

One Minute Memo®



Governor Signs Legislation Amending Massachusetts Paid Family And Medical Leave Law And DFML Extends Worker Notice And Private Plan Application Deadlines And Announces Updated Contribution Rates

By Daniel B. Klein, Ariel D. Cudkowicz, Molly Clayton Mooney, and Christina Duszlak

Seyfarth Synopsis: On June 13, 2019, Governor Baker signed into law S 2255, officially delaying the start of the payroll deductions for the Massachusetts Paid Family and Medical Leave (PFML) program by three months to October 1, 2019 and implementing other technical changes. On June 14, 2019, in response to the three-month delay, the Department of Family and Medical Leave (DFML) extended the deadline for distributing the mandatory PFML notice to workers from June 30th to September 30, 2019 and the deadline for applying for a private plan exemption to December 20, 2019. Now, employers will remit the required contributions for the October - December quarter by January 31, 2020. The DFML also has provided an updated breakdown of the new 0.75% contribution rate.

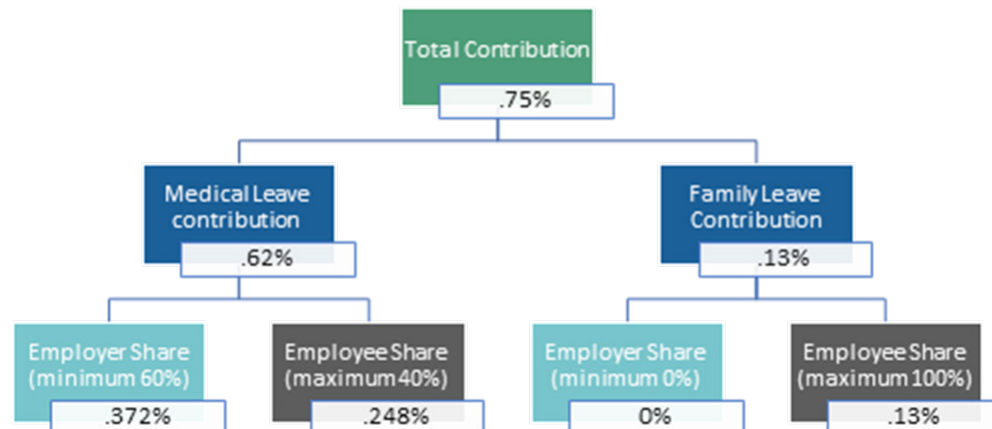
Deadline Extensions And New Contribution Rates

In response to the three-month delay of the payroll deductions and contributions, the DFML extended a number of the program's other deadlines. Rather than racing to finalize and distribute the mandatory worker notice by June 30, employers will now have until September 30 to provide the mandatory notice to all Massachusetts covered workers. The DFML announced that it will be revising and posting on its website updated template notices in the coming days.

For employers considering applying for a private plan exemption, the application deadline has been extended from September 20 to December 20, 2019.

The date for the first payment of the employer-worker contributions to the public program's trust fund has changed from October 31, 2019 to January 31, 2020, covering the first quarter, October 1 to December 31.

To make up for the loss of three months' worth of contributions, the DFML announced that the contribution rate will increase from 0.63% to 0.75%. The new contribution rate will be allocated as 0.13% for family leave and 0.62% for medical leave. If charging employees the 40% maximum share of the 0.62% medical leave contribution, the employee share will be 0.248% and the employer share will be 0.372%. Employers may also charge employees 100% of the 0.13% family leave contribution. The DFML has provided the following chart to explain the breakdown of the new contribution rate as well as the obligation for employers with 25 or more covered workers:



According to the DFML, the final PFML regulations will be posted to the DFML website on Monday, June 17, 2019, and they will go into effect on July 1, 2019.

Technical Amendments To PFML Law

The technical amendments made the following changes and/or clarifications to the PFML Law:

- The term “serious health condition” will have the same meaning under the PFML as under the federal Family Leave and Medical Leave Act.
- A covered individual who is a former employee shall be eligible for PFML benefits if he or she is unable to perform the functions of their most recent position or other suitable employment as that term is defined under the unemployment benefits statute, subsection (c) of section 25 of Chapter 151A.
- Previously, the provision related to the taking of leave intermittently or on a reduced leave schedule stated that taking such leave would “not result in a reduction in the total amount of leave to which the covered individual is entitled.” The amendment clarifies that the total amount of leave will in fact be reduced based on the amount of leave actually taken.
- The amendments clarify that a health care provider should include the following information in the certification for a covered individual taking medical leave: a statement by the health care provider that the covered individual is unable to perform the functions of the covered individual’s position, a statement of the medical necessity, if any, for intermittent leave or leave on a reduced leave schedule and, if applicable, the expected duration of the intermittent leave or reduced leave schedule.

- The certification for a covered individual taking family leave of because of the serious health condition of a family member may also be required to provide a statement of the medical necessity, if any, for intermittent leave or leave on a reduced leave schedule and the expected duration of the intermittent leave or reduced leave schedule. The same changes were made to the provision for covered individuals taking family leave to care for a family member who is a covered service member.
- Previously, the PFML Law assessed employers or covered business entities who failed or refused to make the required contributions a penalty of 0.63% of its total annual payroll for each year or fraction of a year that is failed to comply as well as the total amount of benefits paid to covered individuals for whom it failed to make contributions. The amendment changes this penalty to an amount equal to the employer's or covered business entity's total annual payroll for each year, or the fraction thereof for which it failed to comply, multiplied by the then-current annual contribution rate required in addition to the total amounts of benefits paid to covered individuals for whom it failed to make contributions. This change accounts for potential increases in the contribution rate, including the most recent increase to 0.75%.

The Associated Industries of Massachusetts (AIM) was a key player in convincing State Leaders to amend the PFML Law and extend the various key dates and deadlines.

For our prior reports on the PFML Law and the proposed regulations, you may refer [here](#).

If you would like further information, please contact [Daniel B. Klein](mailto:dklein@seyfarth.com) at dklein@seyfarth.com, [Ariel D. Cudkovicz](mailto:acudkovicz@seyfarth.com) at acudkovicz@seyfarth.com, [Molly Clayton Mooney](mailto:mmooney@seyfarth.com) at mmooney@seyfarth.com, or [Christina Duszlak](mailto:cduszlak@seyfarth.com) at cduszlak@seyfarth.com.

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BREAKING NEWS!!! Massachusetts Governor And Legislative Leaders Agree To 3-Month Delay Of July 1st Paid Family And Medical Leave Contributions

By Daniel B. Klein, Ariel D. Cudkowicz, Molly Clayton Mooney, and Christina Duszlak

Seyfarth Synopsis: Yesterday, the Massachusetts Governor, Senate President and House Speaker issued a joint statement confirming that they have agreed to adopt a 3-month delay to the start of required contributions under the Massachusetts Paid Family and Medical Leave (PFML) Law and to make technical changes to the statute to help improve program design.

The Legislature will need to advance a bill to effectuate these amendments to the statute. At this point, we know that the bill will provide for a 3-month delay to the July 1st start date of required contributions to the PFML program. The bill will also adopt technical changes to clarify program design.

We do not yet know whether the Department of Family and Medical Leave (DFML) will delay the June 30th deadline for the mandatory notices to be distributed to employees and covered contract workers. Stay tuned on that issue.

It appears that the contribution rate will increase from 0.63% to 0.75% to make up for the 3 months of lost contributions, while the January 1, 2021 and July 1, 2021 effective dates for the commencement of leave benefits will remain the same.

The other proposed technical amendments would provide clarity on issues such as intermittent leave and the definition of "serious health condition." The clarifying amendments will also align core principles of the Massachusetts PFML Law with the federal Family and Medical Leave Act (FMLA).

The Associated Industries of Massachusetts (AIM), the Greater Boston Chamber of Commerce and numerous supporters played an integral role in leading the push for this delay. We will keep you posted on any developments.

For our prior reports on the PFML Law and the proposed regulations, you may refer [here](#), [here](#), [here](#), [here](#), [here](#), [here](#), [here](#), and [here](#).

If you would like further information, please contact [Daniel B. Klein](mailto:dklein@seyfarth.com) at dklein@seyfarth.com, [Ariel D. Cudkowicz](mailto:acudkowicz@seyfarth.com) at acudkowicz@seyfarth.com, [Molly Clayton Mooney](mailto:mmooney@seyfarth.com) at mmooney@seyfarth.com, or [Christina Duszlak](mailto:cduszlak@seyfarth.com) at cduszlak@seyfarth.com.

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Breaking News—Massachusetts DFML Clarifies That Businesses Do Not Have To Provide Written Notice To 1099 Contractors Where Such Contractors Make Up 50% Or Less Of Their Massachusetts Workforce

By Daniel B. Klein, Ariel D. Cudkowicz, Christina Duszlak, and Molly Clayton Mooney

Seyfarth Synopsis: The Massachusetts Department of Family and Medical Leave (DFML) has clarified that employers are not required to provide their 1099-MISC contractors the written notice of Paid Family and Medical Leave (PFML) benefits and protections where such contractors make up 50% or less of their Massachusetts workforce. This is a welcome change from the DFML's previous position.

