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The Massachusetts Paid Family and Medical Leave Act Starts January 2021

What You Need To Know

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- Recap of the Law
- Key Changes to the Final Regulations
- How can I prepare for 2021?

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Recap of the Law

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Overview: Paid Family & Medical Leave

- Starting 2021, Massachusetts workers will be entitled to *paid* family and medical leave.
- The state will pay benefits from a State Trust Fund
- The State Trust will be funded through employer contributions based upon worker earnings.
- The costs of the employer contributions may be passed to the employee through payroll deductions (with some limitations).
- Employer contributions began October 1, 2019.

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Timeline of Key Dates

September 30, 2019

- Employers must provide notice to workforce of contribution rates and leave benefits

October 1, 2019

- Employers must begin withholding for PFMLA contributions to state trust fund.

January 31, 2020

- Contributions for first quarter of PFMLA due

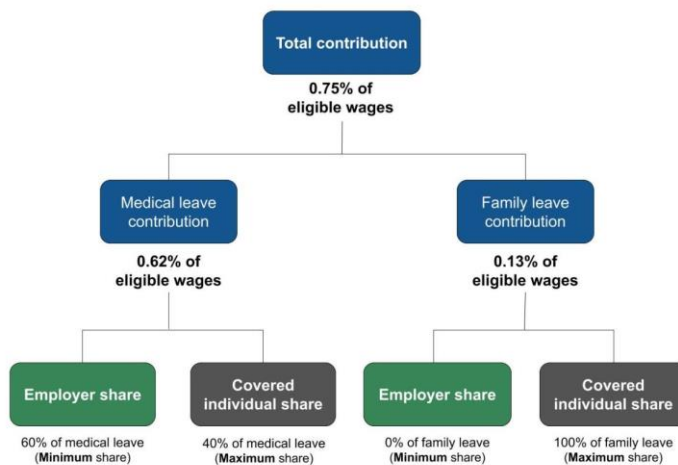
January 1, 2021

- Paid family leave benefits will be available for bonding with a new child, and service member-related events
- Paid medical leave benefits will be available for serious personal health conditions

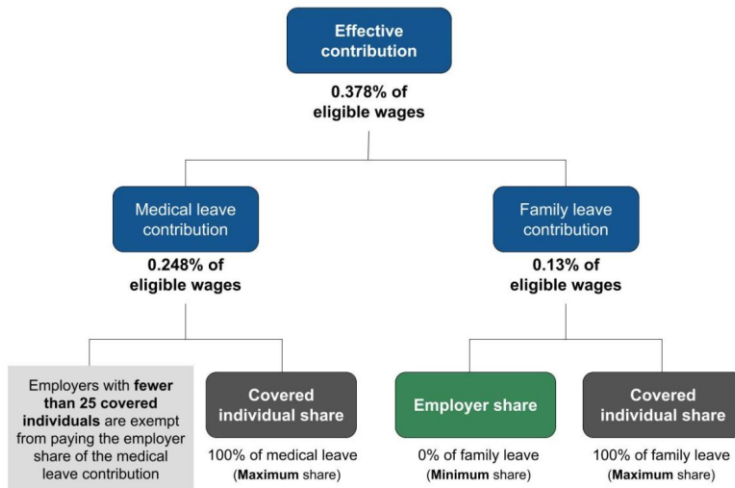
July 1, 2021

- Paid family leave benefits will be available for the care of a family member with a serious health condition

Contribution to the Fund By Large Employers



Contribution to the Fund By Small Employers



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What Leave Do Employees Get Under the Law?

Type of Leave	Annual Benefit Allotment	Effective Date
Medical (employee's own serious health condition)	20 weeks	January 1, 2021
Family (bonding with new child, care for a family member with a serious health condition, or qualifying military exigency)	12 weeks	January 1, 2021 – bonding and military exigency July 1, 2021 – family member with SHC
Family (injured servicemember)	26 weeks	January 1, 2021
Maximum Combined Family/Medical	26 Weeks	January 1, 2021

Notes: Leave runs concurrently with FMLA and MA Parental Leave Law, if eligible.
Employees continue to receive health coverage as if active during leave.

