community. All proposed regulations, even if an exemption applies, must have this form attached when submitting to the Registrar of Regulations.
Date $\xlongequal{5 / 13 / 2024}$ Agency Department of Labor Division/Office $\xrightarrow{\text { Division of Paid Leave }}$

Contact Email (or mailing address for comments) $\qquad$
1401 Division of Paid Leave
Regulation \# $\qquad$ Title $\qquad$

## Exemptions

Exemption A: This proposed regulation is not subject to Chapter 104, Title 29 of the Delaware Code, because it will not apply to small businesses or individuals at all.Exemption B: The agency, board, or commission is exempt from completing the RFA and Impact Statement due to the nature of the proposed regulation.

Choose the reason for exemption:

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B1. This proposed regulation is not substantially likely to impose additional costs or burdens upon individuals and/or small businesses. Explain this conclusion:

B2. This is an emergency regulation pursuant to 29 Del.C. §10119.
B3. This proposed regulation is exempt from the procedural requirements of the Administrative Procedures Act, 29 Del.C. §10113(b). Choose which reason:

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B3a. Descriptions of agency organization, operations and procedures for obtaining information


B3b. Rules of practice and procedure used by the agency

$B 3 C$. Delegations of authority to subordinates

O
B3d. Nonsubstantive changes in existing regulations to alter style or form or to correct technical errorsB3e. Amendments to existing regulations to make them consistent with changes in basic law but which do not otherwise alter the substance of the regulationsB3f. Codifications of existing agency or judicial principles of decision derived from previous decisions and rulingsB4. This proposed regulation defines standard of conduct or qualifications of individuals applying for licensure or as licensed professionals. Identify which professional license or professional qualification this would apply to:B5. Regulations that are required by federal law and/or have already complied with the federal Regulatory Flexibility Act, 5 U.S.C. § 601 et seq. (If this is checked, the agency, board, or commission shall cite the federal law, regulation, directive, or guidance strictly mandating such state regulation and shall attach any applicable Federal RFA related to the regulation, if available. Attach the Federal RFA statement to this form, or provide the URL):

## End of Exemption Section

## Regulatory Flexibility Analysis

State agencies, boards, and commissions proposing to adopt or amend a regulation that is substantially likely to impose additional costs or burdens upon individuals and/or small businesses shall consider, where applicable, lawful, feasible and desirable, the following methods of reducing the additional costs and burdens of proposed regulations on individuals and small businesses:

1. The establishment of less stringent compliance or reporting requirements;
2. The establishment of less stringent schedules or deadlines for compliance or reporting requirements;
3. The consolidation or simplification of compliance or reporting requirements;
4. The establishment of performance standards to replace design or operational standards required in the proposed regulation;
5. The exemption of certain individuals or small businesses from all or part of the requirements contained in the proposed regulation; and
6. Such other alternative regulatory methods that will accomplish the objectives of the proposed regulation while minimizing the adverse impact upon individuals and small businesses.

Explain whether each of the above methods would be applicable, lawful, feasible, and desirable to reduce the costs or burdens of the proposed regulation:

1. A variety of alternative compliance and/or reporting requirements were discussed by the Department, based on other jurisdictions with PFML insurance programs and Delaware agencies with similar contexts. The proposed regulations were believed to be the most appropriate.
2. A variety of alternative compliance and/or reporting requirements were discussed by the Department, based on other jurisdictions with PFML insurance programs and Delaware agencies with similar contexts. The proposed regulations were believed to be the most appropriate.
3. All the data that is being collected as part of the PFML insurance program is already being collected by employers for other purposes. Extracting the data from their timekeeping and payroll systems might be complex for the first report, but should be easily duplicable thereafter.
4. Where ever it was appropriate, we chose to use performance standards rather than design or operational standards as part of these proposed regulation. However, many of the standards and requirements that are referenced were mandated by the Act.
5. 