Under the Massachusetts PFML Law, only employers with more than 50% of their Massachusetts workforce comprised of 1099-MISC contractors ("covered business entities") are required to provide notice to contractors regarding PFML benefits and protections. However, despite the statutory language, the DFML's previous online guidance stated that businesses needed to issue the mandatory written notice to all Massachusetts 1099-MISC contractors, even if the company fell under the 50% threshold. Further, the DFML's template notice to self-employed 1099-MISC contractors included information for employers that were not covered business entities and their contractors. You can access the template notice [here](#).

We raised this issue to the DFML in our written comments and during the May 24, 2019 public hearing on the proposed regulations. The DFML has since revised its online guidance on its website to state that employers that are *not* covered business entities are *not* required to send notice and collect acknowledgments from their Massachusetts 1099-MISC contractors. In its online guidance, the DFML, however, does encourage sending notice to these contractors so that these self-employed contractors become aware of their right to opt-in to the state PFML program.

This clarification is welcome news to employers whose 1099-MISC contractors make up a minority of their Massachusetts workforce and for which issuing notice to contractors and collecting acknowledgments would have posed a difficult endeavor.

On a separate note, we also wanted to share that the Associated Industries of Massachusetts (AIM), with whom we have partnered on a number of PFML-related efforts, recently asked State leaders to postpone the July 1 starting date of the PFML program by three months. AIM based its call for a delay on a growing concern that the marketplace, employers, and workers are not adequately prepared for the sweeping new benefits program. AIM is looking for support for its request to the Governor, Senate, and House. You may join in supporting AIM's request [through this link](#).

For our prior reports on the PFML Law and the proposed regulations, you may refer [here](#), [here](#), [here](#), [here](#), [here](#), and [here](#).

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Breaking News — Massachusetts DFML Confirms That Employers May Be Approved Now For Private Plans That Do Not Provide Paid Leave Benefits Until 2021

By Daniel B. Klein, Ariel D. Cudkowicz, Molly Mooney, and Christina Duszlak

Seyfarth Synopsis: In important breaking news, the Massachusetts Department of Family and Medical Leave (DFML) has changed its position and has confirmed that employers may receive approval of a private paid family or medical leave plan even if the plan does not provide paid leave benefits until 2021.

In a significant departure from the DFML's previous position, likely due to outside feedback, the DFML has confirmed that benefits under a private PFML plan that has been approved for an exemption do not have to begin until January 2021. Employers thus may receive approval of a private plan even though the plan does not provide paid leave benefits until January 2021, when the public program's leave benefits commence.

Under the DFML's prior position, a private plan would have had to have provided benefits in advance of approval and applying for the exemption now would have required an employer to provide the paid leave benefits now, 18 months earlier than the public program's benefits commence in January 2021. This news therefore may be a game-changer for certain companies in deciding whether to apply for a private plan exemption now or at any point between now and January 1, 2021.

As previously reported, for Quarter 1 only (July – September 2019), the deadline to file for a private plan exemption in time to avoid first quarter contributions for PFML has been moved from June 30 to September 20, 2019. This allows employers additional time to contemplate private plan options and insurance companies to develop corresponding insurance products. Going forward, the DFML will continue to accept applications on a rolling basis, but applications must be approved in the quarter prior to the quarter in which the exemption from the contributions will go into effect.

With today's news, if an employer applies for the private plan exemption by September 20th and receives approval of a plan that will not provide paid leave benefits until 2021, the employer will be able to avoid the first quarter contributions to the DFML (otherwise due October 31st), as well as future contributions. An employer also can apply *after* September 20, 2019, but the employer will be responsible for the Quarter 1 contributions and any subsequent quarters until the quarter following approval.

Today, the DFML also announced the dates and locations for its two public hearings. Written presentations may be submitted via the DFML contact form ahead of time as well. The hearings are scheduled as follows:

Thursday, May 23, 2019 (11 a.m. - 1 p.m.)
Picknelly Adult and Family Education Center
206 Maple Street
Holyoke, MA

Friday, May 24, 2019 (1 p.m. - 3 p.m.)
Hurley Building - Minihan Hall
19 Staniford Street, 6th Floor
Boston, MA

For our prior reports on the PFML Law and the proposed regulations, you may refer [here](#), [here](#), [here](#), [here](#), [here](#), and [here](#).

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Hot Off The Presses: Massachusetts DFML Just Announced Extension Of May 31st Notice Deadline And June 30th Exemption Application Deadline

By Daniel B. Klein, Ariel D. Cudkowicz, Molly Mooney, and Christina Duszlak

Seyfarth Synopsis: In response to feedback from the public listening sessions held around the Commonwealth, as well as engagement efforts, the Massachusetts Department of Family and Medical Leave (DFML) announced several important changes this afternoon, including a one-month extension of the deadline for distributing the mandatory PFML notices to employees from May 31, 2019 to June 30, 2019.

Deadline For Employer Notice To Employees Extended To June 30, 2019

The DFML extended the deadline for employer notice to employees from May 31 to June 30, 2019. Because the notice must include the proportion of the contributions being deducted from employees as of July 1, 2019 and whether the employer will apply for an approved private plan, this extension provides employers another month to evaluate and finalize those decisions.

Exemption Application Deadline Extended For Quarter 1 To September 20, 2019

The DFML's current guidance requires that exemptions for private plans be approved in the quarter prior to the quarter in which they will go into effect. The DFML announced today that for Quarter 1 only (July – September 2019), however, the deadline to file for a private plan exemption in time to avoid first quarter contributions for PFML has been moved from June 30 to September 20, 2019. This will allow employers additional time to contemplate private plan options.

The September 20, 2019 extension of the exemption application deadline only impacts the contribution requirements if the exemption request is approved. If the exemption request is denied, the impacted business will be responsible for remitting the full contribution amount from July 1, 2019 forward. Therefore, the DFML is recommending that businesses in the Commonwealth consult with their tax advisors as to the implications associated with applying for a private plan exemption that may or may not be approved.

Going forward, the DFML will continue to accept applications on a rolling basis, but applications must be approved in the quarter prior to the quarter in which they go into effect.

Tax Treatment Addressed Preliminarily By DFML

In the same announcement, the DFML addressed, for the first time, the tax treatment of PFML contributions and benefits. The DFML announced that the Commonwealth has requested guidance from the Internal Revenue Service on this question and others related to the tax implications of PFML contributions and benefits. Until IRS guidance is issued, individuals and businesses are urged by the DFML to consult with their own tax advisors on these questions. Based on its own review of federal rules and following consultation with the Massachusetts Department of Revenue, the DFML states that it anticipates that the IRS will conclude that employee contributions should be withheld from *after-tax wages*. A definitive rule for proper tax treatment of contributions will be available once IRS guidance is issued.

Finally, the DFML also announced that it is planning to host two additional listening sessions for comments on the proposed regulations in May, which will be announced shortly.

Because employers now have until June 30th to distribute mandatory written PFML notices to employees, employers will have an additional month to finalize decisions regarding the proportion of the contributions being deducted from employees as of July 1, 2019 and whether the employer will apply for an approved private plan. For our prior reports on the PFML Law and the proposed regulations, you may refer [here](#), [here](#), [here](#), [here](#), and [here](#).

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Management Alert



Massachusetts DFML Releases Private Plan Exemption Application And Guidance; Applications Due By June 30, 2019

By Daniel B. Klein, Ariel D. Cudkowicz, and Molly Mooney

Seyfarth Synopsis: As previously announced, yesterday, the Massachusetts Department of Family and Medical Leave (DFML) made available the online application for private plan exemptions under the Paid Family and Medical Leave (“PFML”) Law. The DFML also released new information on how to calculate the required surety bond for self-insured private plans, as well as further details regarding the application process. Employers may start submitting exemption applications now. In order to avoid commencing the payroll tax deductions on July 1, 2019 and remitting contributions for the July-September quarter, employers must submit the exemption application by June 30, 2019. The Commonwealth also published related FAQs and materials that address a number of open questions, including a private plan’s coverage of separated employees, and the effect on contributions for employers applying for a private plan exemption in the future.

Eligible Private Plans Must Already Provide The Paid Leave Benefits Prior To Application

Massachusetts employers that “already provide” all employees paid leave benefits that are greater than or equal to those provided under the PFML Law, at a cost to employees that is less than or equal to the amount required for employee contributions under the state plan, may be eligible for an exemption from collecting, remitting, and paying family and/or medical leave contributions to the Commonwealth’s trust fund.

As previously reported, however, the Department has limited applications to those employers that “already provide” sufficiently generous policies or plans. The Department has since clarified that this language reflects its intention to limit the exemption to those actually providing the required paid leave benefits prior to an application. In other words, while the public program will not provide covered workers the paid leave benefits until 2021, those seeking a private plan exemption prior to the July 1, 2019 contributions commencement must provide employees the actual paid leave benefits by July 1, 2019.

Exemption Application Process

Employers seeking approval of private plans must submit an exemption application annually through [MassTaxConnect](#). The DFML will accept applications on a rolling basis, beginning April 29, 2019, and if approved, the approval will be valid for one year. However, to avoid the contribution requirements for the July-September quarter, applications must be received by June 30, 2019.

