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Testimony of Nate Cloutier

Before the Joint Standing Committee on Labor

Paid Family and Medical Leave Legislation

April 23, 2025

Senator Tipping, Representative Roeder, and distinguished members of the Joint Standing Committee on Labor, my name is Nate Cloutier, and I am here today on behalf of HospitalityMaine (HM), representing Maine's restaurant and lodging industries. I am also testifying on behalf of the Maine Tourism Association (MTA). MTA has been promoting Maine and supporting tourism-related businesses—from lodging and dining to camps, retail, guides, amusements, and historic attractions—for over 100 years.

Together, our industries employ more than 130,000 people and contribute $16 billion annually to Maine's economy. According to the Maine Office of Tourism, that impact helps lower the tax burden for every Maine household by nearly $2,500. Maine's hospitality and tourism businesses are fueled by small, independent, family-run establishments—these are your constituents and neighbors, and they are the backbone of our communities.

As you know, Paid Family and Medical Leave (PFML) is a sweeping policy that will touch nearly every business and worker in Maine. There is no issue I hear about more from our members than PFML.

While our members support the idea of a paid leave policy, they strongly believe it should not be mandated on employers. We advocate instead for a balanced, voluntary model—like those adopted in New Hampshire and Vermont. If a voluntary approach isn't pursued, we support a number of common-sense updates that can help ensure the program achieves a workable balance.

Our position is reflected in the following bills:

1. **Voluntary model and implementation delay**: HM and MTA supported a voluntary model during LD 1964's consideration in 2023 and continue to do so today. We also support a modest delay in the program's start date to give businesses and the state time to prepare (LDs 1249, 1273).
2. **Key reforms and clarifications**: If the voluntary path isn't taken, we urge adoption of necessary technical updates and clarifying reforms to the existing law (LDs 1712, 1333).
3. **Private plan tax refund**: We support a revised version of a tax refund concept for employers using private plans (LD 1169).
4. **Preserving undue hardship protections**: We oppose efforts to remove the undue hardship provision (LD 575).

5. **Employer penalties**: We oppose additional penalties on employers, especially when the current structure already lacks balance regarding fraud and enforcement (LD 894).

You may hear that the original bill reflected a compromise. Many in the business community respectfully disagree. That's why the bipartisan proposal in LD 1712 is so important—it makes targeted, thoughtful changes without undermining the law's intent. Now that the tax portion of the law is in effect and awareness around the program is growing, lawmakers are hearing from constituents about real-world impacts. LD 1712 is a direct response.

We support all of LD 1712's provisions and want to emphasize the following:

1. A clearer definition of "undue hardship," grounded in the employer's reasonable determination, as the statute already allows. This adds clarity and predictability.
2. A uniform 65% wage replacement rate, which simplifies administration and supports fund stability.
3. More practical deadlines for filing leave applications—15 or 30 days, based on leave type, rather than the current 90.
4. A fair, capped penalty structure, including department discretion. MDOL already has discretion for pursuing individual fraud—we're simply asking for similar consideration for employer good-faith mistakes.
5. Subjecting PFML benefits to state income tax, as is the case with unemployment insurance, which this program is often compared to.

Our support for a voluntary model comes down to two main reasons.

First, the cost. This is an additional tax on employers—one that's ultimately passed on to consumers.

Second is something that's largely unaddressed in the law and rule: employee absences. This is the true elephant in the room.

Every day, we hear from businesses that are concerned about how they'll manage operations once this law is fully in effect. The law allows leave for all employee types—including those on temporary foreign worker visas, such as H-2B and J-1. These workers are essential to Maine's peak tourism season, and their absence would seriously disrupt already strained operations.

Consider this scenario: a seasonal employee is on staff for 120 days, takes the full 12 weeks of leave, and is guaranteed their job when they return. Under current law, they are not required to maintain close communication with the employer while on leave. This kind of disruption—especially when multiple employees are affected—can put an entire business at risk.

That's why we support setting a clear 120-day employment threshold before an employee becomes eligible for leave. This standard exists elsewhere in Maine law—including in the Earned Paid Leave statute and the Maine Retirement Investment Trust (MERIT), which gives employers 120 days before they must enroll new employees. Both acknowledge the significant burden that immediate leave can place on a business, especially small and seasonal employers.

We need safeguards that allow employers to adapt. The undue hardship provision exists for this reason, recognizing that every business and industry is different. It's meant to offer flexibility, time to prepare, or alternative arrangements before an absence happens.

