

CLIENT ALERT: Massachusetts Releases Final Regulations for the Implementation of the Massachusetts Paid Family and Medical Leave Law - By Jaclyn L. Kugell and Tracy Thomas Boland

The Department of Family and Medical Leave ("Department") released final regulations for the implementation of the Massachusetts Paid Family and Medical Leave law ("PFML"). The final regulations are available on the Department's [website](#).

As a reminder, beginning on January 1, 2021, covered individuals will be allowed to use paid family and medical leave for the following reasons:

- To bond with a child during the first 12 months after the child's birth or after adoption or foster placement of a child;
- For exigencies relating to a family member's active duty or call to duty in the Armed Forces;
- To care for a family member who is a covered service member; or
- To care for the individual's own serious health condition.

Beginning on July 1, 2021, eligible individuals also will be able to use paid family leave to care for a family member's serious health condition.

Leave under PFML is job protected and may be taken continuously, intermittently or on a reduced workweek basis for most qualifying reasons (bonding leave can only be taken continuously unless an employer permits otherwise). While the amount of leave that may be taken for the various reasons can differ, covered individuals may take up to an aggregate of 26 weeks of leave in the 12-month benefit year. Unlike the federal Family and Medical Leave Act ("FMLA"), PFML applies to small employers (even businesses with only one employee), does not require that individuals perform work for the employer for a particular period of time before being eligible for the benefit, and covers not only employees but, in some instances, 1099-MISC contractors (together "covered individuals") and certain former employees.

The most pressing upcoming deadlines relate to employers' obligations to issue notices about PFML and the date by which employers will start making deductions from covered individuals to fund the PFML. As to the funding of the Family and Employment Security Trust (the trust that will fund the PFML benefits), employers must begin withholding contributions from covered individuals' earnings (to the extent the employer is not covering PFML contributions in their entirety) on October 1, 2019 (extended from July 1, 2019). By January 31, 2020, employers will be responsible for remitting to the Department any covered individuals' and employer contributions for the fourth quarter of 2019 through MassTaxConnect.

Notices about PFML must be provided to each covered individual no later than September 30, 2019 (extended from June 30, 2019). Due to the extension for collecting contributions, the contribution rate has increased from 0.63% to 0.75% of a covered individual's qualified earnings. The Department has issued updated notices that employers must provide to covered individuals that explain the new contribution rate. Model notices are available [here](#). Note that employers that already completed the notification process will need to issue an amendment to the previous notice and distribute it to all covered individuals with the modified contribution rate. The Department has directed that this amendment *does not* need to be signed (or otherwise acknowledged in writing) by the covered individuals and can be sent electronically. The Department further notes that this process will need to be completed each time the contribution rate changes.

For employers seeking an exemption from PFML in order to provide the benefits of the law to covered individuals through a private plan, the deadline to apply is now December 20, 2019 (extended from September 20, 2019).

The final regulations provide detail on the mechanics of PFML, including specifics on how covered individuals will apply for benefits, the process for the Department to approve or deny benefits, benefit calculations, and information about the employer's role in the process. They also clarify some of the ambiguities in the previously issued draft regulations.

Some highlights from the final regulations include:

- Clarification of some key definitions, for example:
 - A "child" for whom a covered individual can take leave under PFML includes adult children (without regard to whether such adult children suffer from any disability);
 - An employer may require "intermittent leave" to be taken in minimum increments of not more than four (4) hours.
- Certain categories of employees who are excluded under the unemployment statute are now also specifically excluded from PFML, including but not limited to:
 - Real estate brokers/salespeople and insurance agents/solicitors in commission-only jobs;
 - Those employed by churches and certain religious organizations;
 - Work-study students, student nurses and interns, work trainee programs administered by non-profit or public institutions;
 - In cases of employees under 18 years of age, services performed for one's father or mother;
 - Those employed in the railroad industry.
- Information about quarterly employment and wage detail reports that employers must submit through MassTaxConnect (including the names, social security numbers and earnings paid to all employees). Similar information (name, social security number/tax id, and amounts paid) for all "covered contractors," i.e., self-employed individuals for whom the employer reports payment on a 1099-MISC, must be in the report *even if* the employer does not have to remit quarterly contributions for such contractors.
- The possibility of contribution refunds for employers when remitted contributions are greater than those required by the law.
- An employer's ability to deduct different percentages of the contribution from different groups of covered individuals (though not more than the maximum percentage authorized by the law).
- Additional information about the exemption/private plan process, including an employer's obligation to provide the Department a surety bond issued by a company authorized to transact business in Massachusetts if the employer is self-insuring benefits via a private plan, that private plans must be maintained throughout the approved period, i.e., through the effective date of termination or non-renewal, and that paid leave must be maintained throughout the duration of a covered individual's leave claim, even if the employer does not renew the private plan.
- Specific information about employers' remittance of contributions and the penalties an employer can face for failing to do so (which the Department may waive upon good cause shown).
- Details about PFML claims processing, including a description of information that the Department will obtain from both the individual and the employer to assess a leave request (including medical certifications), the time frames to supply such information and the Department's approval process.

