

Employee Benefit Plan Review

Massachusetts Department of Family and Medical Leave Releases Updated Proposed Regulations

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The Massachusetts Department of Family and Medical Leave (DFML) published updated regulations¹ (Updated Regulations) to the Massachusetts Paid Family and Medical Leave (PFML) law. Additionally, the DFML published PFML guides for employers² and workers,³ the required workplace poster,⁴ and a tool⁵ to calculate contributions. Covered employers and business entities have to provide their current workforce with written notice of their rights and obligations by September 30, 2019 (electronic notification is acceptable). Further, covered employers and business entities should start making deductions from workers' wages toward the PFML program beginning October 1, 2019.⁶ The PFML posting requirement became effective on July 1. Finally, first quarter contributions to the Trust Fund, along with a report, which is a newly added requirement, will be due on January 31, 2020.⁷

Employers and workers had until July 1, 2019 to submit comments on the Updated Regulations directly to the DFML. Most PFML benefits will be available as of January 1, 2021, with all benefits becoming available as of July 1, 2021.

SUMMARY OF THE UPDATED REGULATIONS

Defining Covered Employers

In addition to a business's employees, the Updated Regulations clarify that an employer will be considered a "Massachusetts employer or covered business entity" with respect to services provided to it by a covered individual (i.e., a contractor) if the services provided by the covered

individual are "localized" in the state, or if some part of the services is performed in the state, and either (i) there is a base of operations, or the services are directed or controlled in the state, or (ii) the covered individual's residence is in the state and his or her "base of operations or place from which such service is directed or controlled is not in any state in which some part of the service is performed."

"Localized" within the state is defined as services performed entirely within the state, or partially within the state, where any services performed outside the state are merely incidental to those performed within the state. The DFML's examples of a service performed outside the state that is "incidental" to services performed within the state include a service that is "temporary or transitory in nature, or consists of isolated transactions."

While the Updated Regulations do not provide a definition of "services," they clarify that a "covered business entity" is "a business or trade that contracts with self-employed individuals for services and is required to report the payment for services to such individuals on IRS Form 1099-MISC for more than 50 per cent of [the business's] workforce" (emphasis added). They also provide guidance on calculating whether the 50 plus percent threshold is met.

Required Quarterly Filings

The Updated Regulations provide a new filing requirement for employers, covered entities, and self-employed individuals who self-cover—they must file *quarterly* an "employment and wage detail report and payment" for

their contributions. Employers and individuals should file these reports on MassTaxConnect on or before the quarterly filing deadline set by the Massachusetts Department of Revenue. The first quarterly report and contribution to the Trust Fund will be due on January 31, 2020, and must be paid through MassTaxConnect.

The report must include the following information for each employee, covered contract worker, and self-employed individual electing coverage:

- Name;
- Social Security number or individual taxpayer identification number; and
- Wages paid or other earnings.

Additionally, the report must contain the employer's or covered business entity's federal employer identification number. Finally, an employer or covered business entity must also report the names and Social Security numbers or individual taxpayer identification numbers of those individuals to whom it made payments for services during the quarter, if such payments must be reported on IRS Form 1099-MISC.

Payroll Deductions

As noted, starting October 1, 2019, all Massachusetts employers must begin making payroll deductions from employee wages in order to fund quarterly contributions to the PFML Trust Fund. The rate has been set at 0.75 percent of each employee's wages on the first \$132,900 of annual gross earnings (the contribution and base limit used by the Social Security Administration). Most of the contribution—0.52 percent—will go towards funding for medical leave, while the remainder will be apportioned for family leave. Employers with 25 or more employees may deduct up to the full amount of the family leave contribution, and up to 40 percent of the medical leave contribution from employees' wages, as well as from compensation paid to covered contract workers. An

employer with fewer than 25 covered workers in Massachusetts is exempt from paying the *employer share* of the medical leave contribution.