Eligibility and exemptions are listed in the Act, which excludes federal employees \& seasonal businesses. Employees must work primarily in DE, have worked for at least 12 months, \& have worked less than 1,250 hours in the last year to be eligible for Leave under the program.
6. A multitude of alternative regulatory methods were discussed by the Department, our project management team, and a wide range of interested parties. The proposed regulations were believed to be the most appropriate, efficient, and cost effective.

If the above RFA section does not address each of the six methods and there is not an exemption that applies, explain why the agency, board, or commission decided it was not applicable, lawful, feasible, and desirable to complete the RFA section above:

## Regulatory Impact Statement

Any agency, board, or commission that proposes to adopt or amend a regulation that is substantially likely to impose additional costs or burdens upon individuals and/or small businesses must submit the below Regulatory Impact Statement (RIS).

- Reference the statutory provision that allows for the adoption or amendment of the regulation and the statutory provisions that address the subject matter of the regulation. In addition, provide the URL to the specific section of the Delaware Code to allow the public easy access to view the provision.
- Statutory Citation: 19 Del.C. §105
- URL: https://delcode.delaware.gov/title19/c001/index.html\#105
- Subject Matter Statutory Citation: 19 Del. C. Ch. 37
- URL: https://delcode.delaware.gov/title19/c037/index.html
- Describe the purpose of the proposed regulation (what is the need for the proposed regulation?):

The proposed regulations are the third round of regulations that are intended to implement the Paid Family Medical Leave (PFML) insurance program authorized by the passage of the Healthy Delaware Families Act of 2022. This third set of regulations is the last to clarify lacunae in the Act. This set of regulations focuses on the Job Retaliation and Anti-Discrimination provisions of the Act and stipulates how erroneous payments are to be addressed by the Division. It also updates the prior rounds of PFML regulations to align the language with the capabilities of Delaware LaborFirst (weeks or quarters instead of either days, months, or years) and it cleans-up some errors in the prior language, such as duplications and potential conflicts between provisions.

- What are the anticipated benefits of the proposed regulation? (Describe the benefits that are expected to accrue as a result of the implemented regulation). Please quantify such benefits, as feasible:

The unpaid nature of FMLA means that only those with sufficient savings can actually take the leave that they have been given the theoretical right to take. Surveys taken after the pandemic indicated that $65 \%$ of workers are now living paycheck -to-paycheck, with no savings at all to deal with health issues. PFML will provide a financial bridge for employees to navigate the situations that FMLA covers. For employers, this program will help attract and retain employees versus other states, like Maryland \& New Jersey, who have their own PFML insurance programs. In a time of labor shortages, these lower- than- market- priced benefits will make Delaware employers, especially smaller ones, more competitive.

- Identify the types of individuals and/or small businesses that would be subject to compliance under the regulation:
All Delaware-based employers with ten or more employees will be required to provide coverage under the PFML insurance program. The only types of employees that are excluded from coverage are federal workers (and, by extension, railroad workers and employees of tribal governments) and employees of seasonal companies (those employers that do not engage in commerce for 30 or more consecutive days per year). To qualify for coverage, employees must work primarily in Delaware, be employed by their employer for the previous 12 months, and work at least 1,250 hours during the most recent 12 months. The administrative system that we are creating and will make available to employers will help them manage their eligibility and enrollment requirements under the Act.
- Provide a good-faith estimate of the potential cost of compliance for individuals and/or small businesses, which at minimum shall include the projected reporting, recordkeeping, and other administrative costs required to comply with the proposed regulation. Use the below space for a free-text response (Cost Estimate Option 1) or, use the questionnaire below to guide the response (Cost Estimate Option 2):


## Cost Estimate Option 1:

There is no reliable, credible means of providing such a cost estimate for small businesses to comply with this program. This is a brand new program that will impact over 6,000 (depending on how many employers with less than 10 employees chose to opt-in to the program) of Delaware's approximately 26,000 employers. For employers with 50 or more employees, they have been administering the federal FMLA program for up to the last 30 years, so the additional responsibilities to comply with our PFML program will be de minimus (especially for those with robust payroll systems). However, for the approximately 4,700 Delaware employers who have between 10 and 49 employees, this will be a much more complex challenge (at least, until they create the automated reports that will manage most of their reporting tasks).