- A new provision that allows the Department to contact a covered individual's health care provider when it determines a certification lacks required information, is not accurate or authentic or is otherwise insufficient.
- Affirmative obligations of both the covered individual and the employer to notify the Department (using forms provided by the Department) if there is a change in the circumstances that justifies a modification of the covered individual's leave.
- A fitness for duty process that requires employees to present a fitness for duty certification upon the conclusion of leave that addresses their ability to perform the essential functions of their job, provided the employer gives notice that such a certification will be required within five business days of the leave approval; if notice is provided and the employee does not present the certification following conclusion of the approved leave, the employer may deny reinstatement.
- Information about how PFML's paid leave benefit is impacted by other government programs providing paid leave, paid disability insurance, employer-provided paid disability leave and accrued paid leave, including:
 - The weekly benefit amount one receives will be reduced by the amount of wage replacement they receive from any government program, e.g., unemployment, workers' compensation (other than permanent partial disability), under a state or federal temporary or permanent disability benefits law, or a permanent disability policy of the employer.
 - One's weekly benefit will not be reduced by short term disability (STD) or an employer-paid family or medical leave policy unless the combination of the STD or an employer-paid policy and the benefit results in the covered individual receiving in excess of their average weekly wage.
 - The regulations provide that an employer that makes payments to a covered individual that are equal to or greater than the weekly benefit amount shall receive reimbursement from the trust; however, it is unclear whether this reimbursement is available when the employee has received an amount equal to or greater than the weekly benefit due to an STD policy or other insurance policy paid by a third party.
 - Covered individuals may choose to use accrued paid leave rather than the paid benefit under PFML; if they do, they will not be compensated with PFML benefits while receiving accrued paid leave but the time will run concurrently with their leave entitlement under the PFML.
- Clarification that a covered individual taking intermittent leave must inform the employer, upon request, of the reasons why the intermittent schedule is necessary and attempt to work out a schedule for the leave that meets the individual's needs without unduly disrupting the business (subject to the approval of the health care provider), as well as the ability to discipline an employee who fails to work the agreed upon schedule.
- Confirmation that PFML will run concurrently with FMLA and Massachusetts Parental Leave Act leave, when the leave qualifies under both of the laws.
- The risk of impacting the employment of an individual who is/has used PFML, including the (rebuttable) presumption of retaliation if an employee suffers an adverse employment action within 6 months of an employee's leave or restoration, or participation in proceedings or inquiries related to PFML.

As employers prepare for the impending availability of PFML benefits in 2021, many issues need to be considered. For example, employers should be evaluating their current benefit, paid time off, and leave programs, and discussing how PFML may intersect with these entitlements. Employers may want to consider eliminating duplicative benefits and/or reformulating how much and when paid leave

and benefits may be available to ensure these entitlements are working in concert with the PFML and provide for as little disruption to business operations as possible. Employers will want to review and assess their call-in and attendance procedures to ensure covered individuals can be held accountable for improperly reporting their absences. Employers covered by the FMLA will want to consider whether they will effectively defer family and medical leave administration to the Department and simply designate FMLA, as applicable, once the Department has approved an employee's PFML benefits or whether they intend to continue formally administer FMLA, including requiring employees to submit medical certifications to support their FMLA, attend second opinions, etc.

Finally, employers should consider the strength of their performance management processes. Given the PFML's presumption of retaliation, employment decisions about employees who have taken PFML will be subject to even greater scrutiny. Employers will need to defend these decisions with evidence of routine and legitimate performance management and consistent application of rules and policies.

In short, while the final regulations answer some questions, others remain unanswered, and the work towards implementing the PFML in Massachusetts workplaces is just beginning. Please note this alert is intended to offer highlights from the final regulations. We expect to be holding other educational forums for our clients to discuss further the intricacies of implementing PFML.

As you consider the complexities of this new law and its implementation in your workplace, do not hesitate to contact your MBJ lawyer. MBJ will continue to monitor developments from the Department and will promptly update clients on any developments.

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This alert was prepared on July 2, 2019.

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