

Draft FAML I Appeals Regulatory Outline

For Discussion Purposes Only

Many stakeholders submitted feedback to the FAML I Division regarding our Appeals Discussion Document. Below is a draft outline of possible regulatory language, which was heavily influenced by the stakeholder feedback. The Division welcomes additional comments, feedback, and suggestions as we further refine the policy.

This draft is meant to provide a general outline of the procedures that will be used for dispute resolution. Personnel and structural decisions are still pending. The Division will release additional detail at a later date. Additionally, the Division is aware of significant interest in a regulatory outline for job protection and retaliation. These topics will also be addressed at a later date.

The Division will be accepting written comments via email - FAML I.policy@maryland.gov and asks that comments be submitted by October 9, 2023.

Appeals

General.

Definitions.

- A. "Administrative Procedure Act" means State Government Article, §§ 10-201--10-217, Annotated Code of Maryland.
- B. "Adverse determination" means a disqualification of an individual or denial, in full or in part, of FAML I benefits or leave to a claimant made under the Division's reconsideration process.
- C. "Authorized representative" means an attorney or, when permitted by applicable law, another individual.
- D. "Claim" means a claim for FAML I leave and benefits pursuant to Md. Code Ann., Lab. & Empl. § 8.3-101 *et seq.*
- E. "Claimant" means an individual who applies for FAML I leave and benefits pursuant to Md. Code Ann., Lab. & Empl. § 8.3-101 *et seq.*
- F. "EPIP administrator" means:
 - (1) For a self-insured EPIP the employer or their third party designee administering the EPIP;
or
 - (2) For a commercially insured EPIP the commercial insurer.
- G. "FAML I leave" means family leave, medical leave, and/or qualifying exigency leave that a covered individual is entitled to under Md. Code Ann., Lab. & Empl. § 8.3-101 *et seq.*
- H. "Final order" means the final decision of the Division which contains findings of fact, conclusions of law, and a disposition which grants or denies FAML I benefits and/or FAML I leave.
- I. "Good cause" means a demonstration by a party that a failure to appeal was due to:
 - (1) A serious health condition that resulted in an unanticipated and prolonged period of incapacity and that prevented an individual from filing an appeal or postponement request in a timely manner;
 - (2) A demonstrated inability to reasonably access a means to file an appeal or postponement request in a timely manner, such as an inability to file an appeal or

postponement request due to a natural disaster, power outage, or a significant and prolonged department system outage; or

- (3) A claimant’s lack of knowledge of their right to appeal or file a postponement request.
- J. “Hearing officer” means the individual or entity who issues the final order in a FAMILI appeal.
- K. “Party” means a claimant, an EPIP administrator, or the Division, or all or some of them, as applicable.

Complaints.

- A. Complaints against employers. A party aggrieved by an order issued pursuant to Md. Code Ann., Lab. & Empl. § 8.3-905¹ is entitled to judicial review of the decision under State Government Article, §10-222, Annotated Code of Maryland.

Dispute Resolution Procedures.²

- A. OSEP & EPIP Requests for FAMILI Supervisor Review.
 - (1) Self-employed individuals whose application to participate in the State Plan was denied or participation in the State Plan was involuntarily terminated may file a request for supervisor review.
 - (2) Employers whose application to opt-out of the State Plan and into an EPIP was denied or whose EPIP was involuntarily terminated may file a request for supervisor review.
 - (3) Manner of Filing.
 - (a) Requests for supervisor review shall be filed with the Division within 10 business days of the application denial or termination.
 - (b) Requests for supervisor review shall be in writing.
 - (c) Requests for supervisor review shall include why the requestor believes the application denial or termination was in error.
 - (4) Requests for supervisor review shall be determined by a person who did not participate in the application denial or termination at issue.
 - (5) The Division shall issue a decision on a request for supervisor review within 20 business days. The Division may schedule a conference to discuss the supervisor review request but it must fall within the required time period for a decision to be issued.
- B. FAMILI Reconsideration & Appeals.
 - (1) Reconsideration. Any claimant is entitled to request reconsideration of any determination.
 - (a) Manner of Filing.
 - (i) Requests for reconsideration shall be filed within 30 business days of the application denial or termination with the entity that issued the determination (i.e., EPIP administrator or the Division).
 - (ii) Requests for reconsideration shall be in writing.
 - (iii) Requests shall include why the requestor believes that denial, payment amount, or disqualification were in error.