The Department is building Delaware LaborFirst, an online administrative system that will be available for employers, employees, payroll providers, third party administrators, insurance carriers, and health care providers) to administer the Paid Family Medical Leave insurance program and the State's modernized Unemployment Insurance program in the most user-friendly, efficient, and cost effective manner possible.

Delaware LaborFirst is being built on a CRM technology platform that will enable it to easily and securely interact with the systems used by our clients and customers. The system developers, Infosys, and the technology platform, Salesforce, are two of the most respected technology companies in the world, providing high-value but easy-to-use systems for thousands of the globe's most advanced clients. Development of the full system will take about three years and the developers are on contract to provide maintenance and enhancement services for five additional years.

The Department is working with an outside vendor to create informative FAQ's, videos, podcasts, and the like to educate, train, and assist all those who will be interacting with the program. We are contracting with a professional call center operation that will provide live assistance to employers and employees 24 hours a day, seven days a week, 365 days per year.

We do not anticipate the administrative cost of complying with the proposed regulations to be prohibitive, as the reporting information that we are requiring is readily available from the employer's payroll records that they already in their possession. However, employers will need to spend time and effort to create new reports to draw that information out of their system(s) and send it to the State in the proper format. Yet once the employers set up this new report, they will be able to run them each quarter without much additional effort. Our development team is meeting with Third Party Administrators and the State's largest employers to help ensure that electronic reporting is as smooth as possible.

|  | Cost Estimate Option 2 | Yes | No | Unknown |
| :---: | :---: | :---: | :---: | :---: |
| 1 | Is this regulation being proposed to implement a state or federal program that provides funds to Delaware? | $\bigcirc$ | $\bigcirc$ | $\bigcirc$ |
| 2 | If this regulation is not implemented, will individuals, businesses, or programs lose federal funding? | $\bigcirc$ | $\bigcirc$ | $\bigcirc$ |
| 3 | Does this regulation implement a plan that has already been approved by the federal government, after an opportunity for public comment? | $\bigcirc$ | - | $\bigcirc$ |
| 4 | Does this regulation follow industry standards and best practices? | $\bigcirc$ | $\bigcirc$ | $\bigcirc$ |
| 5 | Are there potential costs in not establishing these standards? | $\bigcirc$ | $\bigcirc$ | $\bigcirc$ |
| 6 | Does the regulation require capital costs (building costs, material costs, upgrades to property or structures, retrofitting of systems, etc.)? | $\bigcirc$ | $\bigcirc$ | $\bigcirc$ |
| 7 | Does the regulation require additional recurring costs on small businesses or individuals? | $\bigcirc$ | $\bigcirc$ | $\bigcirc$ |
| 8 | Does the regulation impose additional administrative burden for a small business or individual? | $\bigcirc$ | $\bigcirc$ | $\bigcirc$ |
| 8 a | If answering yes to \#8, is it ongoing reporting or one time? (Choose answer) <br> Ongoing One Time Unknown |  |  |  |
| 8 b | If answering yes to \#8, generally, how much administrative effort will be require regulation? Large Amount Small Amount Unknown | d to com | ply wit | the |
| 9 | Does the regulation require new or changed record keeping that will create new processes or change processes already in place for small businesses or individuals? | $\bigcirc$ | $0$ | $0$ |


