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Massachusetts Releases Draft Regulations for Paid Family and Medical Leave

Last month, the newly created Massachusetts Department of Family and Medical Leave released draft regulations for the commonwealth's Paid Family and Medical Leave Law along with information on the employer and employee contributions required to fund the new benefit. The department will hold several listening sessions throughout Massachusetts before publishing proposed regulations later next month. Employers should consider how best to integrate the new benefit into their leave programs and payroll practices as further details emerge.

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Background

Last year, Massachusetts Governor Charlie Baker signed into law a bill creating a family and medical leave program that will require employers with at least one employee working in the state to provide paid leave benefits through a state-administered program. The program will be established and administered by a new Department of Family and Medical Leave (department), located within the Executive Office of Labor and Workforce Development.

Most benefits under the Paid Family and Medical Leave Law (PFMLL or law) will be available to covered individuals beginning January 1, 2021. These include family leave benefits to: (1) bond with a child during the first twelve months after the child's birth, adoption, or foster care placement; (2) deal with any "qualifying exigency" arising out of a covered family member's active duty or call to active duty in the Armed Forces; or (3) care for a family member who is a covered service member. Medical leave benefits — available only for the covered individual's own serious health condition — will also be accessible starting January 1, 2021. Beginning July 1, 2021, family leave benefits will also be available to care for other covered family members with a serious health condition.

Massachusetts workers generally will be entitled to up to 12 weeks of paid family leave and up to 20 weeks of paid medical leave in a benefit year, with a combined maximum of 26 weeks of paid leave in any such year. Benefits will be funded through a payroll tax that will start in mid-2019. (See our [July 25, 2018 For Your Information](#).)

Draft regulations

The PFMLL required the newly created department to propose implementing regulations by March 31, 2019, and to finalize them by July 1, 2019. On January 23, 2019, the department released — “for the purpose of early public input only” — [draft regulations](#) for the administration and enforcement of the commonwealth’s PFMLL program. The draft regulations track many of the law’s requirements, while also providing some notable clarifications.

In addition, the department provided information on the amount employers must contribute into the Family and Employment Security Trust Fund that will finance these paid leaves. The department also provided information on the employer contributions and employee payroll deductions required to fund these leaves.

Earnings reports

All employers, self-employed individuals who elect coverage, and covered business entities would be required to file earnings reports and remit required contributions through the Department of Revenue’s MassTaxConnect system. For these purposes, a “covered business entity” is a business or trade that contracts with self-employed individuals for services and is required to report payment for their services on IRS Form 1099-MISC for more than 50% of its workforce. Any employer or covered entity that does not already have a MassTaxConnect account would be required to register and establish one.

Quarterly filings

Employers would be required to file a report through the MassTaxConnect system at the end of each calendar quarter containing the following information for each employee and for each service provider that must be reported on Form 1099-MISC:

- Name
- Social Security Number
- Earned wages or amount of payment made

Employers would also be required to include their federal employer identification number and the identification number included with withholding tax returns filed pursuant to Massachusetts law.

The department will calculate the total quarterly contribution amount owed based on the quarterly filing. Contributions must be remitted within 30 days after the end of the calendar quarter. An employer that fails to make required contributions will be assessed a penalty in the amount of 0.63% of its total annual payroll for each year or part of a year it failed to comply, in addition to the amount of benefits paid to covered individuals for whom it failed to make contributions.

Required contributions

To fund the paid family and medical leave benefits that will become available to qualifying individuals starting in 2021, Massachusetts will begin collecting contributions from employers, employees, and the self-employed on July 1, 2019. Required contributions to support both types of leave will be allocated between employers and employees.

Initial contribution rate

The initial contribution rate will be 0.63% of wages or other qualifying earnings up to \$128,400. The department will set the contribution rate for the upcoming calendar year no later than October 1 annually.

Employer and employee contributions

The PFMLL permits employers with 25 or more employees to deduct from employees' wages up to 100% of the contributions for family leave, but only 40% of the contributions for medical leave.

Contributions would be entirely employee-funded for smaller employers. While not required to pay the employer's portion, small employers will still have to remit employee contributions to the department.

Determining employer size. The draft regulations explain how an employer would calculate its total workforce. The count would be based on the prior calendar year. For these purposes, the employer would count the number of full-time, part-time, seasonal and temporary employees on the payroll during each pay period and divide by the number of pay periods. In addition, the employer must also include in its count any service provider for whom it must file a Form 1099-MISC.

Allocation framework. Guidance issued by the department allocates the total contribution of 0.63% of eligible payroll between the different types of leave. The initial contribution rate split is as follows:

- 0.52% of eligible payroll is designated for medical leave
- 0.11% of eligible payroll is designated as family leave

Based on this allocation, employees will be responsible for the entire 0.11% family leave contribution, and for up to 40% of the 0.52% medical leave contribution. Employers with 25 or more employees will be responsible for the remaining 60% of the medical leave contribution, while smaller employers will not have to contribute.

Weekly benefit

Benefit amounts will be based on the employee's average weekly wage, capped at \$850 per week initially. The regulations clarify that the cap will be adjusted annually based on the statewide average weekly wage of Massachusetts employees.

Benefit reductions

The weekly benefit amount will be reduced by the amount of wages or wage replacement that a covered individual receives for the same period of leave under workers' compensation (other than for permanent partial disability incurred prior to the family or medical leave claim), other state or federal temporary or

permanent disability benefits law, or an employer's permanent disability policy or program. If the employee takes leave on an intermittent or reduced schedule basis, the weekly benefit amount will be reduced in direct proportion to that schedule.

Initial waiting period

No family or medical leave benefits are payable during the first seven calendar days of an approved initial claim for benefits. The initial seven-day waiting period for paid leave benefits will count against the total available period of leave in a calendar year.

