

Newly Created Massachusetts Department of Family and Medical Leave Proposes Regulations

February 13, 2019

By [Susan Gross Sholinsky](#), [Nancy Gunzenhauser Popper](#), and [Anastasia A. Regne](#)*

On January 23, 2019, the newly created [Massachusetts Department of Family and Medical Leave](#) (“DFML” or “Department”) released [proposed regulations](#) that provide guidance on the rights and responsibilities of both employers and employees under the state’s new [Paid Family Medical Leave Law](#) (“PFMLL” or “Law”). The DFML has established a comment period on the proposed regulations, which will remain open until March 31, 2019. During the comment period, the Department will hold a number of [listening sessions](#) throughout the state at which the public can provide comments on the proposed regulations. According to the DFML’s website, final regulations will be released by July 1, 2019.

As a reminder, the deadline for employers to start making contributions toward the PFMLL programs is July 1, 2019. Most benefits will be available as of January 1, 2021, with all benefits effective as of July 1, 2021.

Summary of the PFMLL

As we previously reported,¹ the Law will require all employers of one or more employees working in Massachusetts to provide paid leave benefits in a given benefit year. Paid medical leave is capped at 20 weeks per year, paid family leave is capped at 12 weeks per year, and paid family leave arising from a covered service member’s call to active duty is capped at 26 weeks per year. The maximum amount of combined family and medical leave (including leave to care for a covered service member) that one person may take is 26 weeks per year.

The leave program will be funded by a payroll tax and administered by the DFML. All Massachusetts employers that do not have approval for their own private plan will be required to contribute to a trust fund managed by the Department at an initial contribution rate of 0.63 percent of each employee’s wages. The employee’s or covered individual’s

¹ Please see the Epstein Becker Green *Act Now Advisory* titled “[Massachusetts Enacts New Minimum Wage and Paid Leave Law](#)” and the Epstein Becker Green blog post titled “[New Massachusetts Department of Family and Medical Leave Launches Website, Issues First Round of Guidance](#).”

weekly benefit is calculated as a percentage of his or her earnings,² initially up to \$850 per week, and thereafter up to 64 percent of the state's average weekly wage.³ No benefits will be available during the first seven calendar days of the leave, but this period will count against the total available period of leave in a calendar year.

Under the Law, employers with 25 or more employees in Massachusetts will be obligated to remit the full contribution to the trust fund, but, with respect to medical leave, they may deduct up to 40 percent of the contribution from an employee's wages. With regard to family leave, such employers may deduct up to 100 percent of the contribution from an employee's wages. Employers with less than 25 employees may deduct 100 percent of the family and medical leave contributions from the employee.

Employee and Workforce Count

In determining whether they meet the 25-or-more-employee threshold, employers are instructed to determine the average number of employees by counting the number of workers, "including full time, part-time, seasonal, and temporary employees, on the payroll during each pay period and dividing by the number of pay periods." Employers must include in this count independent contractors for whom the employer is required to report payments on IRS Form 1099-MISC. In future years, an employer should determine its workforce count based on the number of workers it employed in the previous calendar year.

Employer Registration and Filing

Under the proposed regulations, employers will be required to register, file earnings reports, and forward contributions through the Massachusetts Department of Revenue's [MassTaxConnect](#) system. The report must be filed quarterly and contain the following information:

- for each employee: name, Social Security number, wages paid, or other earnings;
- for each employer: the federal employer identification number and the identification number that the employer is required to include on a withholding tax return; and
- for independent contractors (as described above): the names and Social Security numbers of those individuals and the amounts paid to them.

² An individual's weekly benefit rate will be calculated as follows: the portion of the individual's weekly wage that is equal to or less than 50 percent of the state average weekly wage ("AWW") will be paid at a rate of 80 percent, and the percent of an individual's weekly wage that is more than 50 percent of the AWW will be paid at a rate of 50 percent. For example, if an employee earns \$1,000 per week, the state will pay PFMLL benefits at a rate of 80 percent of the first \$425 (50 percent of the AWW of \$850) and 50 percent of the remainder of the weekly wages of \$575. This would be equal to \$627.50 (80 percent of \$425 = \$340) + (50 percent of \$575 = \$287.50).

