

Paid Family and Medical Leave Benefits Become Available in Massachusetts on January 1st: Is Your Workplace Ready?

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For Massachusetts employers, or employers with Massachusetts-based employees, Paid Family and Medical Leave (“PFML”) has been on the horizon for nearly two years. By now, you have [notified your workforce about benefits and contributions, displayed a poster informing them of the same](#), determined the size of your workforce and who is a “covered individual,” [begun making deductions on behalf of eligible employees](#) or [applied for a private plan exemption](#), and more.

Next, on January 1st, 2021, employees will become eligible to take leave under the PFML. Employers can prepare by consulting with counsel regarding your obligations, updating employee handbooks, and reviewing the types of leave your employees may be eligible to take.

This post outlines the parameters of the new PFML law. First, it details which employees are eligible to utilize PFML benefits. Second, it identifies what exemptions exist for employers with private plans that offer the same or greater level of benefits. Next, Part III discusses the types of leave employees are eligible to take. Part IV briefly details the benefits employees may receive and how to calculate them, and Part V touches on employer’s legal obligations with respect to employees on leave.

I. Eligibility

Massachusetts employers and state or federal governmental agencies within the Commonwealth are subject to the new PFML law. Two questions frequently arising, particularly with remote workplace situations occurring due to the pandemic, are: (1) whether out of state employers with one or more employees who live and/or work in the Commonwealth are subject to the PFML; and (2) whether out-of-state remote workers, whose employer is in the Commonwealth, are covered by the PFML.

Employers in these scenarios are encouraged to review eligibility with counsel, but the PFML provides that individuals are covered if:

- The employee's services are performed entirely within Massachusetts; or
- The employee's services are performed both within and outside Massachusetts, but the portion of the services provided outside of Massachusetts is temporary, transitory, or an isolated transaction; or
- The services are not specific to any one state, but some part is performed in Massachusetts and (a) the principle place of business is in Massachusetts, or (b) no service is performed in the individual's principal place of business, but the individual's residence is in Massachusetts.

With regards to independent contractors, these workers fall under the PFML law if the employer issues 1099-MISC tax forms to more than 50% of their workforce.

However, to be eligible for PFML benefits, qualified workers must also satisfy the financial eligibility test, which means they must have earned, at a minimum, 30 times their weekly benefit amount and earned at least \$4,700 in the previous 12 months.

II. Private Plan Exemption

Employers who offer private paid leave plans with benefits that match or exceed the PFML benefits are not required to offer PFML benefits to their workers if they receive an applied-for exemption from the Massachusetts Department of Family and Medical Leave ("DFML").

Employers who have received an applied-for exemption should keep in mind:

- Employers are still subject to the anti-retaliation and other protections under the PFML law (see Part V below).
- Employers with approved private plans must retain information and records related to their plans, including any documentation related to employees' claims for benefits. They must retain all such records for three years and furnish them to the DFML upon request.
- Employers who fail to maintain or renew approved-private plans prior to January 1, 2021 are subject to penalty. The PFML regulations provide instructions for employers who do not renew their private plan, including notifying covered individuals and the DFML of their intent not to renew.

III. Terms of the Leave

Starting January 1, 2021, qualified individuals may utilize the following types of leave:

- Up to **12 weeks** of family leave per benefit year in order to:
 - (i) bond with a newborn child within the first 12 months after the child's birth;
 - (ii) bond with a child within the first 12 months after adoption or foster care placement; or
 - (iii) manage family affairs when a family member is on active duty in the armed forces.
- Up to **20 weeks** of medical leave per benefit year when the employee is unable to work due to their own serious health condition.
- Up to **26 weeks** to care for a covered service member with a serious health condition.

Additionally, starting July 1, 2021, qualified individuals may take up to **12 weeks** of family leave per benefit year in order to care for a family member with a serious health condition.

The **total combined family leave and medical leave** a qualified individual may take in any benefit year is **26 weeks**.

Intermittent Leave

Under PFML, qualified individuals can take their paid leave intermittently, when medically necessary: (a) for their own serious health condition; (b) to care for a covered service member; or (c) to care for a family member with a serious health condition.

Employers are allowed to require that any intermittent PFML be taken in certain minimum increments, but the required minimum must not be greater than four consecutive hours. For example, an employer may require that an employee use PFML time off in minimum increments of two hours at a time, but may not require that the minimum increment be set at five hours. If an employer does apply a minimum increment, however, it should be in the same amount as any current practices or policies regarding minimum increments.

PFML Relationship to MA Parental Leave law and federal FMLA

Any PFML taken runs concurrently with leave taken under Massachusetts' Parental Leave law and the federal Family and Medical Leave Act ("FMLA") if the leave is for a qualified purpose under those laws.

Though PFML and FMLA time can run concurrently, the two laws contain a major difference in that under the PFML, employers may not compel an employee to exhaust rights to any sick, vacation, or personal time prior to or while taking leave under the PFML.

In contrast, the FMLA does allow employers to require that employees use these types of leave concurrently with FMLA leave. Because the PFML allows time to run concurrently with the FMLA, many employers have wondered whether they can, despite the language of the PFML, require employees use other paid time off due to the PFML/FMLA concurrency. As a best practice, it is recommended that employers not try to circumvent the PFML in this manner. The PFML plainly states that employers cannot compel employees to exhaust this other paid time off, and deference should be given to the statute under which employees receive the greatest benefit, in this case, the PFML.

Health Insurance Contributions

Employers are responsible for continuing to make contributions to their share of a qualified individual's health insurance premiums and must pay benefit premiums while the qualified individual is utilizing leave under the PFML.

IV. The Benefit Year and Weekly Benefits

Benefit Year: The PFML utilizes the "measure-forward" method from the FMLA. Under the measure-forward method, the benefit year is measured as the 52-consecutive week period beginning on the Sunday preceding the first day the protected leave begins.

Weekly Benefits: After the first 7 calendar days, qualified individuals will be paid a percentage of their salary or earnings. The maximum weekly benefit available to a qualified individual is \$850/week. The maximum rate is to be recalculated each year. There is a PFML Estimated Benefits Calculator available on the Mass.gov website, [here](#).

V. Job Protection, Anti-Retaliation, and No Interference

The PFML law contains additional protections, including:

- Employers must restore employees who take PFML to their previous position upon their return to work, or to an equivalent position with comparable status, pay, benefits, length of service credit, and seniority as of the date of leave. Job protection does not apply to contractors.
- It is unlawful for employers to retaliate against workers for taking leave under the PFML. It is likewise unlawful for an employer to interfere with a worker's rights under the PFML.
- Any adverse action arising from a qualified individual's exercise of a PFML right, and/or any negative changes to a qualified individual's benefit accrual during PFML leave, or for 6 months thereafter, shall be presumed to be retaliatory.

VI. Conclusion

Qualified employees become eligible for Massachusetts' PFML on January 1, 2021. Employers are encouraged to consult counsel for further guidance, and to ensure they are in compliance with all aspects of the PFML, including the soon-approaching deadlines.

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Related Professionals

- **Mark W. Batten**
Partner
- **Alexandra (Lexie) Rueckle Reynolds**
Associate