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Amount of Paid Benefits During Leave

- Employees who make up to \$669 per week will receive 80% of their weekly pay (\$669 is equal to 50% of the state's current average weekly wage of \$1,338.05).
- Employees who make > \$669 per week, will receive an additional amount at the rate of 50% of earnings above \$669 per week.
- Benefit is currently capped at \$850 per week.
- The cap may be adjusted annually based on changes to the state's average weekly pay.

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Penalties and Enforcement

- Private right of action for aggrieved employees.
- 3-year statute of limitations.
- Court may award reinstatement, treble damages for lost wages, attorney's fees.
- If employer fails to comply with notice provisions
 - \$50 civil penalty per employee for 1st violation
 - \$300 civil penalty per employee for each subsequent violation
- No right to reinstatement if other employees of equal length and status in the same or equivalent positions have been laid off due to economic conditions or other operation changes.

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Key Changes to the Final Regulations

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Definitions and Clarifications

- **Accrued Paid Leave:** Expanded the definition to state that Accrued Paid Leave does not include paid leave under an employer or CBE's (1) disability policy or program; or (2) paid family or medical leave policy.
- **Active Duty:** A new definition that requires deployment to a *foreign* country to qualify as Active Duty.
- **Average Weekly Wage:** Clarified the definition to address multiple employers. If a covered individual has multiple employers, the Average Weekly Wage will be calculated for each employer or covered business entity ("CBE") separately.
- **Average Working Week:** A new definition, where the Average Working Week is the average number of hours worked from the two highest quarters of the 12 months preceding a worker's application for benefits under the PFML Law.

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Definitions and Clarifications (cont.)

- **Base Period:** Clarified the definition as the last four completed calendar quarters within the previous five calendar quarters.
- **Continuing Treatment by a Health Care Provider:** Expanded the definition to include an allowance for telehealth and *removed* qualification to substance abuse disorders.
- **Extended Illness Leave Bank:** A new definition that states an Extended Illness Leave Bank is a voluntary program that allows covered individuals to donate accrued leave time to fund a bank for the benefit of a co-worker experiencing a qualifying reason under the PFML Law.
- **Financial Eligibility Test:** Expanded the definition to allow wages received from multiple employers or CBE within the Base Period to be aggregated to determine financial eligibility for leave.

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Definitions and Clarifications (cont.)

- **Former Members of Armed Services:** Deleted reference to the exclusion of workers for dishonorable discharge.
- **Intermittent Leave:** The revised definition allows the usage of intermittent leave in 15-minute increments consistent with the employer's policies provided, however, that payment by the DFML will not be made in requests of less than eight hours.
- **Job Protected Leave:** The definition clarifies that use of leave under an employer's disability policy, paid leave policy, and Extended Illness Leave Bank program will begin job protected leave and such time will run concurrently with the PFML benefits.

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Employee Notice Obligations

- The final regulations require covered individuals to provide notice to their employer prior to applying for benefits. The DFML will reject benefits applications absent proof of such notice.
- Covered individuals must submit benefits applications at least 30 days in advance of the anticipated leave start date, but no more than 60 days in advance.
- The final regulations include a carve out for covered individuals to file applications as soon as practicable, if the covered individual was unable to meet the filing deadline for reasons beyond the covered individual's "reasonable" control.

Employer Rights to Medical Certifications

- An employer may seek medical certification of the employee's serious health condition under two circumstances:
 - following the expiration of an initial period of incapacity cited in the healthcare certification, or
 - where an intermittent leave has extended for a period of more than six months from the approval by the DFML, whichever occurs first.

Substitution of Accrued Paid Leave/Employer Reimbursement

- Employees who choose to use accrued paid leave may not receive PFML benefits while they are receiving accrued paid leave. The PFML leave allotment, however, will run concurrently with the accrued paid leave.
- Employers may not be reimbursed for payment of accrued paid leave.
- However, an employer who makes payments to a covered individual taking leave that are equal to greater than the PFML benefit is entitled to reimbursement from the DFML but only if those payments were made from a:
 - Short term disability program
 - Paid family and medical leave program; or
 - Extended illness leave bank
- All of these programs must be separate and in addition to any accrued paid leave.