³ The maximum amount that an employee or covered individual can receive will be 64 percent of the AWW. Right now, 64 percent of the AWW is \$850. Every year, but not later than October 1 of each year, the Department will recalculate what is 64 percent of the AWW. That new number, the new maximum amount of benefits that an employee or covered individual can receive each week, will take effect on January 1 of each new year following the October 1 calculation.

The Department will calculate the contribution amount owed for the quarter based on the quarterly report filed by the employer. Employers must remit contributions owed within 30 days after the end of the calendar quarter.

Application for Exemption

Employers that implement a private plan that meets or exceeds the Law's requirements may apply to the Department for an exemption. The Department will accept such applications "on a rolling basis," and, if approved, the exemption will be effective for one year. An employer may apply for exemptions from medical leave coverage, family leave coverage, or both.

Definitions

The proposed regulations clarify, among other definitions, the wide scope of the Law's definition of a "family member." A "family member" is "the spouse, domestic partner, child, parent or parent of a spouse or domestic partner of the covered individual," as well as "a person who stood in loco parentis to the covered individual when the covered individual was a minor," and "a grandchild, grandparent or sibling of the covered individual." Each of these family members also has a specific and broad definition, including the following:

- "Child" means "a biological, adopted or foster child, a stepchild or legal ward, a child to whom the covered individual stands in loco parentis, or a person to whom the covered individual stood in loco parentis when the person was a minor child."
- "Parent" means "the biological, adoptive, step- or foster mother or father of the covered individual."
- "Sibling" means "the biological, adoptive, step- brother or sister of a covered individual."

Claims Process

How to File a Claim:

The employee or covered individual must provide the following notice and information to the employer: (i) at least 30 days' notice of the anticipated start date of the leave, (ii) the anticipated length of the leave, (iii) the type of leave he or she is requesting, and (iv) the employee's expected return date. If the individual cannot provide 30 days' notice for reasons outside of his or her control, he or she must provide notice to the employer as soon as is practicable.

Under the proposed regulations, an individual must file a claim using DFML-issued forms⁴ and must provide the Department, at a minimum, with the following information:

- identifying information (e.g., Social Security number);

⁴ These forms have not yet been issued.

- the employer's name and identification number;
- the nature and expected duration of the leave;
- whether the leave will be continuous or intermittent;
- the date that the individual provided notice to the employer;
- any denied, granted, or pending requests for leave from the employer during the benefit year;
- for family leave or leave related to active duty military service by a family member, evidence of a family relationship; and
- a completed certification evidencing that the leave serves a covered purpose (the draft rules describe the types of certifications that must be provided to support each of the six types of claims for benefits).

In addition, employees must provide the DFML with consent to share their information about the claim with their employer and/or health care provider.

If an employee or covered individual opts to amend or extend his or her claim for leave benefits, the employee must inform the DFML within 14 days prior to the expiration of the original approved leave and obtain the Department's approval.

Employer Responsibilities for a Pending Claim

The DFML will notify the employer that a claim has been filed within five business days of its filing. The Department will then facilitate the disclosure and exchange of information or records relevant to the claim. If the DFML requests additional information from an employer, the employer will have five days to comply. Requested information may include:

- wages or earnings for the past 12 months;
- a description of the employee's or covered individual's position;
- whether the employee or covered individual currently works a full- or part-time schedule;
- weekly hours worked;
- prior requests/approvals for leave;
- amount of paid leave that has already been taken for a qualifying reason during the current benefit year;

- a description of the employer’s paid leave policies and whether the employee or covered individual has received paid leave during the current benefit year;
- whether the employee or covered individual will receive any paid leave benefits from the employer during the requested leave; and
- any other information or records related to the claim, including evidence of a fraudulent claim.

The proposed regulations stress that an employee or covered individual who has been approved for leave benefits must still comply with any attendance and call-in procedures established by the employer.

Intermittent Leave

An employee may take intermittent family leave to bond with a new child only if the employer and employee agree to it. If intermittent leave is requested due to the employee’s or a family member’s (including a service member’s) serious health condition, such leave may be taken only if medically necessary. There are no conditions placed on taking intermittent leave due to a qualifying exigency arising out of a family member’s active duty or impending call to active duty in the Armed Forces. Self-employed individuals and former employees are also entitled to take intermittent leave.⁵ An employee who takes intermittent leave will receive benefits on a prorated basis.