Intermittent, reduced schedule and concurrent leave

Intermittent or reduced schedule leave is available for:

- Medically necessary leaves
- Care of a covered service member
- Responding to a qualifying exigency

However, intermittent or reduced schedule leave is not available for baby bonding leave unless the employer agrees. The draft regulations make clear that the employee's available allotment of leave will be cut in a proportionate amount when leave is taken on an intermittent or reduced schedule basis.

Employers may require that leave taken under the PFMLL be taken concurrently or otherwise coordinated with qualifying leave taken under the:

- Massachusetts Parental Leave Act
- Federal Family and Medical Leave Act of 1993 (FMLA)

The employee's available allotment of leave will be proportionately reduced when taking leave intermittently or on a reduced schedule, and his or her weekly benefit amount will be reduced in direct proportion to the intermittent or reduced leave schedule.

Employment benefits during leave

During a qualifying leave, employees retain the right to accrue vacation time, sick leave, bonuses, advancement, seniority, length of service credit or other employment benefits. In addition, the employer must continue and contribute to the employee's health benefits as if the employee had worked continuously for the duration of the leave.

At the conclusion of the leave, employees must be restored to the same or to an equivalent position, with the same benefits and seniority. Employees cannot be retaliated against for taking qualifying leave. As the draft regulations provide, any adverse employment action taken against an employee following such leave will be presumed to be retaliatory.

Applying for PFMLL benefits

The draft regulations set out detailed procedures for employees seeking benefits under the PFMLL.

Employee notice

The law requires employees to provide 30 days' notice of leave, including the type of leave, length of leave, and anticipated start date. If extenuating circumstances prevent 30 days' notice, notice must be given as soon as practicable.

Department notice to employer

The PFMLL requires the department to notify the employer of the employee's claim within five days of its submission. Under the draft regulations, the notice would have to include the type of leave applied for, expected duration, whether intermittent leave is involved, and any other information needed to process the claim.

Filing a claim

The draft regulations would require employees to provide the following information when filing a claim for benefits.

- Employee's identifying information (e.g., SSN)
- Employer name and identification number
- Nature of leave
- Expected duration
- Whether leave will be continuous or intermittent
- Date the employer was notified
- Denied, granted or pending requests for qualifying leave from the employer during the benefit year
- Proof of family relationship if leave involves a family member
- Certification

Notably, the employee's benefit may be reduced if a claim is filed more than 90 calendar days after the start of leave.

The draft regulations make clear that employees applying for benefits must attest to the truthfulness of all statements and submissions made to the department. Employees who willfully make a false statement or representation, or withhold material facts, will be disqualified from receiving benefits.

Employee certification

All benefit claims must be supported by a certification that the leave is for a covered purpose. The certification required will depend on the type of leave requested.

Department request for information from employer

The draft regulations set out the department's process to request the following information from the employer:

- Wages or earnings for the prior 12 months
- Employee's position description
- Employee's full- or part-time status
- Amount of qualifying leave previously taken during current benefit year
- Description of employer's paid leave policies
- Amount of paid leave received under employer's policy during the current year
- Amount of paid leave benefits, if any, employee will receive from the employer during requested PFMLL leave.

Buck comment. While the draft regulations identify information that the department intends to collect regarding employers' existing paid leave policies and benefits, they do not explain how employer-provided benefits would interact with receipt of PFMLL benefits.

Post-approval

The draft regulations confirm that the department would provide notice to both the employee and employer of a benefits approval or denial. The approval notice would include: (1) the reason for approval; (2) duration of approved benefits; (3) frequency and duration of benefits if intermittent leave; and (4) expiration of benefits.

The draft regulations would require employees to comply with the employer's attendance and call-in procedures, and to work with the employer to avoid undue disruption to its operations. Employers would be permitted to communicate with employees on paid leave.

Employees may be subject to discipline if they fail to work during the agreed-to times while on intermittent or reduced schedule leave, or do not return to a regular work schedule following leave.

Change in circumstances

If a change in circumstances affecting the leave period or amount of benefits occurs after a claim has been approved, both the employee and employer would have to notify the department on forms prescribed by it. Leave extension requests would have to be filed by the employee 14 days prior to the date on which leave was to expire, and describe the need for an extension, its duration, and when notice was provided to the employer. The employee would also have to submit a new certification in support of the extended leave.

The department would notify the employer within five business days of the requested extension. The employer would then have five days to provide any requested information to the department.

Appeals

The draft regulations set forth the following procedure to appeal the denial of family or medical leave benefits to the department.

A request for an appeal generally must be filed within 10 calendar days of the employee's receipt of notice of determination. However, the department would have discretion to extend the filing period under appropriate circumstances.

Employees would be permitted to request an appeal hearing. Hearings would be conducted in the same manner as unemployment appeals. The department would issue a written decision within 30 days of the hearing. Employees would have the right to appeal the department's final decision in District Court within 30 days of receipt.

Private plans

An employer or covered business entity may apply to the department for approval to meet its PFMLL obligations through a private plan. An employer or covered business entity may apply for exemptions from the public plan for medical leave coverage, family leave coverage, or both. Applications will be accepted on a rolling basis.

To be approved for an exemption, an employer's or covered business entity's private plan must provide the same rights, protections and benefits provided to employees under the PFMLL. Exemptions will be granted for a one-year period and may be renewed annually.

In closing

The Department of Family and Medical Leave will hold several listening sessions throughout Massachusetts prior to its March 31 deadline to publish proposed regulations. Employers will want to consider how best to integrate the new entitlement into their leave programs, employment policies, and payroll practices as further details emerge.

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