The DFML has posted a document containing all questions on the exemption application [here](#). The questions on the application are aimed at determining whether the employer's plan satisfies all of the requirements of the PFML Law. Employers should be prepared to provide their workforce count and details of their plan.

Of particular note, the document containing the application's questionnaire reveals the answer to a commonly asked question regarding a private plan's coverage of former employees who apply for leave benefits during the 26 weeks following separation from employment. According to this document, a private plan must cover unemployed former employees who apply for leave benefits for up to 26 weeks after separation, or until they obtain other employment, whichever is sooner.

According to the DFML, once an employer submits an application, it will receive a determination within one to two business days. If the exemption is approved, employers will be required to upload a copy of the plan upon which the exemption is based. Employers with self-insured plans will also need to provide proof of bond coverage. If the exemption is denied, the employer may request a follow-up review.

For more information, the Commonwealth released new FAQs regarding the registration and exemption application process, which can be viewed [here](#), including a [video](#) on how to apply for a paid family and medical leave exemption.

Bond Requirements For Self-Insured Plans

The DFML announced how it will calculate the required surety bond value for self-insured plans. For every 25 covered employees, the DFML will require a bond value of:

- \$19,000 for qualifying family leave plans,
- \$51,000 for qualifying medical leave plans, and
- \$70,000 for qualifying plans for both family and medical leave.

For example, an employer applying for an exemption from family leave with 12 employees will require a bond value of \$19,000. An employer applying for an exemption from medical leave with 12 employees will need a bond value of \$51,000. On the other hand, an employer applying for an exemption from medical leave with 85 employees will need a bond value of \$153,000; and an employer applying for an exemption from both family and medical leave with 85 employees will require a bond value of \$210,000.

New FAQs On The Registration And Application Process

The new FAQs clarify that if a company adopts a private plan sometime in the future and that plan is approved for an exemption, the company can stop contributing to the public trust fund on the first day of the quarter following the quarter in which the exemption was approved.

The FAQs also provide guidance on how employers can calculate their workforce count (as required in the application), which is based on the employer's average number of employees during each pay period for a twelve-month period. The FAQs further explain how to calculate whether 50% or more of a company's Massachusetts workforce is comprised of 1099-MISC independent contractors, in which case the total workforce count must include the 1099 contractors. Examples of workforce count calculations are included as well.

The FAQs address other application-related questions, including how a start-up company can determine its workforce count.

In the FAQs, the Commonwealth also clarifies that for PFML contribution purposes in 2019, the \$132,900 income limit will be calculated using wages/payments made to employees/covered contract workers from July 1, 2019 through December 31, 2019, rather than year-to-date wages.

Additional Exemption Requirements

As a reminder, to be eligible for the exemption, in addition to providing all employees paid leave benefits that are greater than or equal to those provided under the PFML Law, at a cost to employees that is less than or equal to the amount required for employee contributions under the state plan, a qualifying family and/or medical leave plan must provide: job protection during such leave; continued employer contributions to employment-related health insurance benefits, if any, at the level and under the conditions provided if working continuously; intermittent leave with the weekly benefit amount being prorated; and a statement in the plan that all presumptions shall be made in favor of the availability of leave and the payment of leave benefits.

Because mandatory written PFML notices must be distributed to employees and contractors by May 31, 2019, and because the written notice must inform employees of the proportion of the contributions being deducted from employees as of July 1, 2019 and whether the employer has an approved private plan, employers need to decide these matters prior to May 31, 2019. For our prior reports on the notice obligation, the DFML's template notices, and other details of the PFML Law and the proposed regulations, you may refer [here](#), [here](#), [here](#), and [here](#).

If you would like further information, please contact [Daniel B. Klein](mailto:dklein@seyfarth.com) at dklein@seyfarth.com, [Ariel D. Cudkowicz](mailto:acudkowitz@seyfarth.com) at acudkowitz@seyfarth.com, or [Molly Mooney](mailto:mmooney@seyfarth.com) at mmooney@seyfarth.com.

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Massachusetts DFML Releases Template Paid Family And Medical Leave Notices And Sets May 31, 2019 Distribution Deadline

By Daniel B. Klein, Ariel D. Cudkowicz, Molly Mooney, and Christina Duszlak

Seyfarth Synopsis: On Wednesday afternoon, the Massachusetts Department of Family and Medical Leave (DFML) posted [template notices](#) for employers to provide to each Massachusetts employee and self-employed 1099-MISC contractor on or before May 31, 2019, as required by the Massachusetts Paid Family Medical Leave (PFML) Law. This is the first time the DFML has provided a deadline for these notices. Importantly, the notice must include both the employer's and worker's contribution rates. Employers may create their own written or electronic notice as long as it contains the minimum requirements of the PFML Law. Employers must collect written or electronic confirmation from each worker acknowledging or refusing to acknowledge receipt of the notice.

Written Notice To Employees And Self-Employed Contractors By May 31, 2019

According to the DFML, employers must provide the written notice to workers of their rights and obligations under the PFML Law by **May 31, 2019**. The DFML has provided a template notice to employees in six languages (the notice must be provided in the employee's primary language). The English template to employees may be accessed [here](#). The DFML also has provided a template notice to self-employed contractors in six languages (the notice must be provided in the contractor's primary language). The English template to contractors may be accessed [here](#).

The notice must be provided electronically or in paper form by **May 31, 2019** for all employees or self-employed contractors who are employed or contracted with on or after June 1, 2019; or within 30 days of the first day of employment for new employees, or for self-employed contractors, when entering into a contract for services.

Acknowledgment Of Receipt

The notice must include the opportunity for an employee or self-employed individual to acknowledge receipt or decline to acknowledge receipt of the information. Employers may collect these acknowledgements electronically or in paper form.

If an employee or self-employed individual does not acknowledge receipt, an employer or covered business entity can show it fulfilled the notice obligation by establishing that it provided its entire workforce with the notice and the opportunity to acknowledge or decline to acknowledge receipt.

Employer-Created Written Notices

Employers may create their own notice. The written notice to employees must include the following:

- An explanation of the availability of family and medical leave benefits;
- Both the employer's and employee's contribution amounts (by percentage) and obligations;
- The employer's name and mailing address;
- The employer's identification number assigned by the DFML;
- Instructions on how to file a claim for family and medical leave benefits;
- The mailing address, email address and telephone number of the DFML.

The written notice to self-employed individuals (1099-MISC contractors) must include the majority of the same information as the notice to employees. For example, it must include an explanation of the availability of family and medical leave benefits and the procedures for self-employed individuals to become covered individuals entitled to such benefits (where the company is not a "covered business entity"). The notice must also include the self-employed individual's contribution amount (by percentage) and obligations if they were to become a covered individual or if the company is a covered business entity, as well as the company's contribution amount (by percentage) and obligations where it is a covered business entity.

The DFML's website contains substantial information regarding the above items and more. We encourage you to review these resources.

For our prior reports on the PFML Law and the draft regulations, you may refer [here](#), [here](#), [here](#), and [here](#).

If you have any questions or would like further information, please contact [Daniel B. Klein](mailto:dklein@seyfarth.com) at dklein@seyfarth.com, [Ariel D. Cudkowicz](mailto:acudkowicz@seyfarth.com) at acudkowicz@seyfarth.com, [Molly Mooney](mailto:mmooney@seyfarth.com) at mmooney@seyfarth.com, or [Christina Duszlak](mailto:cduszlak@seyfarth.com) at cduszlak@seyfarth.com.

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Seyfarth Shaw LLP One Minute Memo® | April 18, 2019

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Management Alert



Massachusetts Releases Updated Proposed Paid Family And Medical Leave Regulations -- What You Need To Know

By Daniel B. Klein and Ariel D. Cudkowicz

Seyfarth Synopsis: On Friday evening, the Massachusetts Department of Paid Family and Medical Leave (DFML) published its revised version of the highly anticipated proposed Paid Family and Medical Leave (PFML) regulations that were due for release by March 31, 2019 for public comment and hearing. The proposed regulations clarify a number of key issues and provisions of the PFML Law that have been the source of prior confusion and questions, including the private plan exemption, the July 1st payroll deductions, benefits accrual during PFML leave, the interaction of PFML leave and paid time off policies, and the applicability to contract workers paid on an IRS Form 1099-MISC. [As we reported](#) last Wednesday, in advance of the proposed regulations' release, the DFML posted new toolkits and other clarifying information for employers and workers online [here](#). Much of the new information contained in the proposed regulations overlaps with the information the DFML released online last week.

Because much of the noteworthy information in the proposed regulations overlaps with the information posted in advance by the DFML and because many of our readers probably have not had the opportunity to review last week's Alert, below is a consolidated summary of the noteworthy information from both sources in one place. Following that summary, we identify several key areas on which the updated proposed regulations provide new information.