Employees and covered individuals approved for intermittent leave benefits must try to arrange their leave time “so as not to unduly disrupt the employer’s operation.” If an employee on an intermittent or reduced leave schedule fails to abide by the schedule agreed to by the employee and employer, the employee may be subject to discipline.

Interaction with State and Federal Leave Laws

The proposed regulations make clear that PFMLL leave will run concurrently with leave taken under the Massachusetts Parental Leave Act (“PLA”) and/or the federal Family and Medical Leave Act (“FMLA”), when the leave is for a qualified purpose under either or both of those laws. Employees who take leave under the PFMLL while ineligible for leave under either the PLA or the FMLA may thereafter take leave under either of those two laws in the same benefit year “only to the extent they remain eligible for concurrent leaves” under the PFMLL.

Job Protection and Ban on Retaliation

The proposed regulations reiterate that when an employee returns to work from PFMLL leave, he or she must be restored to his or her previous position or to an equivalent position, with the same status, pay, employment benefits, length-of-service credit, and seniority as of the date of leave, unless the employee’s status would have changed had

⁵ Former employees may receive benefits, provided they meet certain requirements pursuant to section 24 of chapter 151A of the Massachusetts General Laws, including the amount of wages, the time period during which they worked, being capable of and actively seeking work, and giving notice of unemployment.

he or she not taken the leave. Further, the taking of PFMLL leave may not affect an employee's right to accrue vacation time, sick leave, bonuses,⁶ advancement, seniority, or other employment benefits. Additionally, during the employee's leave, the employer must continue to contribute to the employee's health insurance.

The proposed regulations also reiterate the PFMLL's ban on retaliation against employees who exercise any of their rights under the Law, as well as the rebuttable presumption that any adverse action taken against an employee within six months of taking or returning from a leave or the assertion of another protected right will be presumed to be unlawful. An employer can rebut the presumption only through clear and convincing evidence that it would have taken the action absent the employee's protected activity.

Penalties for Violations

Aggrieved individuals may, within three years of the violation of the Law, institute a civil claim in the superior court, where a successful plaintiff may be entitled to injunctive relief, reinstatement with pay and benefits, three times lost wages, benefits, other remuneration (and interest thereon), and reasonable costs and attorneys' fees.

What Massachusetts Employers Should Do Now

- Consider attending a listening session to share your comments on the proposed regulations with the DFML.
- Review payroll practices to ensure deductions will be properly set up.
- In anticipation of the effective date of the Law (January 1, 2021), review leave of absence policies in order to determine whether any revisions will be necessary.

For more information about this Advisory, please contact:

[Susan Gross Sholinsky](#)

New York
212-351-4789
sgross@ebglaw.com

[Nancy Gunzenhauser Popper](#)

New York
212-351-3758
npopper@ebglaw.com

***[Anastasia A. Regne](#)**, a Law Clerk – Admission Pending (not admitted to the practice of law) in the firm's New York office, contributed significantly to the preparation of this Advisory.

This document has been provided for informational purposes only and is not intended and should not be construed to constitute legal advice. Please consult your attorneys in connection with any fact-specific

⁶ The proposed regulations do not clarify whether this is in reference to guaranteed bonuses only, or if it also includes discretionary bonus payments.

situation under federal law and the applicable state or local laws that may impose additional obligations on you and your company.

About Epstein Becker Green

Epstein Becker & Green, P.C., is a national law firm with a primary focus on health care and life sciences; employment, labor, and workforce management; and litigation and business disputes. Founded in 1973 as an industry-focused firm, Epstein Becker Green has decades of experience serving clients in health care, financial services, retail, hospitality, and technology, among other industries, representing entities from startups to Fortune 100 companies. Operating in locations throughout the United States and supporting domestic and multinational clients, the firm's attorneys are committed to uncompromising client service and legal excellence. For more information, visit www.ebglaw.com.

© 2019 Epstein Becker & Green, P.C.

Attorney Advertising