Exemption Due to Approved Private Plan

Employers that currently provide paid leave benefits to their workers were able to apply for an exemption to the contribution requirements beginning on April 29, 2019, through MassTaxConnect. The DFML has fleshed out the requirements for an exemption to remit contributions. An employer or covered entity can, with the DFML's permission, be exempted from the requirements to remit contributions if:

- The employer's or business entity's private plan provides at least all of the rights and benefits mandated by the PFML law;
- The plan does not cost employees or covered individuals more than a state-administered plan would cost them;
- The employer's or covered entity's insurance policy, if it has one, is with a Massachusetts-licensed company; and
- The employer or covered entity, if self-insured, provides a bond.

If an employer's own plan is approved, it may be eligible for an annual exemption from collecting, remitting, and paying contributions for paid family or medical leave, or both, under the PFML law.

Fitness-for-Duty Certification

The Updated Regulations include an entirely new section, which provides that an employer may implement a uniformly applied "fitness for duty" policy, requiring any covered individuals who take leave for their own serious health condition to supply a certification from their health care provider that they are able to resume work. The employer may only request certification for the health condition that caused the covered individual to take leave. Further, two

other conditions must be met for such a policy to be deemed compliant:

- The policy must be applied to all similarly situated employees (i.e., same occupation, same serious health condition).
- Within five days of receiving notice from the DFML that it has designated leave, the employer must provide a list of essential job functions to the covered individuals, so that they may address their ability to fulfill those functions in the certification.

The employer may delay the covered individual's return to work until it receives the fitness-for-duty certification. A covered individual who fails to provide the certification could have his or her request for an extension of leave denied.

Accrued Leave Alternative

Under the Updated Regulations, employees and covered individuals can use accrued paid leave that is provided for by the employer, rather than pursuant to the PFML law. If employees and covered individuals choose to go this route, they will have to follow the employer's leave policies, and the employer-provided leave and PFML leave will run concurrently. Further, the employee or covered individual will not be eligible for PFML benefits while using accrued leave. This scheme is different from many other states' statutory wage replacement programs, where an employer offsets the benefit received under the law.

Intermittent and Reduced Leave

The DFML has expanded the scenarios under which a covered individual can take intermittent leave *or* work a reduced schedule,⁸ i.e., for bonding with a child (if the employer and individual mutually agree); when medically necessary; or to care for the individual's or a family member's serious health condition, or that of a covered service member.

There is also now a prorated impact on leave allotments when a

covered individual takes intermittent leave or a reduced schedule. The DFML offers some examples of how such leave would be prorated:

- If an employee or covered individual who normally works a 40-hour workweek takes eight hours of intermittent leave in a week, the leave counts as one-fifth of a week of leave against the employee’s annual leave benefit.
- If a worker who typically works 30 hours per week switches to a reduced schedule of 20 hours per week, the employee’s 10 hours of leave would constitute one-third of a week of leave to be counted against his or her annual benefit.

“Intermittent leave” means “leave taken in separate periods of time due to a single qualifying reason, rather than for one continuous period of time, and may include leave periods from an hour or more to several weeks,” such as leave taken “on an occasional basis” for medical appointments or leave taken “several days

at a time spread over a period of months.” “Reduced leave schedule” is defined as “a leave schedule that reduces the usual number of hours per workweek, or hours per workday.”

POSTING AND NOTICES

Posting

All Massachusetts employers must display in a conspicuous place a PFML law workplace poster⁹ that has been either prepared or approved by the DFML. The poster must provide a summary of benefits available under the PFML law. Further, employers are required to display the poster in English and, if relevant translations are available through the DFML, in each language that is the primary language of five or more individuals in the workplace. The DFML currently provides the poster in English, Spanish, Portuguese, Vietnamese, Korean, Lao, Chinese, Russian, Haitian Creole, Arabic, French, Italian, and Khmer.

Notice Requirement

The DFML’s website provides guidance¹⁰ on how to properly

notify Massachusetts W-2 and 1099-MISC workers in writing about available benefits under the PFML law. The DFML has provided model notices for both W-2 and 1099-MISC workers.

For W-2 workers, employers must issue such written notice in the worker’s primary language within 30 days of the worker’s first day of employment, or by September 30, 2019, whichever is later. Employers must also obtain either a written acknowledgment of receipt of the notice or a statement indicating the worker’s refusal to acknowledge the notice.

