CLIENT ALERT: MA Department of Family and Medical Leave Issues Emergency Regulations Clarifying Bonding Leave Eligibility in 2021, Adopting Limited Special Rules for Acute Care Hospitals and Revising Certain Definitions

On December 21, 2020 the Massachusetts Department of Family and Medical Leave (the "Department") published Emergency Regulations clarifying that bonding leave can be used for births, adoptions or foster care placements that occurred in 2020; adopting special rules for Acute Care Hospitals in light of the ongoing COVID-19 Pandemic; and revising certain definitions contained in the final Paid Family and Medical Leave ("PFML") regulations issued on July 24, 2020. The following is an overview of the salient provisions.

The Emergency Regulations clarify that employees may be eligible for family leave to bond with a child even if the birth, adoption, or foster care placement occurred in 2020. Pursuant to the existing law and regulations, such family leave is available during the first 12 months after the child's birth, adoption or foster care placement with the employee. The Emergency Regulations clarify that bonding leave is available within the first 12 months even if the birth, adoption or foster care placement occurred prior to the effective date of the law, i.e., in 2020. Except as otherwise provided by the Emergency Regulations, such leave must be taken during the first 12 months after the child's birth, adoption or foster care placement and must be completed during calendar year 2021.

Employees of Acute Care Hospitals who are eligible for family leave to bond with a child born, adopted or placed with the employee for foster care in 2020 may request, and with employer approval, take family leave for bonding during a period beyond 12-months from the date the child was born, adopted or placed, so long as the leave is completed on or before December 31, 2021. Recognizing the potential strain on Acute Care Hospitals (defined as "a hospital licensed under M.G.L. c. 111, § 51 and the teaching hospital of the University of Massachusetts Medical School") amidst the ongoing COVID-19 pandemic, the Emergency Regulations also allow those eligible employees to request (and their employer to allow) to delay use of their family leave entitlement to bond with a child beyond the initial 12-month window, so long as the leave is completed by the end of 2021. As an example, if an employee's child was born April 1, 2020, the employee would, under the prior regulations, be entitled to PFML family leave to bond with the child between January 1 and March 31, 2021. Under the Emergency Regulations, an employee of an Acute Care Hospital could request, and with their employer's permission, take that family leave any time in

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2021, including after March 31st.

- **Such a request will not affect the total amount of leave available to the employee**. Eligible employees may take up to 20 weeks of medical leave and up to 12 weeks of family leave, but may not take more than 26 weeks of PFML leave, total, in a benefit year. The 12 weeks of family leave taken in 2021 to bond with a child born, adopted or placed in 2020 will count against the employee's PFML entitlement.
- **Acute Care Hospitals may initiate discussions with eligible employees to determine if the employee intends to request the permissible extensions**. Such employers are not permitted to request that their employees delay their use of family leave. The decision to request the extension lies solely with the employee.
- **An Acute Care Hospital's denial of an extension request will not constitute retaliation**. An employee whose extension request is granted, however, is entitled to all the PFML's protections, including, without limitation, its job restoration and anti-retaliation provisions.
- **The extensions permitted by the Emergency Regulations apply whether the Acute Care Hospital has elected to use the State-funded PFML, or received a private plan exemption**. In either case, the leave must be utilized by the end of 2021.
- **The extensions permitted by the Emergency Regulations do not affect the availability of medical leave or other family leave entitlements**. The extension allowance applies only to those employees eligible for family leave in 2021 to bond with a child born, adopted or placed with the employee in 2020. To the extent eligible, these employees remain entitled to medical leave and/or family leave as otherwise provided by the PFML law.
- **Employers who are not Acute Care Hospitals seeking a similar extension arrangement for family leave entitlements for employees with children born, adopted or placed in 2020 must submit a written request to the Director of the Department**. The Director, in his discretion, may grant or deny such a request after considering the effects on public health and safety, and the public interest.

The definitions of "Covered Individual", "Employee" and "Employer" have been revised to specifically include Personal Care Attendants and Family Child Care Providers and clarify the appropriate employer for purposes of PFML notices, contributions, and claim communications for these workers. Employers of such workers should review the revised definitions to ensure compliance with these requirements.

Please note that the foregoing is based on information available as of the date of this publication. Employers should visit the Department Website for the most accurate and up-to-date information. Employers with questions about PFML should consult with their MBJ attorney.

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