What We Now Know From The Proposed Regulations And The DFML Toolkits

- **Online Applications For Private Plan Exemption Available April 29th.** According to the DFML's website and announcement, beginning April 29th, employers "already providing" paid leave benefits to their workforce may apply online through MassTaxConnect for an exemption from collecting, remitting, and paying contributions to the public Trust Fund. To be approved, the benefits offered must be greater than or equal to the benefits provided by the PFML Law and must not cost employees more than they would be required to contribute to the State plan. Applications will be accepted and reviewed on a rolling basis.
 - At this time, it is unclear if the DFML intentionally limited the current application to employers "already providing" such paid leave benefits or if applications for approval of new private plans will also be accepted as of April 29th, as the PFML Law and the proposed regulations permit applications for approval of any private plan providing equal or greater benefits. Stay tuned for further clarification.

- If a private plan provides for insurance, the insurance policy must be issued by a Massachusetts licensed insurance company. If a private plan is self-insured, the employer or covered business entity must furnish to the DFML a bond running to the Commonwealth in such form as may be approved by the DFML and in such amount as may be required by the DFML.
- For further details regarding the application process and the minimum features a private plan must contain, please refer to [our prior Alert](#).
- **July 1, 2019 Commencement Of Payroll Deductions.** Beginning July 1, 2019, unless receiving an approved exemption for a private plan, all Massachusetts employers will be required to commence payroll deductions to cover worker contributions from employees' wages and from payments for services to covered 1099-MISC contractors (where 1099-MISC contractors make up 50% or more of the Massachusetts workforce).
 - Contributions to the public Trust Fund will be remitted at an initial contribution rate of 0.63% on the first \$132,900 of an individual's annual earnings (this figure may be adjusted annually). The 0.63% contribution rate currently is split between a 0.52% medical leave contribution and a 0.11% family leave contribution.
 - Employers with 25 or more covered workers within Massachusetts must remit the entire 0.63% contribution to the Trust Fund. Such employers may deduct 100% of the 0.11% family leave contribution from employees and covered contractors and up to 40% of the 0.52% medical leave contribution (i.e. 0.21%) from employees and covered contractors. Such employers must pay an employer share of at least 60% of the 0.52% medical leave contribution (i.e. 0.31%).
 - Employers with fewer than 25 covered workers within Massachusetts do not have to pay the employer share of the medical leave contribution, nor do they have to remit that share to the Trust Fund. Such employers need only remit to the Trust Fund the remaining 40% employee share of the medical leave contribution and 100% of the employee's family leave contribution, all of which may be deducted from the wages of employees and the earnings of covered contractors.
 - In the worker toolkit, the DFML provides a helpful breakdown for employees and covered contract workers regarding their maximum contributions, explaining that for every \$100 a worker earns (up to the maximum \$132,900 annually), \$0.32 will be deducted from the worker for the covered contribution share. This will consist of \$0.11 to cover the family leave contribution, and \$0.21 to cover the worker's share of the medical leave contribution (employers with 25 or more covered workers will contribute \$0.31 for every \$100 to cover the employer's share of the medical leave contribution).
- **Quarterly Reports Beginning In October 2019.** All employers will be required to file quarterly reports (including wages paid or other payments for services) through MassTaxConnect beginning in October 2019. Reporting and documentation guidelines will be announced prior to July 1, 2019.
- **Employer Contributions To Trust Fund To Start October 31, 2019.** While payroll deductions from workers will commence July 1st, employers will not remit the quarterly contributions to the Trust Fund for the July-September quarter until October 31st. Quarterly contributions will be submitted through the Massachusetts Department of Revenue's MassTaxConnect system.
- **July 1, 2019 Mandatory Workplace Poster Requirements.** The DFML has clarified that the mandatory workplace posting requirement will take effect July 1, 2019, and the DFML released online its new mandatory poster: [Paid Family and Medical Leave mandatory workplace poster](#). This poster or an otherwise approved poster must be posted at the workplace in a location where it can be easily read. The poster must be available in English and each language which is the primary language of 5 or more individuals in the workforce (if such translations are made available from the DFML).

- **July 1, 2019 Written Notice To Workers.** According to the DFML, beginning July 1st, employers also will be required to notify their workforce about the State's PFML program. Employers must provide all Massachusetts W2 employees written notice of contributions, benefits, and workforce protections; and issue this notice to each new employee within 30 days of their first day of employment. The notice must be written in the employee's primary language. Employers must obtain from each employee a written statement acknowledging receipt of the notice or a statement indicating the employee's refusal to acknowledge the notice. This notice must contain:
 - An explanation of the availability of family and medical leave benefits;
 - The employee's contribution amount and obligations;
 - The employer's contribution amount and obligations;
 - The employer's name and mailing address;
 - The employer identification number assigned by the DFML;
 - Instructions on how to file a claim for family and medical leave benefits; and
 - The mailing address, email address, and telephone number of the DFML.

A similar written notice must be issued to each Massachusetts 1099-MISC contractor who provides services to the company, when entering into a contract for services. The notice must be written in the contractor's primary language and contain similar information, including an explanation of the availability of family and medical leave benefits and the procedures for self-employed individuals to become covered individuals.

- **Covered Individuals' Earnings Eligibility Requirements.** The DFML clarified the earnings eligibility requirement (adopted from the unemployment benefits law) for any individual who wants to take paid leave under the Law. To be eligible for PFML benefits, over the 12 months preceding the claim for benefits, an individual must have received total wages from a Massachusetts employer or covered business entity that in the aggregate:
 - Equal or exceed 30 times the individual's weekly benefit amount (or generally about 15 weeks of employment/earnings); and
 - Equal or exceed \$4,700.
- **Contributions Calculator And Other Resources.** In its employer toolkit, the DFML provides links to a number of helpful resources, including a contributions calculator for employers to calculate their estimated PFML contributions. The DFML also provides an interactive tool for determining if an employer is responsible for the employer share of the medical leave contributions by determining whether the employer has 25 or more covered individuals (including employees and 1099-MISC contractors when more than 50% of the Massachusetts workforce consists of 1099-MISC contractors). The site also includes a link for employers to register with MassTaxConnect.
- **2021 Commencement Of Paid Leave Benefits.** As previously reported, the starting dates for paid leave benefits claims (up to \$850 per week) are as follows:
 - On January 1, 2021, covered employees and covered contractors can begin claiming benefits for bonding with a child or newborn; service-member related events; and dealing with the employee's own serious health condition; and
 - On July 1, 2021, covered employees and covered contractors can begin claiming benefits to care for a family member with a serious health condition.

New Provisions Within The Proposed Regulations

- **Employee Option To Use Employer-Provided Paid Leave.** The proposed regulations now include a provision clarifying that covered employees may choose to use accrued paid leave provided by their employer (e.g. PTO) rather than apply for PFML benefits for a particular leave. However, use of the employer-provided leave will run concurrently with the PFML leave period even though the worker cannot be compensated with PFML paid benefits for such period (presumably because the worker is still receiving PFML-provided job protection rights).
- **No Accrual Of Additional Benefits While On PFML Leave.** In a clear response to comments submitted in response to the PFML Law and the early draft of the regulations, the proposed regulations now clarify that, consistent with the federal FMLA, employees on PFML leave will not accrue additional benefits (e.g. PTO, vacation, sick leave, etc.) while out on PFML leave.
- **Short-Term Disability Leave Offset.** Although not addressed in the earlier draft of the regulations, the latest draft includes language tracking the PFML Law with respect to short-term disability benefits. Pursuant to this language, unlike long-term disability benefits, the PFML weekly benefit (\$850/week maximum) will not be reduced by wage replacement received through short-term disability benefits unless the aggregate amount received would exceed the covered worker's average weekly wage.
- **New Section Permitting Fitness For Duty Certifications.** The proposed regulations include a new section permitting employers to require covered workers returning from medical leave to submit a certification from their health care provider that they are able to resume work, provided the employer has a uniformly-applied policy or practice requiring all similarly-situated workers to provide the same for such leave.
- **Expanded Definitions And Alignment With Federal FMLA.** The revised version of the proposed regulations includes a substantially expanded list of definitions. The proposed regulations now clarify that "substantial health condition" is defined identically to the federal FMLA, and "health care provider" is essentially identical to the federal FMLA's definition. The newly expanded definitions also modify the definition of a "covered individual," providing clarity and a definition of the "financial eligibility test" (discussed above). The new definitions also provide more of a distinction between "self-employed individuals" electing coverage, and "covered contract workers" who provides services to an employer or covered business entity for which 1099-MISC contractors make up more than 50% of its Massachusetts workforce. Consistent with the language of the PFML Law, the definition of "family member" has not changed and thus provides broader family leave coverage than the federal FMLA by including a covered individual's parent in-laws, grandchildren, grandparents, and siblings.
- **New Section Regarding Covered Business Entities And Covered Contract Workers.** The proposed regulations now provide a method for a business to determine annually whether it is a covered business entity – i.e. whether greater than 50% of its Massachusetts workforce were self-employed 1099-MISC contractors based on each pay period of the previous calendar year.

During the public comment and hearing period, the DFML will hold at least two public hearings, beginning in May. There will also be a period for written comments. The DFML expects to promulgate the final regulations ahead of the Law's July 1st deadline. The DFML's website contains substantial information regarding the above items and more. We encourage you to review these resources. You may also join us for an interactive webinar on these developments tomorrow, Wednesday, April 3rd, at 1:00 p.m. EST by registering [here](#).

