



# Massachusetts Paid Family and Medical Leave Act: What Employers Need to Know

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# Agenda

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1. Massachusetts Paid Family and Medical Leave Act Overview
2. Interaction with FMLA
3. Private Plan Exemption
4. July 2020 Amended Regulations
5. What's Next?



# **Massachusetts Paid Family and Medical Leave Act Overview**

***Justin Keith***

# The Massachusetts Paid Family and Medical Leave (PFML) Law

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- A new law that provides paid leave benefits to Massachusetts employees
- Most paid leave entitlements begin January 1, 2021
- Funded through employee and employer payments

# New Benefits and Effective Dates

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- **January 1, 2021**
  - Up to 20 weeks of paid medical leave for an incapacitated worker due to their own serious health 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 for leave arising out of a family member's active duty or call to active duty in the armed forces
  - Up to 26 weeks of paid family leave to care for a service member with a serious health condition
- **July 1, 2021**
  - Up to 12 weeks of paid family leave to care for a family member with a serious health condition

# New Benefits and Effective Dates

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- All leave entitlements are:
  - Per benefit year — The period of 52 consecutive weeks beginning on the Sunday immediately preceding the first day that job-protected leave commences for the covered individual
  - Limited to 26 total weeks in the aggregate in each benefit year

# Coverage

- Employer Coverage — all employers in Massachusetts—regardless of size—are covered
- The following employees are covered by the law:
  - W-2 employees (including part time and seasonal workers)
  - Most 1099 contractors
  - Former employees who separated employment within 26 weeks of taking leave
  - Employees must meet a financial eligibility test for coverage:
    - Must have earned \$5,100 or more in the last 12 months; and
    - Amount earned must be at least 30 times the amount of the paid benefit for each week
- Employees cannot opt out of the law

# Applying for Benefits

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- Employees must notify their employer of an application for benefits and must provide proof to the Department of Family and Medical Leave of that notification
- Must follow either the law's notification requirements or the employer's notification policy
- Employers can—but are not required to—submit applications on behalf of their employees
  - Should be applied uniformly; be careful of inconsistent practices





**Interaction with FMLA**  
*Kelly Pesce*

# Interaction with FMLA

- Type of Law
  - PFML is a state law that was enacted in 2018 and is funded by contributions from both employers and employees that perform services in the Commonwealth.
  - FMLA is a federal law that was enacted in 1993.
- Businesses Covered
  - All Massachusetts businesses may be subject to PFML law, even those that are not subject to FMLA law.
  - Only businesses with over 50 employees, public sector agencies, and private and public schools are subject to FMLA. These employers may be subject to both PFML and FMLA, the same way they pay both state and federal taxes.

# Worker Eligibility Rules

- To be eligible to receive paid leave under PFML, a worker must have earned at least \$5100 in the previous 12 months. PFML eligibility is not dependent on how long an individual has worked for a current employer.
- To qualify for FMLA, an employee must have been with their employer for at least 12 months, with at least 1,250 hours worked over that time. Private sector employers must have over 50 employees to qualify for eligibility. FMLA also applies to all public sector workers and workers in all public and private schools.

# Employer Responsibilities

- Employers may be responsible for collecting and remitting PFML contributions on behalf of their employees. In order to calculate the amount of contributions that is required to be remitted, it is important for all Massachusetts employers to determine their annual average workforce which includes W2 workers and those individuals paid through a 1099-MISC.
- There are no contributions to collect or remit under FMLA, since it is not a paid benefit.
- Under both PFML and FMLA, businesses must inform their employees about their rights and benefits under each law and must display a poster in the workplace that explains these benefits.

# Benefits Provided

- Starting in January 2021, PFML will provide Massachusetts workers with:
  - up to 12 weeks of job-protected, paid family leave,
  - up to 20 weeks of job-protected, paid medical leave, **OR**
  - up to 26 weeks of combined family and medical leave in a benefit year.
- FMLA provides
  - up to 12 weeks of job-protected, unpaid leave in a calendar year for family or medical reasons, **OR**
  - up to 26 weeks of job-protected, unpaid leave in a calendar year to care for a family member in the armed services.
  - Employers are not required to pay workers taking FMLA leave.

# Benefits Provided

- In both PFML and FMLA, employers are required to maintain the employee's health insurance at the same levels the employee had prior to going on leave. Upon their return to the workforce, an employee who has taken leave must be allowed to return to their previous position, or a position of similar responsibility and compensation.
- In both PFML and FMLA, family leave may be taken to:
  - Bond with a newborn or newly adopted child
  - Care for a family member with a serious health condition
  - Manage family affairs when a family member is on active duty
- In both PFML and FMLA, medical leave may be taken if you are unable to work due to a serious medical condition.

