

April 29, 2019

# Client Alert

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## SOME IMPENDING DEADLINES UNDER THE NEW MASSACHUSETTS PAID FAMILY AND MEDICAL LEAVE LAW

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As you are no doubt aware, on June 28, 2018, Massachusetts enacted the Paid Family and Medical Leave law (M.G.L. c. 175M) (“PFML”), providing for paid leave for many Massachusetts workers for up to 20 weeks for a covered individual’s own health condition and family leave of up to 12 weeks. The PFML will affect every employer with Massachusetts employee (who receive W-2 wages) and certain business that deal with sufficient independent contractors (to whom they furnish Forms 1099-MISC), as well as certain electing self-employed individuals. The PFML will provide benefits for covered employees and contractors and electing self-employed individual for leaves that are similar to, but somewhat more expansive than, the federal Family and Medical Leave Act of 1993 (“FMLA”). These benefits will be paid from a newly established public trust fund known as the “Family and Employment Security Trust Fund” (“Trust Fund”). They will be funded by payroll contributions based upon the payroll of the covered workers, which the employers and covered businesses will pay over to Trust Fund, through the Massachusetts Revenue Department’s MassTaxConnect. The cost these new benefits will be shared by the affected employers and covered businesses and covered workers (through payroll deductions and withholding). A new Department of Family and Medical Leave (“Department”) has been established to administer the PFML, and a website (<https://www.mass.gov/orgs/departments-of-family-and-medical-leave>) has been established with much useful information and resources for employers and covered workers regarding such administration.

The key dates for implementing this program range from today, April 29, 2019, through July 1, 2021. Although the benefits themselves will not be available until January 1, 2021 and July 1, 2021, payroll deductions and contributions must begin by July 1, 2019 and related notifications must be given by May 31, 2019—just two months from now. If you are one of the affected employers or covered businesses—and, as indicated, just about every employer with even a single Massachusetts employee will be affected—you likely already are well under way in complying with the new obligations and, for you, much of the remainder of this Client Alert will simply be a review of the major provisions of the PFML requirements. But

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even if you are already technically geared-up to compliance with the new requirements, you might want to give some further consideration to whether any changes need to be made in your current short-term disability (or sick leave) programs or the documentation for them, since most affected employers have such and need to work out how they will want to integrate those benefits with the PFML benefits. Often such programs are not set up in a formal written plan document and this might be the time to do so. We discuss this further below (under “Recommendations”).

**Background and Key Dates.** Although the PFML itself was enacted last year, a first set of “draft” regulations thereunder was not issued until January 23, 2019, and a second set of “draft” regulations, with some important clarifications, was issued on March 29, 2019. The final regulations are promised by July 1, 2019, which is among the following key dates governing the implementation of the program:

April 29, 2019–	Private plan exemption applications become available to employers.
May 31, 2019 --	Initial deadline for required notification posting and employee notifications and acknowledgements.
July 1, 2019 –	Final regulations go into effect and payroll deductions begin.
October 31, 2019 --	Contributions due for July through September, 2019.
January 1, 2021 –	All benefits become available, except those for the care of a family member with a serious health condition.
July 1, 2021 --	Benefits for the care of a family member with a serious health condition also become available.

**Notice Requirements.** One of the first requirements covered employers and businesses must to meet will be to provide a written notice to their current workforce describing the PFML program, including the contributions, benefits and workforce protections thereunder. This notice must be provided by May 31, 2019, and hopefully will be provided well before then. It must be in the employee’s primary language. The DMFL website provides a model form of such notice, in various translations, although an employer may create its own form of notice (presumably with the assistance of legal counsel). The employer must obtain the written acknowledgement by the employee of receipt of the statement (or a statement indicating the employee’s refusal to acknowledge the notice). For future employees, such notice must be provided within 30 days of the first day of employment. This may all be done electronically, if preferred.

For covered businesses (that is, a business more than 50 percent of whose workforce consists of independent contractors for whom the business provides Forms 1099-MISC), a similar notice must be issued to each such contractor who provides services to the business, including a description of the procedures for self-employed individuals to become covered individuals, with a similar 30-day deadline (from date of hire) for notifying new contractors.

The covered employer or business must also display at each Massachusetts work location the “Massachusetts Paid Family and Medical Leave” poster, which is available on the Department’s website, by May 31, 2019.