For our prior reports on this Law and the draft regulations, you may refer [here](#), [here](#), and [here](#).

If you would like further information, please contact [Daniel B. Klein](#) at dklein@seyfarth.com, or [Ariel D. Cudkowicz](#) at acudkowicz@seyfarth.com.
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Seyfarth Shaw LLP Management Alert | April 2, 2019

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Management Alert



Massachusetts DFML Releases New Guidelines Providing Clarifying Information And Other Helpful Resources On Paid Family And Medical Leave In Advance Of Friday's Issuance Of The Proposed Regulations

By Daniel B. Klein

Seyfarth Synopsis: While we await Friday's release of the revised, proposed Paid Family and Medical Leave (PFML) regulations, the Department of Family and Medical Leave yesterday posted on its website new toolkits for employers and workers, providing useful information including the mandatory workplace poster, contribution rate calculators, and other interactive tools and information to assist with planning for the July 1, 2019 implementation of the PFML Law.

As we [previously reported](#) and [updated](#), the new Department of Family and Medical Leave (DFML) will be publishing an updated version of the required proposed regulations for public comment this Friday, March 29, 2019. In advance of that release, the DFML yesterday posted on its [website](#) new toolkits for employers and workers, providing useful information including the mandatory workplace poster, contribution rate calculators, and other interactive tools and clarifying information to assist with planning for the July 1, 2019 implementation of the PFML Law.

We highlight a number of clarifying and other noteworthy pieces of information provided by the DFML below:

- **Online Applications For Private Plan Exemption Available April 29th.** The DFML announced that, beginning April 29th, employers "already providing" paid leave benefits to their workforce may apply online through MassTaxConnect for an exemption from collecting, remitting, and paying contributions to the public Trust Fund. To be approved, the benefits offered must be greater than or equal to the benefits provided by the PFML Law and must not cost employees more than they would be required to contribute to the State plan.
- At this time, it is unclear if the DFML intentionally limited the current application to employers "already providing" such paid leave benefits or if applications for approval of new private plans will also be accepted as of April 29th, as the PFML Law and draft regulations permit applications for approval of any private plan providing equal or greater benefits. Stay tuned for further clarification.

- Employers applying for an exemption will receive an immediate approval or denial of exemption. If the exemption is approved, an employer will be asked to upload a copy of the plan. If the exemption is denied, the employer will be notified why it was denied, and if it disagrees with the basis for denial, the employer may request a follow-up review.
- The DFML provides further details of the minimum features a private plan must contain to be approved. To qualify for an exemption, a private plan must provide the following to all employees for either family leave or medical leave, or both:
 - All employees (full-time, part-time, permanent, and seasonal/temporary) must be eligible for the given leave benefits;
 - A weekly paid benefit amount that is greater than or equal to the benefit provided by the public PFML program, for a number of weeks greater than or equal to the number of weeks required by the PFML Law;
 - Job protection while the employee is on qualified leave;
 - Continued employer contributions to employment-related health insurance benefits, if any, at the level and under the conditions coverage would have been provided if the employee had continued working continuously for the duration of qualified leave;
 - Leave may be taken intermittently or on a reduced leave schedule, with the weekly benefit amount being prorated; and
 - The plan must specifically state that all presumptions shall be made in favor of the availability of leave and the payment of leave benefits.
- **July 1, 2019 Commencement Of Payroll Deductions.** Beginning July 1, 2019, unless receiving an approved exemption for a private plan, all Massachusetts employers will be required to commence payroll deductions to cover worker contributions from employees' wages and from payments for services to covered 1099-MISC contractors (where 1099-MISC contractors make up 50% or more of the workforce).
 - Contributions to the public Trust Fund will be remitted at an initial contribution rate of 0.63% on the first \$132,900 of an individual's annual earnings (this figure may be adjusted annually). The 0.63% contribution rate is split between a 0.52% medical leave contribution and a 0.11% family leave contribution.
 - Employers with 25 or more covered workers within Massachusetts must remit the entire 0.63% contribution to the Trust Fund. Such employers may deduct 100% of the 0.11% family leave contribution from employees and covered contractors and up to 40% of the 0.52% medical leave contribution (*i.e.* 0.21%) from employees and covered contractors. Such employers must pay an employer share of at least 60% of the 0.52% medical leave contribution (*i.e.* 0.31%).
 - Employers with fewer than 25 covered workers within Massachusetts do not have to pay the employer share of the medical leave contribution, nor do they have to remit that share to the Trust Fund. Such employers need only remit to the Trust Fund the remaining 40% employee share of the medical leave contribution and 100% of the employee's family leave contribution, all of which may be deducted from the wages of employees and the earnings of covered contractors.

- In the worker toolkit, the DFML provides a helpful breakdown for workers regarding their maximum contributions, explaining that for every \$100 a worker earns (up to the maximum \$132,900 annually), \$0.32 will be deducted from the worker for the covered contribution share. This will consist of \$0.11 to cover the family leave contribution, and \$0.21 to cover the worker's share of the medical leave contribution (employers with 25 or more covered workers will contribute \$0.31 for every \$100 to cover the employer's share of the medical leave contribution).
- **Quarterly Reports Beginning In October 2019.** All employers will be required to file quarterly reports (including wages paid or other payments for services) through MassTaxConnect beginning in October 2019. Reporting and documentation guidelines will be announced prior to July 1, 2019.
- **Employer Contributions To Trust Fund To Start October 31, 2019.** While payroll deductions from workers will commence July 1st, employers will not remit the quarterly contributions to the Trust Fund for the July-September quarter until October 31st. Quarterly contributions will be submitted through the Massachusetts Department of Revenue's MassTaxConnect system.
- **July 1, 2019 Mandatory Workplace Poster Requirements.** The DFML has clarified that the mandatory workplace posting requirement will take effect July 1, 2019, and the DFML released online its new mandatory poster: [Paid Family and Medical Leave mandatory workplace poster](#). This poster or an otherwise approved poster must be posted at the workplace in a location where it can be easily read. The poster must be available in English and each language which is the primary language of 5 or more individuals in the workforce (if such translations are made available from the DFML).
- **July 1, 2019 Written Notice To Workers.** According to the DFML, beginning July 1st, employers also will be required to notify their workforce about the State's PFML program. Employers must provide W2 employees written notice of contributions, benefits, and workforce protections; and issue this notice to each new employee within 30 days of their first day of employment. The notice must be written in the employee's primary language. Employers must obtain from each employee a written statement acknowledging receipt of the notice or a statement indicating the employee's refusal to acknowledge the notice. This notice must contain:
 - An explanation of the availability of family and medical leave benefits;
 - The employee's contribution amount and obligations;
 - The employer's contribution amount and obligations;
 - The employer's name and mailing address;
 - The employer identification number assigned by the DFML;
 - Instructions on how to file a claim for family and medical leave benefits; and
 - The mailing address, email address, and telephone number of the DFML.

A similar written notice must be issued to each Massachusetts 1099-MISC contractor who provides services to the company, when entering into a contract for services. The notice must be written in the contractor's primary language and contain similar information, including an explanation of the availability of family and medical leave benefits and the procedures for self-employed individuals to become covered individuals.

- **Covered Individuals' Earnings Eligibility Requirements.** The DFML clarified the earnings eligibility requirement (adopted from the unemployment benefits law) for any individual who wants to take paid leave under the law. Before applying for benefits, an individual must have:
 - Approximately 15 weeks or more of earnings within the Commonwealth; and
 - Earned at least \$4,700 in the previous 12 months within the Commonwealth.
- **Contributions Calculator And Other Resources.** In its employer toolkit, the DFML provides links to a number of helpful resources, including a contributions calculator for employers to calculate their estimated PFML contributions. The DFML also provides an interactive tool for determining if an employer is responsible for the employer share of the medical leave contributions by determining whether the employer has 25 or more covered individuals (including employees and 1099-MISC contractors when more than 50% of the workforce consists of 1099-MISC contractors). The site also includes a link for employers to register with MassTaxConnect.
- **2021 Commencement Of Paid Leave Benefits.** As previously reported, the starting dates for paid leave benefits claims (up to \$850 per week) are as follows:
 - On January 1, 2021, covered employees and covered contractors can begin claiming benefits for bonding with a child or newborn; service-member related events; and dealing with the employee's own serious health condition; and
 - On July 1, 2021, covered employees and covered contractors can begin claiming benefits to care for a family member with a serious health condition.

The DFML's newly posted information contains substantial information regarding the above items and more. We encourage you to review these resources. The DFML will be issuing the updated, proposed regulations for public comment this Friday, March 29th. The final regulations will take effect July 1, 2019. We will report on the updated, proposed regulations promptly. You may also join us for an interactive webinar on these developments next Wednesday, April 3rd at 1:00 p.m. EST by registering [here](#).

If you have any questions, please contact [Daniel B. Klein](#) at dklein@seyfarth.com.

