

Updated Draft Regulations Issued for Massachusetts Paid Family and Medical Leave

Effective July 1, 2019, employers with employees working in Massachusetts will begin payroll deductions to fund the statewide Paid Family and Medical Leave (“PFML”) benefits that commence January 1, 2021. On March 29, 2019, the MA Executive Office of Labor and Workforce Development issued draft regulations (for public comment) to help employers prepare to implement the paid family and medical leave benefit program. These draft regulations clarify and expand on the draft regulations issued in January. The [MA Paid family and medical leave website](#) has important information for employers with employees (and independent contractors)¹ working in the Commonwealth. The website includes a new [guide for employers](#) as well as a copy of the [mandatory notice](#) that must be posted in a prominent location as of July 1, 2019. The poster is available on the website in other languages.

Background

Following a 7-day waiting period that counts toward the leave duration, eligible employees (or former employees within 26 weeks of separation from service) who satisfy financial requirements for unemployment insurance will be entitled to PFML benefits as follows:

Reason for Leave	Effective Date	Leave Duration
Employee’s medical leave for serious medical condition	January 1, 2021	20 weeks
Child Bonding: 12 months after birth, adoption, foster placement	January 1, 2021	12 weeks
Qualifying exigency	January 1, 2021	12 weeks
Servicemember care	January 1, 2021	26 weeks
Family member’s serious health condition	July 1, 2021	12 weeks
Total aggregate leave	26 weeks in 52-week benefit year that begins on the Sunday preceding PFML	

The weekly benefit amount based on an employee’s Average Weekly Wages (“AWW”) and the statewide AWW, will be:

- 80% of AWW not greater than 50% of the statewide AWW, plus
- 50% of AWW greater than 50% of the statewide AWW.
- The maximum weekly benefit is set at 64% of the statewide AWW. It’s interesting that the initial 2021 maximum weekly benefit of \$850 included in the statute and earlier draft rules is not mentioned in these regulations.

The program will be funded by employer and employee contributions (i.e. PFML premium). Employers with an average total workforce of less than 25 persons in MA will not be responsible to pay the employer-paid portion of the required premium. The initial contribution/premium rate will be .63% of wages up to the Social Security Taxable Wage Base (currently \$132,900), split approximately 50-50 between the employer and employee. Contribution payroll deductions begin July 1, 2019 with the first premium payment and quarterly report due to the State in October 2019. The website has a [calculator](#) to help employers estimate employer and employee contributions (individually or in the aggregate) required under the program. Employers may elect to pay all or a portion of the employees’ share of the premium.

Highlights in the Draft Regulations

Determining Employer Size

- In determining an employer's size and status as a MA employer, employers will count as covered individuals an individual who: (a) works entirely in MA, (b) performs most of their services in MA, or (c) performs services not localized in any one state but some portion of the work is performed in MA, **AND** (i) the base of operations is in MA, or (ii) the work is directed from MA, or (iii) the individual resides in MA.
- Each year a business must determine if it's a **covered business entity** defined as "a business or trade that contracts with self-employed individuals for services and is required to report the payment for services to such individuals on IRS Form 1099-MISC for more than 50% of its workforce." The determination is based on the workforce population from the prior calendar year recognizing full-time, part-time, seasonal and contract workers. Employers with 50% or more independent contractors in the prior calendar year must collect contributions from independent contractors in the *following calendar year*.

PFML Benefits

- A family member is the spouse, domestic partner, **child**, parent or parent of a spouse or domestic partner of the covered individual; a person who stood in loco parentis to the covered individual when the covered individual was a minor child; or a grandchild, grandparent or sibling of the covered individual. However, when determining whether **leave to care for a child** is a qualifying reason for family leave, a child must be either under age 18, or, if age 18 or older, incapable of self-care because of a mental or physical disability at the time the leave begins.
- PFML will run concurrently with the MA Parental Leave Act, federal Family and Medical Leave Act ("FMLA") and the MA Earned Sick Time Act when the leave also qualifies under these laws. A provision in earlier draft regulations stating that employees who take leave under MA PFML while **ineligible for leave** under the federal FMLA or MA Parental Leave may thereafter take leave under the federal FMLA, or MA Parental Leave Act in the same benefit year *only to the extent they remain eligible for concurrent leaves under MA PFML* has been removed, as this would have interfered with an employee's rights under these laws.
- Employees may **choose** to use accrued paid leave rather than apply for PFML benefits. Employers must inform employees that elect to use accrued paid leave that this time-off will run concurrently and count toward the allotted duration of PFML benefits

in the benefit year. PFML benefits are not payable when an employee elects to use employer-provided paid leave that also qualifies as PFML.