Failure to comply with these notice requirements can subject employers to a fine of \$50 per individual for the first violation and \$300 per individual for a subsequent violation.

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**Contribution Requirements.** Contributions for 2019 are set at 0.63 percent (that is, 63 cents for each \$100 of payroll) of each covered worker's wages on the first \$132,900 of annual earnings (which is the 2019 earnings cap for Social Security payroll deductions and will adjust annually). The 0.63 percent is split 0.52 percent for the medical leave program and 0.11 percent for the family leave program. This contribution rate may be redetermined annually by October 1 for the following calendar year.

Employers with 25 or more covered workers within Massachusetts must remit the entire 0.63 percent contribution to the Trust Fund. They can deduct from the employees and covered contractors all of the 0.11 percent family leave contribution and up to 40 percent of the 0.52 percent (that is, 0.21 percent) medical leave contribution. They end up paying an employer share of at least 60 percent of the 0.52 percent (that is, 0.31 percent) of the medical leave contribution.

Employers with fewer than 25 covered workers in Massachusetts do not have to pay the employer's share of the medical leave contribution and do not have to remit that share to the Trust Fund. Thus, they remit only the 40 percent employee's share of the medical leave contribution and 100 percent of the employee's family leave contribution, all of which may be deducted from the employee's wages and the covered contractor's earnings.

All employers will be required to file quarterly reports (including wages paid or other payments for services ) through MassTax Connect beginning in October 2019, with reporting and documentation guidelines to be announced before July 1, 2019. The first quarterly contributions will be due to the Trust Fund through the MassTaxConnect system by October 31, 2019.

**PFML Benefits.** When they do become available for covered workers (which as indicated will be January 1, 2021 for all but the third item below, and that item will be available July 1, 2021), the PFML benefits will include the following:

- Up to 20 weeks of paid medical leave related to a worker's own "serious medical condition;"
- Up to 12 weeks of paid family leave related to the birth, adoption or foster care placement of a child;
- Up to 12 weeks of paid family leave to care for a family member with a serious health condition;
- Up to 12 weeks of paid leave related to a "qualifying exigency" due to a family member being on or being called to duty in the armed forces; and/or
- Up to 26 weeks of paid family leave to care for a family member who is a covered service member with a serious health condition.

Total annual benefits for qualifying reasons will be capped at 26 weeks per year.

The revised draft regulations now clarify that "substantial health condition" is defined identically to the federal FMLA (and "health care provider" is essentially identical to the federal FMLA definition as well). The definition of "family member" provides broader coverage than the federal FMLA, though, by including a covered individual's domestic partner, parent-in-laws and parents of a domestic partner, grandchildren, grandparents, and siblings.

After a 7-day waiting period (during which employees may use their employer's accrued paid sick leave benefits), workers on paid leave under the PFML may receive wage replacement from the Trust Fund equal to 80 percent of their wages up to 50 percent of the state average weekly wage, and then 50 percent of their wages above that amount, up to an \$850/week cap. This maximum weekly benefit may be adjusted by the Director of the Department annually by October 1 for the coming calendar year.

The taking of family or medical leave will not affect the worker's right to accrue vacation time, sick leave, bonuses, advancements, seniority, length of service credit or other employment benefits, plans or programs. The employer's contributions to any employer-provided health insurance benefits will continue at the same level and with the same benefits as if the employee had continued working continuously for the duration of the leave.

Intermittent leave or reduced schedule leave, paid on a prorated basis, may also be taken, "when medically necessary" where that applies, and subject to employee/employer agreement for bonding leave for a new baby.

After the leave, the employer must restore an employee who has taken family or medical leave to the employee's previ-

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ous position or to “an equivalent position” with the same status, etc. The weekly benefit amount will be reduced by wages or wage replacement received for the period of the leave under (i) any government program or law (including most workers’ compensation); (ii) other state or federal temporary or permanent disability benefits law; or (iii) an employer’s permanent disability policy or program. The weekly benefit amount will not be reduced by the amount of wage replacement received while on leave under an employer’s temporary disability policy or program, or an employer’s paid family or medical leave policy, unless the aggregate amount an employee would receive would exceed the employee’s average weekly wage.

The PFML law will run concurrently with the Massachusetts Parental Leave Law and the federal FMLA and will not obviate the employer’s greater or additional rights under any company policy, law or collective bargaining agreement.

Former employees can also receive paid leave benefits for family or medical leave that begins within 26 weeks of their separation from employment (provided they meet certain financial eligibility requirements).