Covered Individuals With Multiple Employers

- Calculation of the Weekly Benefit Amount is based on wages for a specific employer.
- The final regulations clarify that a covered individual with multiple employers is not required to take leave from each employer or CBE at the same time. Accordingly:
 - If all of the covered individual's employers are on the State's public plan, then the State should theoretically administer the worker's PFML benefits appropriately.
 - If the covered individual is employed by one or more employers on a private plan, then any PFML benefits received under one private plan will be separate and apart from PFML benefits received from another employer's private plan.

Covered Individuals With Multiple Employers (cont.)

- The DFML cannot reduce or offset benefits where the covered individuals has other benefits under another employer's private plan or for wages earned from other employment. However, the DFML may consider wages from another employer or CBE or through self-employment *if the aggregate amount* a covered individual receives would exceed the covered individual's Average Weekly Wage.

Substance Abuse Disorders and Policies

- Substance abuse disorders may now qualify as a serious health condition. Accordingly, covered individuals may take family or medical leave for treatment by a qualifying treatment provider.
- **Note: absences because of an employee's use of the substance does not qualify for leave.**
- The final regulations provide guidance regarding when an employer may take action against an employee for substance use that violates an employer's established policy.

Intermittent Leave

- Each request for intermittent leave must be recertified consistent with the new definition of intermittent leave as described below.
- The regulations allow the use of intermittent leave in 15-minute increments consistent with the employer's policies provided, however, that payment of PFML benefits by the DFML will not be made in requests of less than eight hours, unless more than 30 calendar days have elapsed since the initial taking of such leave.
- Employers must confirm to the DFML wages paid to an employee on a monthly basis or at other intervals deemed necessary by the DFML. The DFML may seek a refund from the covered individual or offset future benefit payments where the DFML determines that the covered individual has received wages or from both the employer and from the state PFML program.

Additional Issues to Note

- Covered individuals are required to notify the DFML within seven days of a change in circumstances affecting benefits.
- The final regulations clarify that no PFML benefits are payable during the first seven calendar days after the date on which job protected leave begins, except for medical leave during a pregnancy or recovery from childbirth if supported by a healthcare provider that this *medical* leave is followed by family leave, in which case there will be no waiting period for the family leave.
- The final regulations also clarify that in case of multiple births, no more than 12 weeks of leave benefits are permitted in a benefit year.
 - Note: the Massachusetts Parental Leave law that provides up to eight weeks of unpaid, job-protected leave for *each* child.

Important Changes to Private Plan Exemptions

- Private plans must be available to the entire workforce and not select groups of employees.
- Employers and covered business entities (CBE) with an approved private plan exemption must make coverage available to covered individuals by their date of hire.
- The private plan must provide notice to covered individuals, as part of any determination, of their rights under both the private plan and the PFML.
- With respect to the Financial Eligibility Test, employers may request verification of wages earned in Massachusetts.
- Private plans may now be approved for periods that are more or less than one year. If the approval period is reduced, the DFML must provide 60 days' notice.

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Important Changes to Private Plan Exemptions

- The weekly benefit amount and the leave allotment will be based on the covered individual's average working week in addition to the wages or qualified earnings earned with the employer or CBE at the time of an application for benefits.
- Private plan employers are not permitted to seek reimbursement from DFML.
- A private plan must provide covered individuals with an internal appeals process through the private plan administrator before the covered individual can exercise their rights to an appeal with the Department.
- The internal appeals process must give the individual at least 10 calendar days to submit an appeal, and must extend that period if the individual can establish that circumstances outside of their control prevented the filing of the appeal within the proscribed period.

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Important Changes to Private Plan Exemptions

- When a former covered individual, who has been separated from an employer or CBE for less than 26 weeks, applies for benefits, the entity that the individual applies to for benefits will depend on whether the individual is employed or unemployed at the time of filing.
 - If the covered individual remains unemployed on the filing date, the covered individual should submit the application with the former employer or CBE.
 - If the covered individual has become employed by a different employer or CBE at the time of filing, the covered individual should submit the application with the new employer or CBE.

Special Considerations When Transferring Between Private Plans and the State Trust Fund or Vice Versa

- Includes new language to avoid gaps in coverage when an employer or CBE is transitioning to a different private plan or between the State Trust Fund and a private plan.
 - If an employee was receiving benefits from the DFML prior to the effective date of the employer transferring from the State Trust Fund to a private plan, then the employee will continue receiving benefits from the DFML for the duration of the leave.
 - If the employee was receiving benefits from an employer prior to the effective date of the employer transferring from a private plan to the State Trust Fund, then the employer will continue paying benefits for the duration of the leave.
- Covered individuals may file applications for benefits with the DFML on the first day of the first quarter after the termination of a private plan.