|  | Cost Estimate Option 2 (continued) | Yes | No | Unknown |
| :---: | :---: | :---: | :---: | :---: |
| 10 | Would a small businesses or individual be required to hire an outside professional to comply with the proposed regulation (such as an attorney, accountant, tax advisor, environmental consultant, engineering firm, etc.)? | $\bigcirc$ |  | - |
| 10a | If answering yes to \#10, estimate how many hours an outside professional may be needed to assist |  |  |  |
| 10b | If answering yes to \#10, will a small business or individual be required to retain the services of the outside professional on an ongoing basis? |  |  | $\bigcirc$ |
| 11 | Does the regulation require small businesses to purchase goods or services that are unusual or not commercially reasonable? |  |  | $\bigcirc$ |
| 12 | Does the regulation require that small businesses exceed commercially reasonable data storage and transmission standards? |  |  | $\bigcirc$ |
| 13 | Will small businesses have to hire additional employees in order to comply with the proposed regulation? |  |  | $\bigcirc$ |
| 14 | Does the regulation require small businesses to cooperate with audits, inspections, or other regulatory enforcement activities? |  |  | $\bigcirc$ |
| 15 | Does the regulation have the effect of creating additional licenses, taxes and/or fees for small businesses? |  |  | $\bigcirc$ |
| 16 | Does the regulation require small businesses to obtain additional education to keep up to date with regulatory requirements? | ( |  | $\bigcirc$ |
| 17 | Please further explain any additional costs or burdens, which at a minimum shall include the projected reporting, recordkeeping, and other administrative costs required to comply with the proposed regulation. |  |  |  |
|  | The program will require quarterly reports of the firm's employees, their wages \& hours (in-state vs. out-of-state) broken out by week. Employers have this information in their systems (or else they would not be complying with existing state/federal regulations and/or accounting best practices). At the inception of the plan, the employer will need to create a report to pull the information out of their systems and send it to Delaware LaborFirst for both the PFML and UI programs. While ti may be difficult to create that report, once it has been created, the reporting will there after be automatic. Claims will be intermittent and the system will help employers manage their employees' applications. |  |  |  |

- Provide a description of any less intrusive or less costly alternative methods of achieving the purpose of the proposed regulation, and why these methods were not preferred to a regulation:

Within State government, we worked with the Divisions of Unemployment Insurance \& Industrial Affairs; the Departments of Finance, Human Resources, Technology \& Information, Insurance, \& Justice; and the Office of State Treasurer. We also worked with external stakeholders, such as: the State Chamber of Commerce, New Castle Chamber of Commerce, all 13 Chambers of Commerce, the Delaware Bar Association's Labor \& Employment Section, Society of Human Resource Management (SHRM), Committee of 100, American Council of Life Insurers (ACLI), National Payroll Reporting Consortium (NPRC), ADP, Paylocity, Paychex, DelawareCares, and more. Many were not happy that the PFML program had passed, but most agreed that what we were putting into place to implement and administer the program were appropriate to the task. A main concern that they have is the quarterly reporting requirement for individual employee's weekly information. However, that information is necessary to produce the advisory algorithms that will help employers more effectively and easily administer this complex plan.

- (Optional) Estimate the amount of agency, board, or commission staff hours it took to prepare this RFA and RIS statement:
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- (Optional) Agencies are encouraged to list trade or industry groups, small businesses, or other stakeholders such as currently regulated parties that were consulted by the agency, board, or commission in preparing this RFA and RIS. The agency, board, or commission is further encouraged to send them a copy of the RFA and RIS upon completion:


[^0]:    ${ }^{1 "}$ "Small business" means any not-for-profit enterprise, sheltered workshop or business enterprise which is engaged in any phase of manufacturing, agricultural production or personal service, regardless of the form of its organization, when such enterprise or workshop employs fewer than 50 persons, has gross receipts of less than $\$ 10,000,000$ and is not owned, operated or controlled by another business enterprise.
    ${ }^{z}$ "Individual" means any natural person, including any sole proprietorship. The term "individual" does not include any natural person affected by a regulation in his/her capacity as an officer, director, or employee of an organization that is not a "small business"; e.g. the CEO of a large business.

