

CLIENT ALERT: Massachusetts Executive Office of Labor and Workforce Development Issues Revised Draft Regulations and an Informational Guide for Employers Concerning the Paid Family and Medical Leave Law - By Damien M. DiGiovanni and Allison Cherundolo

The Executive Office of Labor and Workforce Development, Department of Family and Medical Leave (the “Department”) recently released revised draft regulations on the Massachusetts Paid Family and Medical Leave law (the “PFML”) as well as an informational [guide](#) for employers that clarifies what actions they must take prior to July 1, 2019, when contributions to fund the PFML commence. Below we summarize the relevant information and key dates provided by the Department.

April 29, 2019 - Application Process for Private Plan Exemptions

Beginning on April 29, 2019, employers and covered business entities may apply for an exemption from collecting, remitting and paying contributions for PFML through MassTaxConnect. Employers and covered business entities have the option of seeking an exemption for the contributions for family leave, medical leave, or both. To qualify for the exemption, the employer or covered business entity must provide a private plan that offers benefits greater than or equal to those provided under the law and cannot cost employees or covered individuals more than they would be required to contribute under the PFML. The Department has provided additional information [here](#) to assist employers and covered business entities in deciding whether or not to apply for an exemption.

If the private plan provides for insurance, the forms of the policy must be issued by a Massachusetts licensed insurance company. If an employer’s or covered business entity’s plan is in the form of self-insurance, the employer or covered business entity must furnish to the Department a bond running to the Commonwealth in such form that may be approved by the Department and in such amount as may be required by the Department.

Employers or covered business entities seeking an exemption will receive an immediate approval or denial of their application. If approved, an employer or covered business entity will be required to upload a copy of the preexisting plan. If denied, an employer or covered business entity will be notified of the grounds for denial and permitted to seek review thereafter. The Department notes, however, that even where a private plan exemption is granted, employees and covered individuals are still entitled to certain rights and protections under the PFML including job protection, the right to appeal a denial of benefits, and the right to be free from discrimination or retaliation to the same extent provided by the law.

July 1, 2019 - Notice to Employees and Covered Individuals (Mandatory Poster and Written Notification)

Employers and covered business entities are required to notify employees and covered individuals of the PFML and its benefits in two ways.

First, employers and covered business entities must post the Department’s mandatory workplace [poster](#) (or another poster approved by the Department) that explains the benefits available to employees and covered individuals under the PFML. The poster can be posted immediately, but in any event before July 1, 2019, in a location that is easily accessible. The poster must be displayed in English and in each language that is the primary language of five (5) or more employees or covered individuals.

Second, employers and covered business entities must distribute written notice of the PFML to employees and covered individuals within 30 days of their first day of employment. The notice must be written in the employee or covered individual's primary language and provide the following:

- An explanation of the availability of benefits;
- The employee/covered individual's and employer/covered business entity's obligations and contribution amounts;
- The employer/covered business entity's name, address and identification number assigned by the Department;
- Contact information for the Department; and
- Instructions on how an employee/covered individual can file a claim for benefits.

Such written notice must be provided to each 1099-MISC contractor at the time they enter into a contract to provide services. Contractors must also be advised of the procedures for self-employed individuals to become covered individuals under the law.

The Department is expected to issue a model notice for employers/covered business entities in the coming months.

Employers and covered business entities must obtain a written acknowledgment or statement refusing acknowledgment of the notice from each employee or contractor.

July 1, 2019 - Payroll Deductions

In the absence of an approved exemption described above, beginning July 1, 2019, employers and covered business entities must begin making payroll deductions from employees and covered individuals to the extent permitted by law, or prepare to cover the contribution allocable for each employee and covered individual, to fund the public trust that will pay out benefits under the law beginning January 1, 2021. The amount of the deductions will be determined by the size and composition of an employer or covered business entity's workforce.

October 31, 2019 - Contributions and Quarterly Reports

While payroll deductions start in July 2019, employers and covered business entities will not be required to remit quarterly trust contributions until October 31, 2019. Employers and covered business entities can preview the contribution rates under the law [here](#). All contributions can be submitted to the trust through MassTaxConnect. Employers and covered business entities who have not yet registered with MassTaxConnect can do so [here](#).

October 2019 - Reporting

Employers and covered business entities will also be required to submit quarterly reports to the Department. The Department will provide more specific information on reporting and documentation guidelines before July 1, 2019, but advises that employers and covered business entities will need to include, at a minimum, the following information for W-2 employees and 1099-MISC contractors (regardless of whether the worker qualifies for individual coverage) in their quarterly reports:

- Employee/covered individual's name;
- Social security number;
- Wages paid or other payments for services; and,
- Employer/covered business entity's federal identification number.

Quarterly reports will also be filed through MassTaxConnect.

New Information in the Revised Draft Regulations

Definition of a “Covered Business Entity” and “Covered Contract Worker”

- The updated regulations now define a “covered business entity” as 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 percent of its workforce.”
- A “covered contract worker” is a “self-employed individual for whom an employer or covered business entity is: (i) required to report payment for services on IRS Form 1099-MISC; and (ii) required to remit contributions to the Family and Employment Security Trust Fund pursuant to the requirements of section 6 of M.G.L. c. 175M.”

Fitness for Duty at the Conclusion of the Medical Leave Period

- Employers and covered business entities can require, as a condition of restoring an employee or covered individual whose leave was occasioned by their own serious health condition, a certification from the employee or covered individual’s health care provider that the employee or covered individual is fit and able to resume work – provided the requirement is part of a uniformly-applied policy or practice that applies to all similarly-situated employees/covered individuals.
- Employers and covered business entities are *not* permitted to require a certification of fitness to return to duty for leave taken on an intermittent or reduced leave schedule, but they are entitled to a certification for such absences up to once every 30 days if reasonable safety concerns exist, based on the serious health condition for which they took leave.

Substitution of Employer/Covered Business Entity-Provided Paid Leave

- Employees or covered individuals may use accrued paid leave provided by their employer or covered business entity rather than file a claim for PFML benefits. The use of the employer/covered business entity-provided leave will run concurrently with the PFML leave period even though the employee or covered individuals will not be compensated with PFML paid benefits for this period.

Accrual of Benefits While on Leave

- Employees or covered individuals utilizing PFML will not accrue benefits while on leave.

Additional Resources

Within its guide for employers, the Department launched two interactive tools to help employers and covered business entities prepare. The **first** allows employers and covered business entities to calculate their estimated contributions based on the size of their workforce and payroll.

The **second** helps employers and covered business entities determine if they are responsible for the employer share of contributions by determining the number of covered individuals in their workforce. In addition, the Department provided **information** for self-employed individuals to determine whether or not they may elect to purchase PFML coverage.

Morgan, Brown & Joy will continue to monitor PFML developments including additional information released by the Department and will update clients on the anticipated impacts for employers.

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This alert was prepared on April 11, 2019.

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