If the committee does not pursue reforms or a voluntary model, we urge you to at least consider delaying implementation, as Maryland has done with its program after it was proposed by DOL.

For your reference, I've also included HospitalityMaine's comments from September 30, 2024, on the Chapter 1 Rule proposal governing this program. Many of our concerns overlap with the legislation in front of you today.

Thank you for your time and consideration. I'd be happy to answer any questions.

HOSPITALITY MAINE

DELIVERED VIA E-MAIL

September 30, 2024

Luke Monahan
Director, Paid Family and Medical Leave Program
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Re: 12-702 Department of Labor, Paid Family and Medical Leave Program – Chapter 1 Rule Revisions

Director Monahan,

Thank you for the opportunity to provide comments on behalf of HospitalityMaine regarding the revised Chapter 1 rule of the Paid Family and Medical Leave (PFML) Program. HospitalityMaine is a statewide trade association representing nearly 1,400 restaurant, lodging, and other hospitality establishments of all sizes. Each of our members will be directly impacted by the laws and rules governing this program. We appreciate and thank the Department (Maine Department of Labor) for revising the rule based on public feedback.

General Comments

Maine's hospitality and tourism industries are cornerstones of the Maine economy, and their continued success is essential for sustaining economic growth and prosperity.

- In 2023, these industries had a **$16.4 billion** impact on the state's economy, lowering taxes for every Maine household by **$2,467**, according to the Maine Office of Tourism. [1]
- Across the state, there are **3,360 restaurant locations**[2] and over **630 hotel properties**[3]. These businesses employ nearly **78,000 workers**.

[1] Downs & St. Germain Research. "2023 Maine Office of Tourism Highlights." Report. Maine Office of Tourism, 2023. https://motpartners.com/wp-content/uploads/2024/05/MOT_GovCon_HighlightSheet_2023_Printed-Paper_FNL-0430.pdf.

[2] National Restaurant Association, Bureau of Labor Statistics, Bureau of Economic Analysis, and U.S. Census Bureau. "WE ARE RESTAURANTS IN AMERICA," 2023. https://restaurant.org/getmedia/6cbde9b9-ae12-4a31-810e-b919a7c71d0d/maine.pdf.

[3] AHLA Dashboard. "AHLA Dashboard," n.d. https://economic-impact.ahla.com/states/maine.

The PFML program is unprecedented in size, scope, and cost. It is intended to cover each of the state's **650,000+ workers**, could impact each of the state's **45,000+ businesses**, and will bring a new, estimated annual cost of nearly **$350 million**[4] to both businesses and workers. We remain deeply concerned about the ability for businesses—particularly small and seasonal operations— to comply with these new and complex regulatory obligations while also ensuring they can stay afloat in the face of record employee absences and increased costs.

Unprecedented Employee Absences Are Likely to Put Maine Small Businesses at Risk

Maine's tight labor market and its reliance on small and seasonal businesses to drive the economy make the state especially vulnerable to economic hardship if these businesses reduce hours, eliminate positions, or close altogether.

Maine has had the advantage of observing the implementation of mandatory PFML programs in 12 other states. While some of these programs are relatively new, two alarming trends have emerged consistently:

- The number of employees using PFML is **significantly higher** than anticipated
- The costs associated with the PFML program continue to **exceed expectations**

We are deeply concerned that the Maine Department of Labor is underestimating the impact that employee absences will have on Maine's small businesses. Maine should closely examine Washington's PFML program to anticipate what could happen here. Since the Washington State Employment Security Department (ESD) began paying out benefits in 2020, it has received over one million applications for leave. A September 2024 report from ESD projects a **35% growth in applications over the next two years**, with the department calling for additional resources to manage the demand.[5] Since July 2022, Washington's program has seen a 15% year-over-year increase in uptake. In response, Washington raised its PFML tax rate in 2023 and will likely need to increase it again to avoid operating in a deficit. Similarly, Minnesota's estimated PFML costs have nearly doubled— from $830 million in 2022 to $1.6 billion in 2024.[6]

Throughout the legislative and rulemaking processes, we have stressed the importance of implementing this program in a way that is both manageable and predictable for employers and the Department alike. However, we are increasingly concerned that a program of this size and scope, under current law and proposed rule, will not provide the necessary safeguards to ensure the continued operations of many of the state's small businesses.

