

New Massachusetts Paid Leave of Absence Law

Description

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Certain Obligations Take Effect on July 1 – What Employers Need to Know Now

THE BASICS. Massachusetts has enacted yet another new leave law. Paid Family and Medical Leave (“PFML”) provides employees with job protected leaves of absence similar to those provided by the federal FMLA, but also allows employees to receive benefits (i.e., payments) during the leave. Those payments, however, do not come directly from employers. Instead, both employers and employees will soon start contributing (through payroll deductions) into a newly established Family and Employment Security Trust Fund (“Trust Fund”). Qualified employees on leave will then be able to file a claim with the Trust Fund to receive benefits. The Department of Family and Medical Leave (“DFML”) will administer the program.

WHAT EMPLOYERS NEED TO DO RIGHT NOW.

While employees will not be able to actually take PFML leave or apply for benefits until 2021, the first phase of the PFML places a number of burdens on employers as of *July 1, 2019*. Here are three things every employer needs to do right now.

1. Provide Notice to Employees

Employers are required to post a notice of the program’s benefits by July 1. The notice must be posted at every location and in every language that is the primary language of five or more employees or contractors. A form notice recently published by the DFML and versions of the notice in other languages are available [here](#). *While not required until July 1, Employers are well-advised to post the notice now.*

Employers are also required to provide personal notice to new employees and contractors. This personal notice must include information regarding the availability of benefits, both the employee’s and company’s obligations and contribution amounts under the law, the employer’s ID number assigned by the DFML along with the DFML’s address and telephone number, and instructions on how to file for benefits. Employers must also have each new employee and contractor sign proof of receiving the personal notice. While the law requires that personal notice be provided to new employees and contractors only, employers are well-advised to provide the personal notice to all existing employees and contractors prior to July 1 in order to avoid confusion, conflict and questions later. It is expected that the DFML will post a form personal notice and receipt acknowledgment on their website shortly.

2. Register and Calculate Contributions/Payroll Deductions

Contributions to the Trust Fund are made from payroll deductions. Employers must register with MassTaxConnect and are responsible for calculating the correct deductions, making the contributions, and filing detailed quarterly Employment and Wage Reports. Information on how to register with MassTaxConnect is available [here](#).

The contribution amount will be set by the Director of the DFML annually no later than October 1 for the

following calendar year. For 2019, the total contribution is .63 percent of wages, made up of .11 percent for *family* leave and .52 percent for *medical* leave. The entire family leave contribution is made by the employee through payroll deduction. The employee also pays 40 percent of the medical leave contribution. The employer pays the other 60 percent of the medical leave contribution, however if the employer has less than 25 employees then the employer does not have to make the 60 percent contribution. Contributions are also required for contractors if more than 50 percent of the company's workforce is made up of contractors. By way of example, if an employee makes \$1,000 per week, \$3.18 would be deducted from the employee's paycheck (\$1.10 for family leave and \$2.08 for medical leave). The employer would separately contribute \$3.12 for medical leave, but not be required to make this payment if the company employs less than 25 employees. Further explanation of the makeup of the contribution rates can be seen [here](#) and a contribution calculator that will estimate the total amount of contributions an employer will be required to make based upon its workforce profile can be found [here](#).

3. Consider Applying for a Private Plan Exemption

Employers who already provide paid FMLA-type benefits that are equal to or greater than those required under the PFML, may seek an exemption for what the law refers to as a "private plan". An employer may apply for a total or partial exemption from either family and/or medical leave coverage. Employers with plans already in place should be aware that plans may need to be amended to meet the exemption requirements. Applications for the private plan exemption will be accepted on a rolling basis, and each exemption is effective for one year, with an annual renewal option. The application form is expected to become available on April 29, 2019.

Information on the private plan exemption and application process is available [here](#).

A HINT OF WHAT'S TO COME.

The "scary" portion of PFML does not go into effect until 2021 but bears mention now because it includes some truly groundbreaking expansions of federal FMLA. For example:

- PFML is paid (FMLA is not);
- PFML covers all private employers (FMLA covers only those with 50 or more employees);
- PFML protects every employee who meets the low threshold of earning enough income over the prior year, while working for any employer, to qualify for unemployment (FMLA only covers employees who have been with their current employer for one year and who worked 1250 hours for that employer during the prior year);
- PFML provides more leave (20 weeks for the employee's own condition and 26 for all combined family and medical versus FMLA's allowance of only 12 weeks for leave unrelated to caring for a covered service member);
- PFML is broader in scope (covering some former employees and more family members than FMLA);
- PFML restricts the benefit year to a 12-month period starting on the first day of leave (FMLA allows four different options);
- PFML appears to prohibit the employer from forcing an employee to use other employer provided paid leave such as vacation time (FMLA allows this); and
- PFML is more protective than FMLA with respect to retaliation and reinstatement.

This last difference is particularly alarming. PFML creates a presumption that "any negative change" in employment occurring during leave or within six months after leave ends constitutes illegal retaliation. An employer can avoid liability only by proving "by clear and convincing evidence" (a much higher standard than the usual "preponderance of the evidence") that its actions were made for non-retaliatory reasons. This will place a tremendous amount of pressure on employers with respect to any decisions relating to every employee who has been on PFML during the prior six months and will undoubtedly result in an uptick in illegal retaliation claims.

This is just a taste of the breadth of the PFML. We will be providing more detailed information in future alerts on the full measure of the PFML, and how it will intersect with employers' current leave policies and existing law.

FOR NOW, STAY UPDATED.

The PFML's procedural requirements and operational mechanics continue to be further explained and fine-tuned. The DFML website is being updated on an ongoing basis and employers should look [here](#) and [here](#) frequently for updated information. The regulations implementing the law are not expected to be finalized until July 1.

July 1 is coming soon. Employers do not need to panic, but must be diligent in their efforts to prepare to meet their July 1 obligations.

Partridge Snow & Hahn joined with Starkweather and Shepley to present a webinar designed to give employers a better understanding of the law and their compliance obligations. The webinar presentation can be viewed [here](#).

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