

# Management Alert



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

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**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](#).

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