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[4] "Commission to Develop a Paid Family and Medical Leave Benefits Program." Maine State Legislature, December 2022. https://legislature.maine.gov/doc/9693.

[5] "Paid Family & Medical Leave Program Needs and Resources." Washington State Employment Security Department, September 2022. https://app.leg.wa.gov/ReportsToTheLegislature/Home/GetPDF?fileName=2024-PFML-Program-Needs-and-Resources-Report_9d626f7c-2503-4a9d-b342-a6c750a3c1a3.pdf.

[6] Correia, Paul. "Actuarial Analysis for the Minnesota Paid Family and Medical Leave Program." Minnesota Paid Family and Medical Leave Program, October 27, 2023. https://strgnfibcom.blob.core.windows.net/nfibcom/Actuarial-Analysis-of-Minnesota-PFML-Program-10-27-23-1.pdf.

For instance, many restaurants operate on profit margins of 3% to 5%, and the absence of even one or two employees—especially in Maine's tight labor market—could have devastating economic consequences. In Maine, there are only 50 available workers for every 100 job openings, highlighting the immense difficulty of finding temporary replacements for employees on leave.[7] This is particularly true for small businesses, where unanticipated employee absences could quickly lead to unsustainable operational challenges for both employers and their workers.

Please see our comments on specific aspects of the proposed rule below.

1. **Section V – Undue Hardship**

The Department has clearly made changes to the undue hardship provision to attempt to make it more workable for employers and employees; however, several significant problems remain in this section. Most notably, the Department, as a regulatory agency, is proposing language in rulemaking that does not conform to the plain intent of the law. Additionally, there are other concerns:

- An employer could not claim an undue hardship exception if an employee provided thirty days or more notice. This would create a tremendous burden for employers and fails to consider critical factors, such as whether it is a peak time of year for the business or if the employee is a key or essential worker. For instance, when speaking to a restaurant owner about this provision, he reminded me that his business conducts 80% of its revenue during 25% of the year, which is not uncommon for many hospitality businesses in Maine.

- The revised rule introduced a provision stating that if a medical provider deems the employer's proposed schedule is unreasonable, then the employer would not be able to claim an undue hardship exception. Delegating decision-making authority to medical professionals who are entirely removed from the employer's business environment raises concerns about the consistency and fairness of these determinations. A medical provider's expertise lies in practicing medicine, not acting as a third-party arbiter of an employer's operational needs. It is also unclear how these medical opinions would be compensated.

- It is reasonable for an employer to expect timely notification of an employee's unplanned leave. As written, the rules do not impose sufficient obligations or incentives for employees to notify their employer promptly. Without the threat of penalty, employees should be expected to notify the employer within three operating business days of taking leave. Additionally, friends and family should also be allowed to notify the employer on the employee's behalf. Moreover, if the employee or an individual acting on their behalf fails to communicate with the employer for thirty days, the employer should be granted undue hardship status and not be required to hold the position open.

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[7] "MSN," n.d. https://www.msn.com/en-us/money/news/the-10-states-with-the-worst-worker-shortages-right-now-and-see-how-maine-compares/ar-AA1rk3CX.

While we appreciate the Department's attention to this issue, the revisions in rule still contradict what is clearly stated in statute. Under the law, the employer has the discretion to determine whether an employee's leave will create undue hardship. It states, "Use of such leave must be scheduled to prevent undue hardship on the employer *as reasonably determined by the employer*." The continued inconsistency between this statutory language and the proposed rules would almost certainly lead to future litigation.

The need for an undue hardship clause in a program as consequential as PFML is evident. In testimony delivered on behalf of Governor Mills, Elise Baldacci stated, "In discussing the proposed legislation with the sponsors and others, the Governor conveyed her desire to see an exemption for small businesses. The bill sponsors responded by creating a hardship exemption, which the Governor appreciates... The Governor, therefore, recommends that the Committee strengthen the proposed hardship exemption by adopting the same hardship language included in Maine's current earned paid leave law." [8] The Governor emphasized the need for an undue hardship clause specifically for small businesses, and the unfortunate irony is that small businesses will be disproportionately harmed by rolling back the protections provided in the statute, as even a small number of absences can threaten a business's ability to operate.