¹ The procedures for Md. Code Ann., Lab. & Empl. § 8.3-905 complaint investigations and hearings will be announced at a later date.

² The Division’s Claims outline addresses incomplete applications.

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- (b) Requests for reconsideration shall be reviewed by a person who did not participate in the determination at issue.
 - (c) The decision shall be issued within 10 business days. A conference to discuss the reconsideration request may be scheduled but it must fall within the required time period for a decision to be issued.
- (2) Appeals. Claimants whose claim has been denied, in part or in full, or whose benefits have been underpaid, or individuals who have been disqualified from receiving benefits pursuant to Md. Code Ann., Lab. & Empl. § 8.3-901 are entitled to file appeals of adverse determinations.
- (a) The appeals process is only available to parties who have completed the reconsideration process above.
 - (b) The appeal must be filed with the Division within 30 days of the adverse determination unless the claimant can show good cause.
 - (c) The Division shall be a party to every appeal under this section regardless of which entity issued the adverse determination on appeal.
 - (d) Notice of appeal. All parties to an adverse determination which results in an appeal, including the issuer of the benefits at issue, shall be notified in a timely manner when an appeal is filed.
 - (e) Informal mediation. There may be an informal mediation process activated at the time of filing of the appeal. Proceeding with mediation will be at the discretion of the Division.
 - (f) A hearing shall be held on the appeal within 30 days of filing of the appeal.
 - (g) Hearing notice. Parties to appeals shall be provided with reasonable written notice of a hearing to the parties.
 - (i) The hearing notice shall contain:
 - 1) The date, time, place, and nature of the hearing;
 - 2) A statement of the right to present witnesses, documents, and other forms of evidence, and the right to cross-examine witnesses of another party;
 - 3) A statement of the right to request subpoenas for witnesses and evidence, specifying the costs, if any, associated with the request;
 - 4) The availability on request of a copy of the hearing procedure, and the costs associated with the request;
 - 5) A statement of the right or restrictions pertaining to representation;
 - 6) A statement that failure to appear for the scheduled hearing may result in an adverse action against that party; and
 - 7) A statement that the parties may agree to the evidence and waive their right to appear at the hearing.
 - (ii) Service of Notices, Orders, and Other Documents. Except as provided by prior agreement of the parties, the hearing officer shall serve all notices, orders, and other documents in one of the following ways:
 - 1) By personal delivery;
 - 2) By mailing a copy of the document, first class, postage prepaid, to the person's last known business or home address; or

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- 3) If the person is represented by counsel, by delivering or mailing a copy of the document, first class, postage prepaid, to the person's attorney.
- (iii) The hearing officer shall send the hearing notice to the parties to the appeal electronically and by certified mail to the person's last known address:
 - 1) At least 20 days before the hearing; or
 - 2) If the parties have agreed to a date for which 20 days notice cannot be given, at the earliest time possible.
- (h) Representation.
 - (i) A party to a proceeding may:
 - 1) Appear in person or, if appearance by a representative is permitted by law, through a representative; or
 - 2) Be represented by an attorney authorized to practice in Maryland.
 - (ii) Any notice, decision, or other matter required to be sent to a party may be sent instead to the party's attorney of record at the attorney's address.
 - (iii) If a party is represented by an attorney or appears through an authorized representative, all submission of evidence, examination and cross-examination of witnesses, and all objections and motions on the party's behalf shall be made solely by the attorney or the authorized representative.
- (i) Failure to Appear. A hearing may proceed as scheduled in the absence of a party if the party has:
 - (i) Been served in accordance with the rules above; and
 - (ii) Failed to obtain a postponement of the hearing from the hearing officer under these requirements.
- (j) Postponement.
 - (i) The hearing officer may postpone a hearing only if a written request for postponement is filed with the hearing officer not later than 10 days before the date of the hearing.
 - (ii) If a request for postponement is received later than 10 days before the date of the hearing, the hearing officer shall deny the request unless it determines that there was good cause which justified the delay.
 - (iii) Failure to retain counsel or to timely request a subpoena may not be considered good cause under this regulation.
 - (iv) A request for postponement based on failure to obtain service on a witness may not be granted if the party has failed to comply with subpoena rules.
- (k) Discovery. Except for submission to the hearing officer of the documents used by the provider of benefits in reaching its decision, there is no pre hearing discovery.
- (l) Subpoenas. Subpoena procedures are governed by COMAR 09.01.02.
- (m) Conduct of the Proceedings.
 - (i) The hearing officer, in consultation with counsel, shall determine all procedural and evidentiary issues governed by this chapter and by the