# Overlap with Other Forms of Leave

- M.G.L. c. 175M, §2(f) provides: “The taking of 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. During the duration of an employee's family or medical leave, the employer shall continue to provide for and contribute to the employee's employment-related health insurance benefits, if any, at the level and under the conditions coverage would have been provided if the employee had continued working continuously for the duration of such leave.”
- M.G.L. c. 175M, §2(h)(1) provides: This chapter shall not: (i) obviate an employer's obligations to comply with any company policy, law or collective bargaining agreement that provides for greater or additional rights to leave than those provided for by this chapter; (ii) in any way curtail the rights, privileges or remedies of any employee under a collective bargaining agreement or employment contract; or (iii) ***be construed to allow an employer to compel an employee to exhaust rights to any sick, vacation or personal time prior to or while taking leave under this chapter.***
- M.G.L. c. 175M, §2(i) provides: “***Leave taken under this chapter shall run concurrently with leave taken under section 105D of chapter 149 [parental leave] or under the Family and Medical Leave Act of 1993***, codified at 29 U.S.C. section 2611, et seq. Employees who take leave under this chapter while ineligible for leave under the Family and Medical Leave Act of 1993 may take leave under the Family and Medical Leave Act of 1993 in the same benefit year only to the extent they remain eligible for concurrent leaves under this chapter.”

# Overlap with Other Forms of Leave

- The regulations define Accrued Paid Leave as “Leave earned by or otherwise provided to a covered individual pursuant to a benefit plan or policy offered by an employer or covered business entity including, but not limited to, sick leave, annual leave, vacation leave, personal leave, compensatory leave or paid time off. Accrued paid leave shall not include: (a) disability policy or program of an employer or covered business entity; or (b) paid family, or medical leave policy of an employer or covered business entity.” 458 C.M.R. 2.02
- Substitution of Employer-provided Paid Leave. “(a) **Covered individuals who use accrued paid leave or leave** through an extended illness leave bank program provided by their employer or covered business entity **rather than receive a paid benefit under M.G.L. c. 175M shall not receive any paid leave benefits pursuant to M.G.L. c. 175M for a period of time for which they received accrued paid time** or leave through an extended illness leave program from their employer or covered business entity and **the accrued paid leave** or leave from an extended illness leave program provided by an employer or covered business entity **shall run concurrently with any available leave under M.G.L. c. 175M.** (b) Covered individuals who choose to use accrued leave paid by the employer or covered business entity are required to follow the employer's or covered business entity's notice and certification processes related to the use of this leave. (c) Employers and covered business entities are required to inform employees or covered contract workers who choose to use accrued leave paid or leave from an extended illness leave program provided by the employer or covered business entity that the use of these leave accruals or leave from an extended illness leave program will run concurrently with the leave period provided in M.G.L. c. 175M. (d) Upon request from the Department, employers and covered business entities, if any, shall report the use of accrued leave by covered individuals for this purpose.” 458 C.M.R. 2.12(8)





**Private Plan Exemption**  
*Terence McCourt*

# Private Plan Overview

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- Employers may be eligible to receive an exemption from collecting, remitting, and paying contributions for paid family or medical leave under PFML.
- Benefits must be greater than or equal to the benefits provided by the paid leave law to be granted an exemption.
- Private plan must meet all the minimum requirements and must not cost covered individuals any more than they would be required to contribute to the state plan under PFML.
- Employers can apply for an exemption from family leave, medical leave or both, but must cover entire MA workforce.

# Private Plan Benefit Requirements

- **Family Leave**

- Weekly paid benefit amount greater than or equal to the benefit provided by the PFML
- 26 weeks of paid leave to provide care to a family member for serious health condition suffered while on active duty in the armed forces
- 12 weeks of paid leave if spouse, child, or parent is a current member of the Armed Forces and is on covered active duty or notified of an impending call to covered active duty
- 12 weeks of paid leave to provide care to a family member with a serious health condition
- 12 weeks of paid leave to bond with a newborn or adoption or foster placement
- Job protection while on qualified leave

# Private Plan Benefit Requirements

- **Medical Leave**

- 20 weeks of paid medical leave if individual is unable to work due to a serious health condition
- Weekly paid benefit amount that is greater than or equal to the benefit provided by the PFML
- Job protection while individual is on qualified leave
- Continued employer contributions to health insurance benefits at same level and conditions as if the individual was working for the duration of qualified leave

# Private Plan Procedural Requirements

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- Must avoid coverage gaps.
- If employer moves from private plan to state plan, employer/insurer must continue to pay benefits for entire duration of leave.
- If employer moves from state plan to private plan, individual will continue to receive benefits from the state for entire duration of leave.

# Private Plan Procedural Requirements

- Internal Appeals Process
  - Must provide an appeals process with the private plan administrator before individual exercises their right of appeal with the Department of Family and Medical Leave.
  - Must give individual at least 10 calendar days to submit an appeal.
- Notice of Rights
  - Must provide notice to the individual as part of any adverse determination as to their rights under the private plan as well as rights provided by the PFML.

# Private Plan Options

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- Self Insured –Employer pays benefits from its own assets.
- Fully Insured –Employer purchases insurance product/policy and pays premiums to insurer. Employees apply to insurer for benefits and insurer pays benefits.

# Self-Insured Option

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- Employer must submit self-insurance declaration document.
- Surety Bond running to the Commonwealth based on Massachusetts workforce size.
- Bond calculation formula and bond forms available from Department of Family and Medical Leave.