The DFML requires that the notice contain:

- An explanation of the availability of PFML benefits;
- Both the employer’s and worker’s contribution amounts and obligations;
- The employer’s name, mailing address, and assigned DFML identification number;
- Instructions on how to file a claim for benefits; and

EFFECTIVE DATE	KEY ACTIONS
April 29, 2019	Applications for exemptions are accepted. Employers and other covered entities that already provide paid leave benefits that meet or exceed those required by the PFML law can begin to apply for annual exemptions through MassTaxConnect.
September 30, 2019	Employers and other covered entities must provide written notice to current employees and other covered individuals (both W-2 and 1099-MISC workers) of their rights and obligations under the PFML law and obtain signed acknowledgements. For newly hired employees, notice must be provided within 30 days of hire; for 1099-MISC workers, notice must be provided upon entering into a contract for service.
October 1, 2019	Payroll deductions begin. Employers and other covered entities must start making deductions from employees’ wages and payments made to independent contractors. Employers and other covered entities must display the state-provided PFML poster in a conspicuous location.
January 31, 2020	The first quarterly contribution and report (for October – December) are due. They can be submitted through MassTaxConnect.
January 1, 2021	Most benefits become available.
July 1, 2021	All benefits become available.

- The mailing address, email address, and telephone number for the DFML.

For Massachusetts workers who receive 1099-MISC forms, employers must provide written notice about PFML benefits when the parties enter into a contract for service, or by September 30, 2019, whichever is later. Again, the notice must be in the worker's primary language, and the employer must obtain either a written acknowledgment of receipt of the notice or a statement indicating the worker's refusal to acknowledge the notice. For these workers, the notice must contain:

- An explanation of the availability of PFML benefits and the procedures for self-employed workers to become covered individuals;
- The self-employed worker's contribution amounts and obligations if they were to become a covered individual;
- The employer's contribution amount and obligation;
- The employer's name, mailing address, and assigned DFML identification number;
- Instructions on how to file a claim for benefits; and
- The mailing address, email address, and telephone number for the DFML.

All of the posting and notice requirements are discussed on the DFML website.¹¹

WHAT MASSACHUSETTS EMPLOYERS SHOULD DO NOW

As the October 1 deadline for remitting contributions is quickly approaching, if you are an employer or other entity that may be covered under the PFML law, you should do the following:

- Pursuant to the guidance provided in the Updated Regulations, confirm whether you are covered by the PFML law, and, if you are, identify all covered individuals.
- If you are a covered employer that already has a plan that is equivalent to or more generous than the PFML program, determine whether to apply for an exemption. If an exemption is desired, begin the application process promptly. If you are an employer with a paid leave plan that is not currently compliant with the PFML law's requirements, evaluate which is the best option for your business—bringing your current program into compliance or switching to the state plan.
- If you are an employer that will be subject to the PFML program's mandates, ensure that all necessary elements for implementing the plan are in place, including insurance (if you are not self-insured), notice requirements to employees, recordkeeping systems, and comprehensive training for all

staff involved in administering the program. 🌀

NOTES

1. https://www.mass.gov/files/documents/2019/03/29/3-29-19_Draft_Regulations_for_Public_Comment_0.pdf.
2. <https://www.mass.gov/paid-family-and-medical-leave-for-massachusetts-employers>.
3. <https://www.mass.gov/paid-family-and-medical-leave-for-workers>.
4. <https://www.mass.gov/info-details/informing-your-workforce-about-paid-family-and-medical-leave>.
5. <https://www.mass.gov/info-details/calculate-your-paid-family-and-medical-leave-contributions>.
6. <https://www.mass.gov/news/notice-to-massachusetts-employers-about-pfml-delay>.
7. *Id.*
8. The earlier version of the proposed regulations did not include language about reduced leave; however, the Updated Proposed Regulations clarify that reduced leave is also an option.
9. <https://www.mass.gov/info-details/informing-your-workforce-about-paid-family-and-medical-leave#workplace-poster->
10. <https://www.mass.gov/info-details/informing-your-workforce-about-paid-family-and-medical-leave#notifying-massachusetts-w2-employees->
11. <https://www.mass.gov/info-details/informing-your-workforce-about-paid-family-and-medical-leave>.

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