State Application Process

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Application Process—What we know as of now

- The state application process will be online. If individuals cannot apply online, there will be a call center run by the state for the individuals to provide information, which will be inputted online
 - As part of the application process for medical leave, individual will be required to submit medical certification form (which is being prepared by the state)
 - Individual also will have to provide consent, so that the state can share this information, including the medical certification form with the employer
 - Individual will have to provide evidence that notice of the leave was provided to the employer
- State will request information from employer
 - Wages/earning information for past 12 months
 - Description of individual's position/schedule
 - Description of the employer's current paid leave policies, and whether the individual is receiving pay from these policies

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Application Process—What we know as of now

- Other information requested from the employer
 - Whether the individual is receiving other “wage replacement benefits”, such as STD or other paid family and medical leave policy
 - “Any other relevant information or records related to the claim, including any evidence of a potentially fraudulent claim.”
- Employers will have 10 business days to respond to the state
- Within 14 calendar days of receiving the application, the state will provide its approval/denial of the leave
- Within 14 calendar days after approving an application, the state will begin payments (unless the leave is scheduled to start later)
 - Payment will be through direct deposit or state issued pay card

How can I prepare for 2021?

Understand FMLA vs. PFMLA

- PFMLA eligibility is same as unemployment (not 12 months/1250 hours).
- Leave under PFMLA is potentially greater than 12 weeks.
- Benefit year is different (no option to use rolling 12-month period).
- Broader PFMLA coverage for family members (not limited to spouse, parent, child).
- Can't require use of PTO for leave taken under PFMLA.

Keep In Mind the Anti-Retaliation Provision

- Any adverse action taken within 6 months of an employee taking leave for reasons associated with the new law is ***presumptively*** retaliatory.
- Employer can only rebut the presumption with ***clear and convincing*** evidence.
- A “negative change” does not include “trivial” or subjectively perceived inconveniences that affect de minimis aspects of an employee’s work.
- Employer’s notification to DFML of a bona fide belief of fraud in the application for benefits will not give rise to a retaliation claim.
- A negative change resulting from the application of a preexisting employment rule or policy constitutes clear and convincing evidence sufficient to rebut a presumption of retaliation.
- If a covered individual’s use of approved intermittent leave is inconsistent with the DFML’s approval, it will not be considered retaliation for an employer to request additional information related to the use of leave.

What does this mean for employers?

- Conduct manager training on leave management (e.g., how requests are handled, working with HR on requests for leave/accommodations, applicable leave laws, and the meaning of retaliation).
- Conduct manager training on best practices for documenting performance/conduct issues.
- HR should be more vigilant in documenting performance issues and contemplated actions.
- Scrutinize any potential adverse employment action contemplated in the 6-month period following protected PFMLA leave.

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Handbook/Policy Revisions

- Implement a Paid Family and Medical Leave Policy to address the requirements of the new law.
- Review your existing leave policies to ensure they coordinate with the Paid Family and Medical Leave Policy. For example, review the following:
 - Family and Medical Leave Act policy
 - Parental Leave policy
 - Military Leave policy
 - Personal Leave
- Consider adding a substance abuse policy or revising an existing policy.
- Review and possibly expand code of conduct, workplace rules and discipline/performance management policies.

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Practical Issues For 2021

- Stacking with FMLA or MA Parental Leave
 - What about employees already on statutory protected leave as of January 1, 2021?
 - What about employees who exhaust PFMLA for a reason not covered by federal FMLA?
 - What about medical leave under PFMLA that evolves into family leave?
- Topping off – can employers allow employees to “top off” using PTO/vacation (i.e., to use PTO to bridge the gap between state benefit and regular pay)
- Partial day deductions for exempt employees on intermittent leave if not FMLA eligible
- Taxability?
 - Are the employer's contributions on behalf of its employees into the state insurance system taxable to the employee?
 - Are employee benefits paid from the state fund taxable to the employee?

Questions?

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Thank **you.**