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Seyfarth Shaw LLP Management Alert | March 27, 2019

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Management Alert



Hot Off The Presses: Massachusetts Releases An Early Draft Of Its Paid Family And Medical Leave Regulations

By Daniel B. Klein and Ariel D. Cudkowicz

Seyfarth Synopsis: Yesterday, January 23, 2019, the Massachusetts Executive Office of Labor and Workforce Development (EOLWD) released a draft of the Paid Family and Medical Leave (PFML) regulations still under development for the purpose of early public input. The EOLWD has scheduled public listening sessions throughout the Commonwealth over the next few weeks to collect feedback on the draft regulations (dates and locations are available on the Commonwealth's website [here](#)). Proposed regulations will then be published for public comment and hearing by March 29, 2019, and final regulations will be promulgated by July 1, 2019.

As previously reported [here](#), [here](#), and [here](#), under the PFML Law, Massachusetts workers will be eligible for up to 12 weeks of paid family leave and up to 20 weeks of paid medical leave, with a maximum of 26 total weeks, in the aggregate, per benefit year. As we knew, after a 7-day waiting period, workers on paid leave will earn 80% of their wages up to 50% of the state average weekly wage, and then 50% of their wages above that amount, up to an \$850/week cap (which may be adjusted annually). Unlike the federal FMLA, the PFML Law will apply to all employers of one or more employees working in Massachusetts. Job-protected, paid leave will be available to eligible new employees without any hours worked or service time requirements. The PFML Law also will apply to certain former employees after separation and self-employed workers.

Although the draft regulations are a work-in-progress, they answer a number of open questions employers have had since the PFML Law was signed last June. In particular, they shed new light on the contributions (*i.e.* payroll tax) employers will start paying on July 1, 2019, as well as the benefits claim process for workers, beginning January 1, 2021. We highlight the key features and other questions answered and unanswered below.

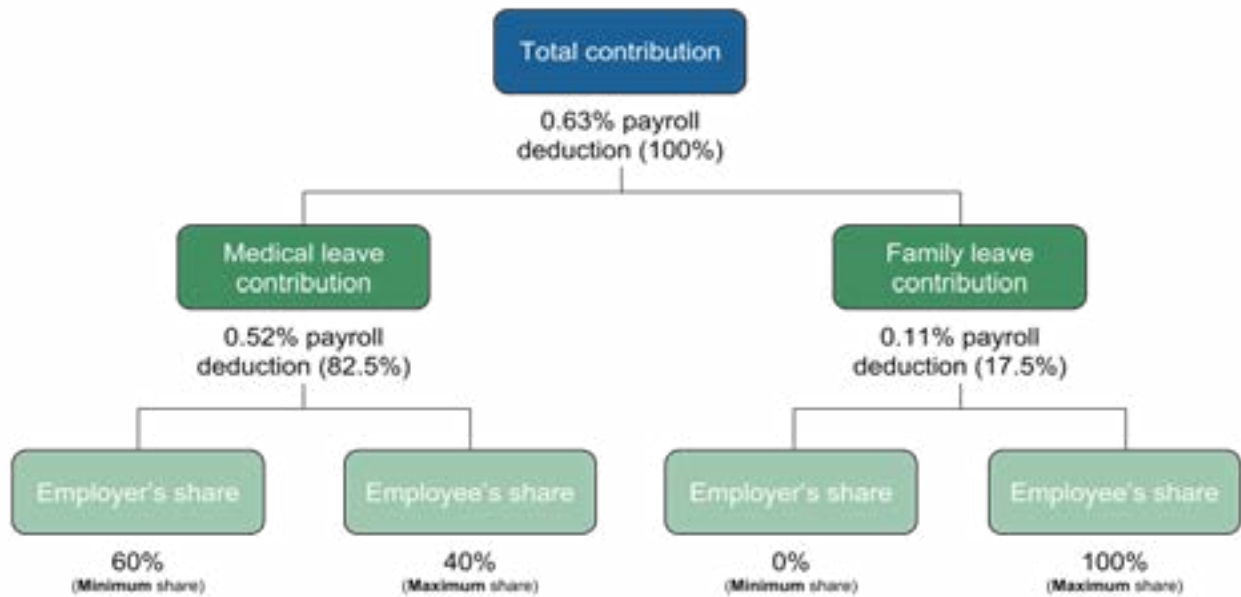
Payroll Tax Contributions To Trust Fund

As previously reported, unless employers receive approval for a private plan (discussed below), the benefit will be paid by the Family and Employment Security Trust Fund, which will be funded by a payroll tax on employers and workers, beginning July 1, 2019. The initial contribution rate will be 0.63% of the first \$128,400 of an individual's annual earnings (this figure may be adjusted annually based on the contribution and base limit established by the federal Social Security Administration for the maximum amount of wages subject to the Social Security tax).

The 0.63% total contribution rate will be allocated between a family leave contribution rate and a medical leave contribution rate, based on the PFML Department’s estimate of the anticipated costs of benefits and administration of the program. On its web site, the Department has announced that for employers with 25 or more employees, the initial split of the 0.63% contribution rate will be allocated as a 0.52% payroll deduction for the medical leave contribution and a 0.11% payroll deduction for the family leave contribution. The Department may change the allocation of rates when it deems it necessary, but no more than once per year.

Although not mentioned in the statute or regulations, the Department’s web site states that the total contribution rate for employers with less than 25 employees will only be 0.42%. The initial allocation for such employers will be 0.31% payroll deduction for the medical leave contribution and a 0.11% payroll deduction for the family leave contribution.

The cost may be shared between employer and employee at varying percentages, based on the type of leave and the size of the company. Employers with less than 25 employees may deduct up to 100% of both family and medical contributions from an employee’s wages. Employers with 25 or more employees may deduct up to 100% of the family leave contribution from an employee’s wages, and up to 40% of the medical leave contribution from an employee’s wages. In other words, employers with 25 or more employees must pay at least 60% of each employee’s medical leave contribution. The Department’s web site provides the following visual breakdown for employers with 25 or more employees:



source: <https://www.mass.gov/info-details/family-and-medical-leave-contribution-rates-for-employers>

Process For Remitting Contributions

The draft regulations clarify the process by which employers will make contributions to the PFML Trust Fund. Following the end of each calendar quarter, all Massachusetts employers, self-employed individuals electing coverage, and other covered business entities must file earnings reports through the Massachusetts Department of Revenue’s MassTax Connect system.

The quarterly report must contain the following information for each employee: name, social security number, and wages paid or other earnings during the quarter. The report must contain the following information for each employer, self-employed individual, or covered business entity: the federal employer identification number and the identification number such employer, entity or self-employed individual is required to include on a withholding tax return filed with the Commonwealth. Additionally, if an employer or covered business entity made payments to individuals for services during the calendar quarter that are required to be reported on IRS Form 1099-MISC (*i.e.* independent contractors), the report must also

include the names and social security numbers of those individuals, and the amounts of such payments made. Employers and covered business entities that do not have pre-existing accounts on the MassTax Connect system must register and establish an account in order to make required filings and remit the required contributions.

Based on the quarterly report, the Department will calculate the total quarterly contribution amount owed. Employers, self-employed individuals electing coverage, and covered business entities must remit such contributions owed through the MassTax Connect system within 30 days after the end of the calendar quarter.

An employer or covered business entity who fails or refuses to make required contributions will be assessed 0.63 percent of its total annual payroll for each year it failed to comply, or fraction thereof, in addition to the total amount of benefits paid to covered individuals for whom it failed to make contributions.

Applications for Exemptions for Private Plans

According to the draft regulations, an employer or covered business entity may apply to the Department for approval to pay PFML through a private plan. Applications for such exemptions from the public plan will be accepted by the Department on a rolling basis and approvals will be effective for one year. Exemptions may be renewed annually. An employer or covered business entity may apply for exemptions from medical leave coverage, family leave coverage, or both.

To be approved for an exemption, the private plan must confer all of the same rights, protections and benefits provided to employees under the PFML Law. If a private plan meets or exceeds the requirements but is denied an exemption due to an apparent error, an employer or covered business entity may re-submit the same plan for supplementary review by the Department.

An employer must notify the Department in writing at least 30 days before implementing any proposed changes to the terms or conditions of an approved private plan. The Department may withdraw approval for a private plan when the plan's terms or conditions have been changed or violated, including for a failure to pay benefits or a failure to pay such in a timely manner, misuse of private plan trust funds, or failure to comply with the PFML Law or regulations.

An employer or covered business entity who fails or refuses to make required contributions will be assessed 0.63 percent of its total annual payroll for each year it failed to comply, or fraction thereof, in addition to the total amount of benefits paid to covered individuals for whom it failed to make contributions.

Benefits Claim Process

The regulations confirm what the EOLWD recently clarified concerning the starting dates for eligible workers being able to file claims for PFML benefits with the Department, as follows:

- On January 1, 2021, eligible workers can begin claiming benefits for bonding with a child or newborn; service-member related events; and dealing with the employee's own serious health condition; and
- On July 1, 2021, eligible workers can begin claiming benefits to care for a family member with a serious health condition.

An individual filing a claim for benefits must provide the individual's employer with: (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, and (iv) the expected return date. If, for reasons beyond the individual's control, the individual cannot provide 30 days' notice, then the individual must provide notice as soon as practicable.