**Claims.** Employees must provide employers with at least 30 days prior notice of the leave’s anticipated start date, duration and end (return) date, or if the delay is for reasons beyond the employee’s control, such notice must be provided as soon as practicable.

Workers must submit benefit claims to the Department within 90 calendar days after the start of the leave (to avoid benefit reduction. The Department will notify applicants of its eligibility determination within 14 days of the receipt of the claim, will commence benefits within 14 days of that determination, and will notify the employer within five business days after the claim is filed.

All claims must include a certification supporting the leave request, differing according to the reason for the leave. For example, the certification to care for a family member with a serious health condition must include a statement by a health care provider that the covered worker is needed to care for the family member and an estimate of the amount of time needed for that care.

**Restrictions.** The PFML law prohibits retaliation against employees for exercising their rights under the law. Any negative change in status or adverse employment change during the leave or within six months thereafter will create a presumption of retaliation, which can be rebutted only by clear and convincing evidence of an independent justification.

Employees are also provided with a private right of action, with a three-year statute of limitations, for violations of the job restoration, benefit accrual and continuation, and anti-retaliation provisions. If the employee prevails, the court may award job reinstatement, benefit reinstatement, injunctive relief, compensation for three times the lost wages, benefit and other remuneration and interest thereon, and reasonable costs and attorneys’ fees.

**Exemption Requirements.** According to the revised draft regulations, beginning today, April 29, 2019, employers who are “already providing” paid leave benefits to their workforce may apply online through MassTaxConnect for an exemption from collecting, remitting and paying contributions to the Trust Fund. The application may be from the PFML family leave provisions, the medical leave provisions or both. To be approved, the benefits currently offered under the employer’s present plan must be greater than or equal to the benefits provided by the PFML and must not cost employees more than they would be required to contribute to the PFML program.

Applications will be accepted and reviewed on a rolling basis, will be in effect for one year, and may be renewed annually. If the application is for an insured private plan, it must be insured by a Massachusetts insurer, and if it is self-funded, a bond may be required, the amount and terms of which will be determined by the Department.

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At this time, it is not clear whether applications will be accepted for new private plans, or limited just to those currently in existence.

**Recommendations.** If you are an employer or covered business affected by the PFML law, even though the regulations thereunder are not yet final, because there is not much time left before the first compliance deadlines are upon us, you certainly should already begin (if you have not already done so) to take the following actions:

- Prepare to deliver the required notices and postings by the May 31, 2019 initial deadline;
- Prepare for the payroll changes that will take effect on July 1, 2019; and
- If you intend to apply for a private plan approval as an alternative to any or all of the PFML requirements, prepare to submit the documentation beginning as early as today, April 29, 2019, and before July 1, 2019.

In this regard, the Department's website can provide considerable assistance with its model notices and postings, as well as its other resources. Also, before issuing final regulations, the Department has indicated that it will be holding at least two additional hearing and listening sessions.

Most significantly, however, you should also not overlook the interaction of the new PFML benefits and any employer-provided paid leave programs you currently maintain. While other employee benefit programs you maintain should also be reviewed for this purpose, the one program you clearly will want to review is any short-term disability program you currently maintain and most employers do maintain such a program in one form or another. In that regard, it has been our experience that often these are simply wage-continuation programs providing for some percentage of regular wages to be paid for a limited period of time (often to cover the elimination period for permanent disability benefits to kick in, if applicable), sometimes with little or no documentation. While this approach was perhaps acceptable in the past, it might be time to review, amend and properly document such programs. Most such programs had the benefit of not being considered ERISA plans because they met an exemption from coverage as payroll practices, instead, which permitted the lack of formal plan documentation, summary plan descriptions and Form 5500 filings. It may be that employers with such programs will now want to simply offset the new PFML benefits (and maybe also similar benefits under other states or local governments in which they operate) against the current benefits provided, without losing the ERISA exemption. The good news is that this should be possible, and we have already provided formal plan documents for some clients that should ensure that. Simply providing such a plan document that clearly spells out the offsets and covers all contingencies will not defeat the exemption and will resolve many ambiguities that otherwise might occur.

Please feel free to contact us (by calling at 508-785-0250 or emailing to [zjskapars@skapars.com](mailto:zjskapars@skapars.com)) if you would like to discuss any such documentation further, or any other issues or questions you might have regarding the above.

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