

Hearing Scheduled On Proposed Amendments to Massachusetts Paid Family and Medical Leave Law

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On June 11, 2020, the Department of Family and Medical Leave (“DFML”) will hold a virtual public hearing on its recent [proposed amendments](#) to the final regulations pertaining to the [Massachusetts Paid Family and Medical Leave Law](#) (“PFML”) issued in June 2019. (Instructions for registering for the virtual hearing are available at [this link](#)). A number of the amendments are particularly noteworthy for businesses in the Commonwealth:

- **Private Plan Exemptions:**

The proposed amendments offer additional details regarding a covered business entity’s right to seek an exemption under the PFML on the basis that its own private leave plan satisfies the PFML’s requirements. In particular, the proposed amendments clarify that an exemption may *not* be granted if a private plan only covers a part, but not all, of the workforce. However, a covered business entity may apply to an exemption *just* from the requirement to make contributions for medical leave coverage, or *just* for family leave coverage, or both.

The proposed amendments also set forth three new requirements for covered businesses to satisfy in order to obtain a private plan exemption:

- A private plan must offer covered individuals an internal appeals process with the plan administrator that is to be invoked before the employee may appeal to the DFML. An employee must have at least ten calendar days after receiving notice of the determination in order to submit an appeal, or more time if the individual proves to the DFML that circumstances “beyond the individual’s control” prevented filing of a timely appeal.
- When issuing determinations, the private plan must notify covered individuals of their rights both under the private plan and under the PFML.
- A private plan shall calculate the weekly benefit amount owed pursuant to the wages earned by the individual as a result of performing services for the covered

business entity at the time the employee applied for benefits.

- **Coverage for Contract Workers:**

The proposed regulations offer some clarity on the extent to which MA 1099-MISC contractors should be counted as covered individuals under the PFML. In accordance with [prior informal guidance](#) issued by the DFML, the proposed regulations confirm that a 1099 MISC contractor may be counted as a covered individual only if that contractor performs services “as an individual entity” in Massachusetts and resides in Massachusetts, and *is not* classified as an independent contractor pursuant to M.G.L. c. 151A, § 2 (Massachusetts’ unemployment statute). This means that any individuals properly classified as contractors for purposes of unemployment in the Commonwealth should not be counted as covered individuals under the PFML.

- **Presumptive Retaliation:**

The PFML provides that any negative change in status or adverse action taken against an employee during PFML leave – or within six months following that leave – is to be presumptively considered retaliation. An employer may rebut the presumption of retaliation by providing clear and convincing evidence of non-retaliatory reasons for the change in status or adverse action. The proposed amendments offer some additional clarifications:

- It shall not be presumed retaliatory for an employer to provide notice to the DFML of its *bona fide* belief that an employee has committed fraud in connection with his or her application for benefits.
- A “trivial, or subjectively perceived inconvenience that affects de minimis aspects of an employee’s work” will not constitute adverse action for purposes of raising a presumption of retaliation.
- The presumption of retaliation applies to all leave “associated with a qualifying reason” allowable under the PFML, regardless of whether the employee “has actually filed an application for benefits” with the DFML.
- To the extent an employer offers a preexisting employment rule or policy as a basis for adverse action or change in status, that rule or policy shall be deemed to be clear and convincing evidence for purposes of rebutting the presumption of retaliation.

- **Applications for Benefits:**

The proposed amendments revise and clarify the procedure for applying for benefits. An individual must provide notice to a covered business entity no less than 30 days before the anticipated start of family or medical leave (or as soon as practicable if a delay is beyond the individual's control), and prior to making an application to the DFML for family or medical leave benefits. The individual's application for benefits to the DFML must include proof of having provided such notice. An individual may not file an application with the DFML more than 60 days before the anticipated start date of the leave, but must aim to do so at least 30 calendar days prior to the leave (or as soon as practicable if the individual is unable to do so "for reasons beyond the covered individual's reasonable control").

Significantly, the proposed amendments also newly provide that a covered business entity may submit an application for benefits *on behalf of* a covered individual, so long as it adheres to all other requirements under the PFML.

Finally, the proposed amendments clarify the terms of the initial seven-day waiting period, elaborating further upon the rule that no benefits are payable during the first seven calendar days of approved leave. Where benefits are taken on an intermittent or reduced leave schedule, the wait period commences "from the date of the first instance of leave from the employer" rather than the aggregate accumulation of seven days of leave. A new seven-day waiting period shall apply at the beginning of *each* application for benefits. However, if documentation from a health care provider confirms that medical leave during pregnancy or recovery from childbirth is to be followed immediately by family leave, a subsequent seven-day waiting period for the family leave portion of the benefits is not required.

- **Reduction of Benefits:**

The PFML provides that benefits are to be reduced by any wage replacement or wages received by the individual from a government program or law, including state or federal disability benefits laws. The proposed amendments further provide that benefits are to be reduced by any benefits an individual receives from a covered business entity in accordance with an approved, exempted private plan or through self-employment, as well as by any outstanding tax obligations or obligations for child support.

- **Reimbursement for Covered Business Entities:**

An employee may choose to use accrued paid leave (now defined in the proposed amendments to include sick leave, annual leave, vacation leave, personal leave, compensatory leave or paid time off) provided by a covered business entity, which is to run concurrently with PFML benefits. However, a covered business entity is *only* eligible for reimbursement from the DFML if the individual need not use PFML benefits as a result of having taken leave under the covered business entity's temporary disability policy or program, or paid family/medical leave policy, which – critically – must be “separate from and in addition to any sick leave, annual leave, vacation, personal leave, or accrued paid time off that is made available to the covered individual.” This means that no reimbursement is available where a covered individual has elected to utilize any other accrued paid leave.

It bears emphasis that these are only some of the many proposed revisions made to the PFML regulations. We will continue to follow and report on any further developments to the regulations, as we anticipate final changes to the regulations will be made in the months following the virtual public hearing on June 11, 2020. PFML benefits are still scheduled to become available on January 1, 2021.

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