

# Management Alert



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

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**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](#).

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