The inclusion of the undue hardship provision was likely strongly supported by the Governor and the business community because the PFML program, as designed, is one of the most generous and benefit-reach programs in New England and across the country. The undue hardship clause serves as a small but essential tool for employers to reasonably ensure the vitality of their businesses. If the Department's proposed rule is adopted as written, it weakens these protections, forcing many businesses to reduce hours, lay off staff, or even face closure.

We strongly urge the Department to refrain from implementing a regulatory framework that conflicts with the statute. There is no evidence suggesting that the undue hardship provision, as outlined in the law, would be unworkable within the program.

Lastly, we reiterate our previous comments regarding the removal of the 10-day window for an employer to claim an undue hardship. Business conditions can change quickly, and a strict 10-day window is unrealistic. Additionally, absences exceeding 30 days without notification to the employer should automatically release the employer from the obligation to hold the position open.

2. **X: Premiums (Small Employer Definition)**

In the redraft, the Department has proposed another change regarding small and seasonal businesses. An employer will now be included in the PFML program if it has more than 15 employees for 20 calendar workweeks.

This standard will encompass many seasonal employers, as most operate for more than 20 weeks.

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[8] Maine State Legislature. "Testimony of Elise Baldacci, Deputy Chief of Staff to Governor Janet T. Mills," May 25, 2023. https://www.mainelegislature.org/legis/bills/getTestimonyDoc.asp?id=179270.

A more reasonable standard would be to impose the tax obligation only on businesses employing 15 or more workers for at least 27 weeks (more than a majority of the year). As has been reiterated multiple times, small employers face disproportionate difficulties in complying with this program, and including seasonal businesses under this new tax obligation could result in significant unforeseen consequences.

3. **Section XIII – Substitution of Private Plans**

We appreciate the improvements made to the substitution of private plans and the concept of substantial equivalence.

However, it remains unclear why the program would both collect and retain the taxes paid in the first quarter of PMFL's effective date for a state plan that would not be utilized except to build capital reserves. This raises valid concerns for both employers and employees. While there have been improvements, constitutional concerns regarding equal protection and due process, which have been raised previously, persist.

Additionally, we propose that in 2025, the effective date of applications for private plan substitution should be the date of submission (if ultimately approved), not the date of approval. Given the likelihood of an influx of applications in the program's first year, employers should not be obligated to pay the tax to the program solely because the Department is unable to render timely decisions within a given quarter. Massachusetts and Connecticut allowed for opt-outs when their respective state programs began; Maine should be able to adopt a similar approach.

We appreciate that the Department has considered how to determine substantial equivalence in private plans, particularly regarding guidance for the "floor" for the number of weeks of benefits. The statute permits substantially equivalent wage replacement rates and a substantially equivalent maximum benefit amount. However, Section XIII(D)(3) includes language stating that all modifications combined must produce benefits that are "the same or greater aggregate monetary benefit to employees." Instead, to align more closely with the statute's intent, the rule should specify that substantially equivalent benefits are determined based on collective factors, including the number of weeks, wage replacement rate, and maximum benefit.

4. **Section I – Definitions, & Section VI – Process for Application and Approval of Benefits (Affinity/"Like Family" Relationships)**

We believe that the Department's first draft of the rules was on the right track for affinity related leave. It allowed PFML to be used for one affinity relationship per year, which strikes a fair balance between accommodating extenuating circumstances and mitigating unnecessary leave use. However, the revised rule removes the definition of affinity relationships and relies on an existing legal definition of "family member," which the Department contends is already inclusive of affinity relationships.

Allowing leave for an unlimited number of individuals with "like family" relationships could result in excessive and unnecessary absences, threatening fund solvency. Notably, Maine Family Medical Leave includes an expansive list of individuals who are family members but does not account for leave related

to affinity relationships. We recommend that the Department provide a comprehensive list of family members for whom leave can be taken and include a provision that allows leave to be utilized once per benefit year for those with whom the employee has a relationship that is "like family." In practice, the list of family members would encompass nearly every scenario for which leave might be used, while the one "like family" leave would be reserved for extenuating and currently unforeseen circumstances. An extensive and thoughtful list of family members, coupled with the allowance for one additional "like family" individuals, would also address concerns raised by some regarding the applicability of leave in certain instances.

Lastly, to protect the integrity of the program and the fund, we urge the Department to require that any leave taken be accompanied by the verification of the relationship. Specifically, the individual for whom the leave is being taken should be required to attest to the relationship in a signed statement. The guidelines and requirements for family-related leave should be aligned with those for medical-related leave.