An individual must file a claim for PFML benefits with the Department using forms prescribed by the Department, although these forms have not been released to date. The regulations provide the minimum information an individual's claim must contain, including without limitation, whether the leave is for family leave or medical leave, the expected leave duration, whether it is continuous or intermittent, the date notice was provided to the employer, any denied, granted, or pending

leave requests for a qualifying reason from the employer during the benefit year, evidence of family relationship if the leave involves family leave, and a completed certification form. If a claim is filed more than 90 calendar days after the start of leave, the covered individual may receive reduced benefits in the discretion of the Director.

The Department will notify the employer, if applicable, within 5 business days after an employee has filed a claim for PFML benefits, and will facilitate the disclosure and exchange of relevant information or records regarding the claim. The Department's notice to an employer will contain: (i) the employee's name, (ii) the type of leave at issue, (iii) the expected duration of the leave, (iv) whether the request is for continuous or intermittent leave, and (v) any other information relevant to verification of the claim.

All benefits claims must be supported by a certification evidencing that the leave serves a covered purpose. The draft regulations set forth the minimum information required for each type of leave certification.

Upon request, an employer will have 5 calendar days to provide the Department information or records relevant to a benefits claim, including without limitation, wages/earnings for the prior 12 months, a job description, whether the employee or covered individual currently works a full- or part-time schedule, weekly hours worked, prior requests/approvals for a qualifying reason, amount of PFML already taken during the benefit year, a description of its paid leave policies, and any other relevant information or records.

The Department will notify applicants of their eligibility or ineligibility within 14 calendar days of receiving a claim. The Department will commence payment of leave benefits within 14 calendar days after the eligibility determination (unless that determination occurs more than 14 days before the onset of eligibility, in which case payment will commence as soon as eligibility begins). The Department will provide contemporaneous notice to the individual and the employer of the approval or denial of a benefits claim.

Other Noteworthy Terms While On Approved Leave

Nothing in the PFML Law or regulations will limit an employer's or covered business entity's ability to communicate with an employee or covered individual who is approved for leave benefits.

An employee or covered individual who has been approved for leave benefits must still comply with any attendance and call-in procedures of the employer or covered business entity.

An employee or covered individual approved for intermittent leave must work with the employer or covered business entity to make an effort to take leave so as not to unduly disrupt the employer's or entity's operation.

Following an approval, if there is a change in relevant circumstances that would justify an extension, reduction, or other modification of the period of leave or amount of benefits, both the employee and the employer have an affirmative obligation to inform the Department using forms to be prescribed.

Other Questions Answered

The current draft of the regulations does not alter the following provisions of the PFML Law, some of which were being targeted for possible modification:

- "Serious health condition" remains defined more broadly under the PFML Law and regulations than under the federal FMLA, defined here as an illness, injury, impairment, or physical or mental condition that involves (i) inpatient care in a hospital, hospice, or residential medical facility; or (ii) continuing treatment by a health care provider.
- The taking of family or medical leave shall not affect an employee's right to accrue vacation time, sick leave, bonuses, advancement, seniority, length of service credit, or other employment benefits, plans or programs.

- During the duration of leave, the employer shall continue to provide for and contribute to the employee's employer-provided health insurance benefits, if any, at the level and under the conditions coverage would have been provided if the employee had continued working continuously for the duration of such leave.
- Intermittent leave or reduced schedule leave, paid on a prorated basis, may be taken "when medically necessary" for a medical leave for the worker's own serious health condition, for a family leave to care for a family member with a serious health condition, or for injured service member family leave. Qualifying exigency family leave may also be taken intermittently or on a reduced schedule. However, bonding leave for a new baby may not be taken intermittently or on a reduced schedule unless the employee and the employer agree otherwise.
- An employer must restore an employee who has taken family or medical leave to the employee's 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 (except in the event that other employees of equal length of service credit and status in the same or equivalent positions have been laid off due to economic conditions or other changes in operating conditions).
- The weekly benefit amount shall be reduced by the amount of wages or wage replacement a worker receives for that period under: any government program or law, including workers' compensation (other than for permanent partial disability incurred prior to the leave claim); other state or federal temporary or permanent disability benefits law; or an employer's permanent disability policy or program.
- The law prohibits retaliation against employees for exercising their rights under this law, and any negative change in status or adverse employment action during a leave or within six months following the leave will create a rebuttable presumption of retaliation, which the employer can rebut only with clear and convincing evidence that such action was not retaliation and was based on an independent justification.
- The law provides employees a private right of action with a 3-year statute of limitations for violation of the job restoration, benefits accrual and continuation, and anti-retaliation provisions. A court may award a prevailing employee job reinstatement, benefits reinstatement, injunctive relief, compensation for 3 times any lost wages, benefits and other remuneration and the interest thereon, and reasonable costs and attorneys' fees.

Open Questions Remaining

- By what date must employers post the required PFML notice? The statute was amended to remove a July 1, 2019 effective date for this provision, but the new date has not been announced.
- The draft regulations do not provide any details regarding the application form or specific process for an employer to apply for an exemption for a private plan.
- If the first quarterly payroll tax is due July 1, 2019, how can employers who intend to apply for a private plan exemption avoid paying the July 1 payroll tax in the interim?
- Can a new employee who is otherwise eligible for PFML benefits immediately commence an extended leave for a qualifying reason even if only employed for a short period (e.g. after one day of employment)? This appears to be the case.
- Must a private plan create a private trust fund into which contributions are made and from which PFML benefits are paid?
- The draft regulations do not create a mechanism for employers to charge employees their share of the cost for health insurance continuation during leave.
- While the draft regulations address the reduction of PFML benefits to offset certain alternative wage replacement from other sources, they do not reference or clarify the PFML Law's provision that the weekly benefit amount can be reduced by the amount of wage replacement received under a short-term disability policy to the extent the aggregate amount an employee would receive would exceed the employee's average weekly wage.

The draft regulations and the Department's FAQs can be found [here](#). We will continue to provide updates as to any significant events that occur with respect to the PFML Law or regulations.

If you have any questions regarding this or any related topic please contact any member of Seyfarth Shaw's [Workplace Counseling & Solutions](#) or [Absence Management and Accommodations](#) Teams, [Daniel B. Klein](#) at dklein@seyfarth.com, or [Ariel D. Cudkowicz](#) at acudkowicz@seyfarth.com.

Be on the lookout for an invite for our upcoming webinar on **Tuesday, February 5, 2019 at 1:00 p.m. ET** on this topic, or you can register [here](#).

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One Minute Memo[®]



Governor Signs Massachusetts Paid Family And Medical Leave Law

By Daniel B. Klein

Seyfarth Synopsis: Earlier today, Governor Baker signed into law “An Act Relative To Minimum Wage, Paid Family Medical Leave And The Sales Tax Holiday.” We [previously reported](#) on the details of this bill after the Legislature passed it last week.

The so-called “grand bargain” law will provide Massachusetts employees paid family and medical leave. Massachusetts will have one of the most generous paid family leave programs in the country. Currently, California, New Jersey, New York, and Rhode Island mandate paid family leave.

The law also will gradually raise the state minimum wage from the current \$11 per hour to \$15 per hour by 2023. It would also phase out over five years the time-and-a-half premium pay requirement for retail workers working on Sundays and holidays.

As previously reported, the statutory language raises a number of questions that will need to be addressed through the regulatory process. The Governor signed the legislation as is, although it is our understanding that at some point in the future, the Governor will file a corrections bill. Both technical and substantive corrections will likely take place through this corrections bill and the regulatory process.

Please join us for a live webinar on Wednesday, July 11 at 1:00 p.m. ET to discuss the Family Medical Leave Law and its impact on Massachusetts employers. [Click here to register.](#)

If you would like further information, please contact [Daniel B. Klein](#) at dklein@seyfarth.com.

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Management Alert



Massachusetts Legislature Passes Bill Providing \$15 Minimum Wage And Paid Family And Medical Leave: What Employers Need To Know

By Daniel Klein

Seyfarth Synopsis: On June 20, 2018, the Massachusetts Legislature overwhelmingly passed a bill providing a number of important provisions impacting employers in the Commonwealth. The so-called “grand bargain” bill resulted from a compromise among legislators, the business community, labor unions and community groups designed to eliminate three potential November ballot questions on proposals concerning paid leave, the minimum wage, and a reduction in the state sales tax. The bill will now advance to Governor Baker’s desk for his consideration by June 30.

The “grand bargain” bill would gradually raise the state minimum wage from the current \$11 per hour to \$15 per hour by 2023. It would also phase out over five years the time-and-a-half premium pay requirement for retail workers working on Sundays and holidays.

The bill also provides for paid family and medical leave. While the statutory language raises a number of questions that will need to be addressed through the regulatory process, the principal terms are mostly clear. Over a 3-year phase-in period, the Family And Medical Leave Law would provide Massachusetts workers up to 12 weeks of paid family leave, and up to 20 weeks of paid medical leave for the employee’s own serious health condition. After a 7-day waiting period, workers on paid leave would earn 80% of their wages up to 50% of the state average weekly wage, and then 50% of their wages above that amount, up to an \$850/week cap (which may be adjusted annually). The benefit will be paid by a state trust fund which will be funded by a payroll tax on employers at an initial contribution rate of 0.63% of the employee’s wages. The cost may be shared between employer and employee at varying percentages, based on the type of leave and the size of the company. Unlike the federal FMLA, the state law will apply to all employers of one or more employees working in Massachusetts. Job-protected, paid leave will seemingly be available to eligible new employees without any hours worked or service time requirements. That law also will apply to certain former employees after separation and self-employed workers. The key provisions are unpacked below, subject to regulatory clarification.