- The weekly benefit amount will be reduced by the amount of wages or wage replacement paid under: (i) any government program or law, including but not limited to workers' compensation, other than for permanent partial disability incurred prior to the family or medical leave claim, or (ii) under other state or federal temporary or permanent disability benefits law, or (iii) a permanent disability policy or program of an employer.
- Unless the aggregate benefit exceeds the employee's average weekly wage, the weekly PFML benefit will not be reduced by the amount of wage replacement received from an employer-provided: (i) temporary disability policy or program, or (ii) a paid family or medical leave policy. An employer who makes payments to an employee during a period of family or medical leave that are equal to or greater than the PFML benefit will be reimbursed from the trust fund by the department.
- Leave may always be taken continuously with no constraints. Restrictions on intermittent or reduced schedule leave include: (i) child bonding requires mutual agreement between employer and employee, and (ii) personal, family or servicemember care must be medically necessary. There are no restrictions for taking intermittent or reduced schedule leave for a qualifying exigency. Benefits are pro-rated when taken on an intermittent or reduced leave schedule.
- Employees will file a claim for benefits with the Department of Family and Medical Leave. Employees are required to provide 30-days advance notice to the department and the employer for a foreseeable event or as soon as practicable. The draft regulations include details about the claims and appeals process, documentation employees must provide, as well as how the department will interact and request/exchange information with employers.

Contributions, Filing and Notice Requirements

- Employers will remit contributions and file employment and wage detail reports following the end of each calendar quarter using the MassTaxConnect system.
- Employers will report to the department for each employee and independent contractor: name, social security number and wages (w-2 earning and 1099-MISC).
- **Quarterly reporting and documentation guidelines will be announced prior to July 1, 2019.**

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- Employers must notify employees about PFML benefits by posting a notice in a prominent location. In addition, employers will need to notify each employee and independent contractor in writing (in their primary language) about available PFML benefits within 30 days of employment and obtain a written statement acknowledging receipt of the notice. While not specifically addressed, it seems reasonable to assume that this notice may need to be issued to all current employees by July 1, 2019.

Other Topics Included in the Draft Regulations

- New or expanded definitions for terms such as: covered contract worker, continuing treatment by a health care provider, health care provider, intermittent and reduced leave, etc.
- A municipality, district, political subdivision or its instrumentalities are not subject to PFML unless adopted by the governing body.
- How employers that offer a paid family and/or medical leave program that is equivalent or better than the statewide program will file for exemption from MA PFML.
- Employee rights including job protection, continuation of health benefits, and the ability to seek civil action for a PFML rights violation.
- These regulations clarify that, upon reinstatement, taking 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. Leave periods under PFML need not be treated as credited service for purposes of benefit accrual, vesting and eligibility to participate.
- An employer may require a fitness-for-duty certification when an employee is scheduled to return to work following a leave for the employee's own serious health condition. The regulations provide guidance on how this process should be implemented. Employers may not request a fitness-for-duty certification for intermittent or reduced schedule time off.

The term employee used in this UPDATE may also include independent contractors, when applicable. The term covered individual includes employees of the employer and independent contractors.

ADDITIONAL INFORMATION

For specific questions concerning information contained in this UPDATE, please contact your CohnReznick Benefits consultant. Information contained in this UPDATE is not intended to render tax or legal advice. Employers should consult with qualified legal and/or tax counsel for guidance with respect to matters of law, tax and related regulation. CohnReznick Benefits Consultants provides comprehensive consulting and administrative services with respect to all forms of employee benefits, risk management, qualified and non-qualified retirement plans, and compensation and human resources. For additional information about our services, please contact us at 516.683.6100 or mail@CohnReznickBenefits.com