

EMPLOYMENT ALERT

Benefits Under Paid Family and Medical Leave Are Available January 1: What Employers Need to Know

November 2020

As we near the end of a historically challenging year for businesses nationwide, one significant challenge for Massachusetts employers still looms large: beginning January 1, 2021, Massachusetts employees and some self-employed individuals will be eligible to take up to 26 weeks of paid, job-protected leave for family or medical reasons through the Commonwealth's Paid Family and Medical Leave program (PFML). The benefits program will be administered by the Department of Family and Medical Leave (Department) and funded by the PFML payroll tax in place since October 1, 2019. Online benefits applications will be available December 2, 2020, for employees seeking leave beginning January 1, 2021, to bond with a new child. Employees seeking leave for other covered reasons must wait until January 1, 2021, to submit benefits applications.

While the Department issued revised PFML regulations in July 2020, clarifying points of confusion and providing additional details, aspects of PFML's benefits program remain vague, including the employer's role in the application process and coordination of employer-provided benefits. We anticipate the Department will provide additional guidance in the coming weeks.

In the meantime, we have summarized below key PFML provisions, incorporating the recent regulatory revisions. Notably, the law permits employers to opt-out of the state-administered PFML program by implementing an approved, private paid family and medical leave plan that provides employees equivalent benefits and protections. The summary below addresses only the state-administered PFML program.

CONTRIBUTIONS

Massachusetts employers are by now familiar with the contribution component of the PFML program, which requires employers to collect, pay (in the case of larger employers), and remit payroll contributions to the Department on behalf of

employees. Contributions will remain at the 2020 rate of 0.75% of a worker's earnings until October 2021. With the implementation of PFML's benefits program approaching, employers should review their contribution practices for compliance, particularly if the pandemic has disrupted an employer's workforce or administrative procedures.

ELIGIBILITY FOR BENEFITS

Beginning on January 1, 2021, employees will be eligible under PFML to receive:

1. Up to 20 weeks of paid medical leave per year to care for their own serious health condition;
2. Up to 26 weeks of paid family leave per year to care for a qualifying family member who suffers from a serious health condition as a result of active duty service overseas in the armed forces;
3. Up to 12 weeks of paid family leave per year to manage needs arising out of a qualifying family member's current or impending active duty service; and
4. Up to 12 weeks of paid family leave per year to bond with a child after birth, adoption, or foster care placement.

Employees seeking leave under one of the first three provisions above may submit applications starting January 1, 2021. Employees seeking leave to bond with a new child may submit applications on December 2, 2020, for benefits beginning January 1, 2021. Parents are eligible for leave under this provision until their child's first birthday or the first anniversary of the child's adoption or foster care placement.

Beginning on July 1, 2021, employees will be eligible to take up to 12 weeks of paid family leave per year to care for a family member with a serious health condition. Regardless of the reason for taking PFML leave, an employee may take no more than 26 total weeks, in the aggregate, per benefit year.

APPLYING FOR BENEFITS

The Department facilitates and processes benefit applications, while employers have obligations throughout the application process to supply and verify employees' information to the Department. The employee must provide the employer at least thirty days' notice of the leave sought, where feasible. Though the application system will go live on the Department's website on December 2, 2020, many details regarding the application process remain outstanding. We anticipate the Department will issue additional guidance on the application process in the coming weeks.

CALCULATING BENEFITS

An employee's weekly PFML benefit amount is calculated using his or her average weekly wage when the leave request is filed, determined by the employee's earnings as reported to the Massachusetts Department of Revenue during the base period. Employees are entitled to a benefit replacing up to 80% of their average weekly wage, with a maximum weekly benefit of \$850 for the 2021 benefit year. An employee's weekly benefit amount will be reduced by certain other benefits or wages received.

COORDINATING BENEFITS

Employers with at least fifty employees in a seventy-five-mile radius subject to the Family and Medical Leave Act (FMLA) should remember that while PFML will often run concurrently with FMLA, there will be exceptions. For example, while employees are eligible for PFML benefits upon hire, employees must work for at least a year and for at least 1,250 hours to qualify for FMLA benefits. Conceivably, a new employee could exhaust PFML leave and become eligible for FMLA shortly thereafter.

In addition, PFML's twelve-month benefit period looks forward from the first day of leave, unlike the FMLA, under which an employer can choose from several methods for calculating a benefit year. Employers subject to FMLA may wish to consider changing their FMLA benefit year calculation to run concurrently with PFML's "look forward" method to streamline administrative procedures.

Regarding employer-provided leave, the revised regulations contain some ambiguities. It appears that an employee's entitlement to PFML benefits while simultaneously taking employer-provided paid leave will depend on the type of employer-provided leave at issue. We anticipate the Department will provide additional guidance in the coming weeks to clarify the interplay of PFML and employer-provided leave.

JOB PROTECTION

Any "negative change" to an employee's seniority, status, employment benefits, pay, or other terms or conditions of employment during PFML leave or within six months thereafter creates a presumption of retaliation that the employer can only overcome with clear and convincing evidence.

The revised regulations clarify that an employer's application of a preexisting employment rule or policy shall constitute sufficient clear and convincing evidence to rebut the presumption of retaliation. Also, "trivial, or subjectively perceived inconveniences that affect *de minimis* aspects of an employee's work" will not constitute a negative change necessary to trigger the presumption. Finally, it will not be considered retaliation for an employer to report to the Department a *bona fide* belief that an employee committed fraud in connection with applying for benefits.

While these qualifications to the retaliation presumption should provide some reassurance to employers, the law's anti-retaliation provision remains employee-friendly.

CONTACT

If you have questions about the Paid Family and Medical Leave program, or any other employment-related matter, please contact a member of our [Employment Law Practice](#).