- Administrative Procedure Act, and may impose reasonable time limitations.
- (ii) The Maryland Rules of Civil Procedure may be used as a guide in resolving procedural issues governing the conduct of the hearing that are not addressed in this chapter and the Administrative Procedure Act.
 - (iii) The hearing officer may conduct all or any part of the hearing by telephone, television, or other electronic means, in accordance with State Government Article, §10-211, Annotated Code of Maryland.
 - (iv) Order of Proceedings. Absent unusual circumstances, the order of proceedings shall be as follows:
 - 1) Opening statements and preliminary matters may be heard;
 - 2) All individuals planning to testify shall be sworn before testifying;
 - 3) The claimant or the claimant’s attorney or representative may present the claimant’s case;
 - 4) The EPIP administrator may present EPIP administrator’s case;
 - 5) The Division may present the Division’s case;
 - 6) The claimant shall be entitled to a brief rebuttal after the conclusion of the EPIP administrator’s case and/or the Division’s case; and
 - 7) The hearing officer may hear closing arguments in the same order as the presentation of evidence.
- (n) Evidence. The rules of evidence under this chapter shall be under State Government Article, §10-213, Annotated Code of Maryland.
- (o) Interpreters.
- (i) If a party or witness cannot readily hear, speak, or understand the spoken or written English language, and applies to the hearing officer in advance of the hearing for the appointment of a qualified interpreter to assist that party or witness, the hearing officer shall appoint a qualified interpreter to provide assistance during the hearing.
 - (ii) With the approval of the hearing officer, a party who intends to offer the testimony of a witness who cannot readily hear, speak, or understand the spoken or written English language, may arrange for a qualified interpreter to assist the witness.
 - (iii) An interpreter shall take an oath or affirm that the interpreter will accurately translate.
- (p) Burden of Proof.
- (i) The claimant shall bear the burden of proving, by a preponderance of the evidence, that the claimant is entitled to FAMLI leave and/or benefits.
 - (ii) The individual who has been disqualified from receiving benefits pursuant to Md. Code Ann., Lab. & Empl. § 8.3-901 shall bear the burden of proving, by a preponderance of the evidence, that the individual should not have been disqualified.
- (q) Closed Hearings. Unless otherwise provided by statute, all hearings conducted under this chapter are closed to the public.
- (r) Recording.
- (i) The proceedings shall be recorded.

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- (ii) The record need not be transcribed unless requested by a party.
 - (iii) The cost of a typewritten transcript of any proceeding or part of a proceeding shall be paid by the party requesting the transcript.
 - (iv) Cameras, tape recorders, and other electronic and photographic equipment of any type are not permitted at the hearing, unless the equipment is intended to be introduced into evidence or used to present evidence.
- (s) Recusal. A hearing officer shall be recused from the review of an appeal and from participating in a hearing if the hearing officer:
 - (i) Has personal knowledge of the facts which gave rise to the appeal;
 - (ii) Has a personal or business relationship with any of the parties or witnesses; or
 - (iii) For any other reason may be unable to act impartially in the matter.
- (t) Decisions. After consideration of the testimony and other evidence at the conclusion of the hearing the hearing officer shall issue a final order. Documentation detailing the final order shall be provided to the parties at the conclusion of the hearing.
- (u) Judicial Review. A party aggrieved by the final order is entitled to judicial review of the decision under State Government Article, §10-222, Annotated Code of Maryland.