Minimum Wage And Premium Pay

If signed, the bill will gradually raise the state minimum wage over 5 years from the current \$11 per hour to \$15 per hour by 2023, including annual increases to \$12, \$12.75, \$13.50, \$14.25, and \$15. The bill also will gradually increase the alternative minimum “service rate” for eligible customarily tipped employees from \$3.75 per hour to \$6.75 per hour by 2023.

The bill will phase out over five years the time-and-a-half premium pay requirement for retail workers working on Sundays and holidays, decreasing annually from 1.5 times to 1.4 to 1.3 to 1.2 to 1.1 and ultimately to straight time. However,

retail work on Sundays and certain holidays will still need to be voluntary, and refusal to work shall not be grounds for discrimination, dismissal, discharge, reduction in hours, or any other penalty.

Family And Medical Leave

The Family And Medical Leave Law, Massachusetts General Laws Chapter 175M, would establish a Department of Family and Medical Leave within the Executive Office of Labor and Workforce Development. This new department will be responsible for administering the paid leave program. The law would phase in mandated paid family and medical leave over three years with the following key provisions:

- Effective July 1, 2019, employers will be required to post a notice of benefits available under this law in a conspicuous place on each of their premises. The notice must be prepared or approved by the Department. The notice must be in English and any other language which is the primary language of 5 or more employees or self-employed individuals of that workplace (if such notice is available from the Department).
- Also effective July 1, 2019, employers must issue to each employee within 30 days after the employee's start date, written information provided or approved by the Department in the employee's primary language explaining the available benefits, the employee's contribution amount and obligations, the employer's contribution amount and obligations, instructions on how to file a claim for family and medical leave benefits, and related information.
- Failure to comply with the above notice requirements will result in a civil penalty for a first violation of \$50 per employee, and \$300 per employee for each subsequent violation.
- Beginning July 1, 2019, all Massachusetts employers will contribute to the Family and Employment Security Trust Fund at an initial contribution rate of 0.63% of each employee's wages. For employers with 25 or more employees in Massachusetts, while the employer must remit the full contribution to the Trust Fund, for medical leave, the employer may deduct up to 40% of the contribution from the employee's wages; and for family leave, the employer may deduct up to 100% of the contribution from the employee's wages. (The regulations will need to address how this varied deduction will work.) Smaller employers with less than 25 employees in Massachusetts are not required to pay any portion of the contribution for family and medical leave. The Director of the Department may adjust the contribution rate annually by October 1 for the coming calendar year.
- Beginning July 1, 2021 (although the statutory language concerning this date is currently inconsistent and needs to be clarified), workers will be able to take family or medical leave and file claims with the Department for medical or family leave benefits. After an initial 7-calendar day waiting period, employees will be entitled to up to 12 weeks of paid family leave per benefit year, and up to 20 weeks of paid medical leave per benefit year for the employee's own serious health condition. The law sets a maximum aggregate of 26 weeks of paid leave per benefit year.
- After the 7-day waiting period (during which employees may use accrued paid sick leave), workers on paid leave may receive wage replacement from the state Trust Fund equal to 80% of their wages up to 50% of the state average weekly wage, and then 50% of their wages above that amount, up to an \$850/week cap. The Director may adjust this maximum weekly benefit amount annually by October 1, to be 64% of the state average weekly wage, which shall take effect on January 1 of the year following.
- Paid "medical leave" will be available to any covered individual with a serious health condition.
- Paid "family leave" will be available for the following reasons: (i) to care for a family member with a serious health condition; (ii) to bond with the worker's child during the first 12 months after birth or the first 12 months after the placement of the child for adoption or foster care with the worker; (iii) because of any qualifying exigency arising out of the fact that a family member is on active duty or has been notified of an impending call or order to active duty in the Armed Forces; or (iv) in order to care for a family member who is a covered servicemember with a serious injury or illness incurred or aggravated in the line of duty (for this particular reason, up to 26 weeks of leave may be taken in a benefit year).

- The taking of family or medical leave shall not affect an employee's right to accrue vacation time, sick leave, bonuses, advancement, seniority, length of service credit, or other employment benefits, plans or programs.
- During the duration of leave, the employer shall continue to provide for and contribute to the employee's employer-provided health insurance benefits, if any, at the level and under the conditions coverage would have been provided if the employee had continued working continuously for the duration of such leave.
- Intermittent leave or reduced schedule leave, paid on a prorated basis, may be taken "when medically necessary" for a medical leave for the worker's own serious health condition, for a family leave to care for a family member with a serious health condition, or for injured servicemember family leave. Qualifying exigency family leave may also be taken intermittently or on a reduced schedule. However, bonding leave for a new baby may not be taken intermittently or on a reduced schedule unless the employee and the employer agree otherwise.
- An employer must restore an employee who has taken family or medical leave to the employee's 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 (except in the event that other employees of equal length of service credit and status in the same or equivalent positions have been laid off due to economic conditions or other changes in operating conditions).
- The weekly benefit amount shall be reduced by the amount of wages or wage replacement a worker receives for that period under: any government program or law, including workers' compensation (other than for permanent partial disability incurred prior to the leave claim); other state or federal temporary or permanent disability benefits law; or an employer's permanent disability policy or program. The weekly benefit amount shall not be reduced by the amount of wage replacement received while on leave under an employer's temporary disability policy or program, or an employer's paid family or medical leave policy, unless the aggregate amount an employee would receive would exceed the employee's average weekly wage.
- The state law adopts many of the same definitions as the federal FMLA, but provides broader coverage in various respects:
 - According to the current language of the bill, unlike the federal FMLA, all employees will be eligible for paid family or medical leave under the state law, regardless of length of service with the employer or hours worked.
 - Under the Massachusetts law, in addition to the family members included under the federal FMLA, "family member" also includes a worker's domestic partner, grandchildren, grandparents, and siblings, as well as the parents of a spouse or domestic partner.
 - "Serious health condition" is defined more broadly under Massachusetts law as an illness, injury, impairment, or physical or mental condition that involves (i) inpatient care in a hospital, hospice, or residential medical facility; or (ii) continuing treatment by a health care provider.
- The law will not obviate an employer's obligation to comply with any company policy, law, or collective bargaining agreement that provides for greater or additional leave rights.
- Leave under this law will run concurrently with leave taken under the Massachusetts Parental Leave Law or the federal Family and Medical Leave Act.
- Employees must provide employers at least 30 days' notice of the anticipated starting date of the leave, the anticipated length of the leave and the expected date of return, or shall provide notice as soon as practicable if the delay is for reasons beyond the employer's control.
- Workers must submit a benefits claim to the Department within 90 calendar days after the start of leave, or benefits may be reduced. The Department shall notify applicants of their eligibility or ineligibility for benefits within 14 days of receiving a claim and shall pay benefits not less than 14 days after the eligibility determination. The Department shall notify the employer within 5 business days after a claim has been filed.

- All claims must include a certification supporting the leave request, which differs based on the reason for leave. Of note, the certification to care for a family member with a serious health condition must include a statement by the health care provider that the covered worker is needed to care for the family member and an estimate of the amount of time that the covered worker is needed to care for the family member.
- Employers may apply to the Department for approval to opt out of the state program if they have a program that offers benefits greater than or equal to what an employee would receive in the state program.
- The law prohibits retaliation against employees for exercising their rights under this law, and any negative change in status or adverse employment action during a leave or within six months of the leave will create a rebuttable presumption of retaliation, which the employer can rebut with clear and convincing evidence that such action was not retaliation and was based on an independent justification.
- The law provides employees a private right of action with a 3-year statute of limitations for violation of the job restoration, benefits accrual and continuation, and anti-retaliation provisions. A court may award a prevailing employee job reinstatement, benefits reinstatement, injunctive relief, compensation for 3 times any lost wages, benefits and other remuneration and the interest thereon, and reasonable costs and attorneys' fees.
- Former employees, if they otherwise meet the financial eligibility requirements, could receive paid leave benefits for family or medical leave that starts within 26 weeks after their separation from employment.
- Self-employed individuals may elect coverage under certain conditions.
- By March 31, 2019, the Department will publish for public comment and hearing proposed regulations and procedures, and such regulations will be promulgated by July 1, 2019.

Questions surrounding many of the Family and Medical Leave Law's terms and implementation issues will likely be the subject of much discussion and debate between now and the March 2019 issuance of proposed regulations. If the bill is signed by the Governor, Massachusetts would have one of the most generous paid family leave programs in the country. Currently, California, New Jersey, New York, and Rhode Island mandate paid family leave. California is the only other state currently with plans for a minimum wage as high as \$15, which is to be implemented by 2022.

We will keep you informed of upcoming clarifications and developments, including Governor Baker's consideration and the future regulations.

If you would like further information, please contact [Daniel Klein](mailto:dklein@seyfarth.com) at dklein@seyfarth.com.

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