5. **Section IX – Fraud and Ineligibility**

The rule now clarifies that if an individual is found to have *willfully* committed fraud against the program, that individual may be required to pay back the benefits collected and will be barred from participating in the program for one year. However, this is not a strong enough deterrent to discourage misuse.

Furthermore, the approach to penalties within the program appears to be applied unequally, disproportionately favoring employees over employers, raising concerns about fairness. Additionally, the standards for determining when a demonstration of "willfulness" is required seem inconsistent across different Bureaus within the same Department. This inconsistency creates confusion for both employers and employees. Establishing a clear, consistent standard for "willfulness" is essential to ensure fairness and transparency in the enforcement of penalties.

While we agree with the Department's emphasis on fund solvency, the lack of effective deterrents or penalties for preventing fraudulent claims undermines the fiduciary duty to the fund. We have not encountered another insurance product without these basic safeguards.

While it is sensible that the administrator is obligated to investigate fraud, the rule lacks provisions for how employers and the public may report fraud to the administrator. The Department should develop clear guidelines outlining the reporting process. Many hospitality businesses have "no call, no show" policies, which could be undermined by potential retaliatory claims, especially since individuals have up to 90 days to apply for benefits after leave is taken. Lastly, it is unclear why the administrator would provide an individual being investigated for fraud with 10-days' notice of an interview.

6. **Section XVI: Advisory Rulings**

The revised rule introduces a new section that allows the issuance of advisory rulings. We are unclear on the rationale behind this addition, as it appears to be a new and previously undiscussed provision.

This creates an avenue for the Department to interpret the statute and rule without ensuring proper due process. We are concerned that these rulings could result in binding decisions for employers outside of the formal rulemaking procedures, which raises significant issues of accountability and transparency. Therefore, we recommend that this provision be removed.

7. **Foreign Visa Workers**

We appreciate that the draft rule proposal acknowledges that certain workers should be exempt from contributing to the program. However, we believe that these exemptions should be extended to the thousands of workers in Maine on J-1, H-2B, and other visas every year. These workers are typically in the state for a limited amount of time before returning to their home country, making it unlikely that they will utilize the program.

Moreover, should there be a significant uptake of benefits by foreign visa workers, it would impose a tremendous burden on employers who rely on these individuals—who are expressly here to work—if they were to be absent from the workplace for extended periods. It is common for these workers to be in Maine for six months or less, raising understandable concerns among employers that these employees could potentially be absent for three of those six months.

Additional Recommendations:

Penalties – At a very basic level, employers will need to determine coverage, calculate employee and employer tax withholdings, and remit the withholdings on a new portal. While large employers often benefit from payroll companies or in-house HR specialists to review and certify all information, small businesses typically do not have access to such resources. Our reading indicates that remittance must be both timely and accurate to the nearest dollar, with any deviation resulting in a penalty of 100% of the total tax due for the quarter that was not remitted in whole or in part. Given that the program is set to roll out in January 2025, and that educating employers will require significant effort from the Department and business associations, we recommend that the Department waive any penalties for errors made in good faith by employers in 2025.

Alternative Work Assignments – The Department should operationalize the directive that the PFML program is for individuals who are *unable to work* due to a disability or medical condition. It is important to recognize that not all medical conditions result in 100% disability, which may prevent an individual from working in any capacity. In the interest of fund solvency and preventing potentially unnecessary workplace absences, we urge the Department to develop comprehensive guidelines for alternative work assignments within the workplace. While it may not be feasible for every business or position, when an employer can provide light-duty work that accommodates an employee's disability, clear guidelines should be in place for employers to follow.

Extending PFML to Unemployed Individuals – It has come to our attention that there is interest in extending PFML benefits to unemployed individuals.

The revised rule clarifies in Section IV(A)(4) that to qualify for leave, an individual must "be employed as of the date of the application for benefits if applying in advance of leave or be employed as of the date of leave beginning if applying retroactively for leave."

The rationale that benefits could be extended to unemployed individuals simply because the statute does not explicitly prohibit it is misguided. The intent of the PFML is clear: it is designed to provide benefits to employed individuals who are unable to work due to a qualifying condition. Extending benefits to unemployed individuals could compromise the integrity of the program and place additional strain on fund solvency.

Thank you for your consideration of our comments. We would welcome the opportunity to discuss any questions you may have.

Sincerely,

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