# Fully Insured Option

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- Must be covered by a policy issued by a MA licensed insurance company.
- Insurance company must submit its policy forms to the MA Division of Insurance which will then review and acknowledge that coverage is sufficient and policy is compliant with PFML.

# Private Plan Pros and Cons

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- **Self-Insured**

- PRO: Employer keeps money that would otherwise go to state. May already offer similar coverage.
- CON: Employer owns the risk. Compliance responsibilities, must purchase bond, and submit plan document.

# Private Plan Pros and Cons

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- **Fully Insured**
  - PRO: Administrative convenience. May be bundled with other plans and policies, such as STD and LTD.
  - CON: Expense of premiums. Cost/benefit analysis.



**July 2020 Amended  
Regulations**  
*Amanda Carney*

# July 2020 Amended Regulations

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- Definitional Changes
- Intermittent leave
- Reduction in benefits
- Accrued paid leave
- Private plans
- Filing applications for benefits
- Treatment for substance use disorders

# Amended: Definitions

- **Accrued Paid Leave:** (added) does not include paid leave under an employer (1) disability policy or program; or (2) paid family or medical leave policy.
- **Active Duty:** (added) deployment must be to a foreign country.
- **Average Weekly Wage:** (added) for employees with multiple employers, the Average Weekly Wage will be calculated for each employer separately.
- **Average Working Week:** (new) the average number of hours worked from the two highest quarters of the 12 months preceding an individual's application for benefits under the PFML.
- **Base Period:** (added) the last four completed calendar quarters *within the previous five calendar quarters.*

# Amended: Definitions

- Continuing Treatment by a Health Care Provider: (added) telehealth
- Extended Illness Leave Bank: (new) voluntary program where individuals may donate accrued leave time to fund a bank for the benefit of a co-worker experiencing a qualifying reason under PFMLA.
- Financial Eligibility Test: (added) wages received from multiple employers within the Base Period to be aggregated to determine financial eligibility for leave.
- Former Members of Armed Services: (updated) deleted reference to the exclusion of workers for dishonorable discharge.
- Job Protected Leave: (added) use of leave under an employer's disability policy, paid leave policy, and EILB program will begin job protected leave and will run concurrently with the PFML benefits.

# Amended: Intermittent Leave

- Can be taken in increments consistent with the employer's policy used to account for use of other forms of leave.
- State plan:
  - DFML will not pay in increments of less than 15 minutes
  - Covered individuals cannot apply for payment of benefits associated with intermittent leave until they have accumulated eight hours of leave time, unless more than 30 calendar days have lapsed since the initial taking of such leave.



# Amended: Reductions to Benefits

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- Weekly benefit amount will be reduced by paid family or medical leave received from any source in the 12-month period prior to filing an application.
- If an individual's benefits exceed his or her average weekly wage, the DFML will reduce benefits by wages received from other employers or self-employment.
- Removed language that the weekly benefit amount may be reduced where a covered individual has an outstanding obligation for taxes or child support.

# Amended: Accrued Paid Leave

- An employee who chooses to use accrued paid leave or leave from an extended illness bank program rather than receive a paid benefit under the PFMLA is not eligible to receive PFML benefits for the same period of time.
- Use of accrued paid leave or leave from an extended illness bank program provided by the employer will run concurrently with any available PFML.
- Leaves for qualifying reasons under PFMLA are job-protected even if the employee doesn't apply for PFML benefits.

# Amended: Private Plans

- All employees and covered contract workers must be included within the private plan in order for the employer to be exempt.
- Former employees may file a claim for benefits if unemployed less than 26 weeks after separation.
- Guidance for employers that decide not to renew a private plan, or it dissolves, merges, or is acquired, on how to handle coverage to avoid gaps.
- Additional employer requirements:
  - Provide for an internal appeals process to the private plan administrator before the employee can appeal with the DFML.
  - Provide notice to covered individuals of their rights under the private plan and PFMLA.
  - Provide coverage beginning on the first day of the first quarter following approval of the private plan OR on the employee's date of hire.

# Amended: Filing Applications

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- Employees are now required to provide notice to their employer **prior to** applying for benefits.
- DFML will reject benefits applications that are missing proof of notice to the employer.
- Benefits applications may be filed as soon as practicable if the covered individual was unable to meet the filing deadlines for reasons beyond their “reasonable” control.

# Amended: Substance Use

- PFML may be taken for treatment for substance abuse disorder by a health care provider or program licensed by the MA Dept. of Public Health.
- Absence because of use of the substance, rather than treatment, does not qualify for PFML.
- Treatment for substance abuse disorder does not prevent an employer from taking employment action against an employee if the employer has an established policy, applies it in a nondiscriminatory manner, and has communicated the policy to all employees.
- Also applies to employee taking leave to care for covered family member who is receiving treatment for substance use disorder.



**What's Next?**  
*Amanda Carney*

# Takeaways

- Final version of Regulations  
<https://www.mass.gov/doc/departments-of-family-and-medical-leave-clean-72420/download>
- Review the amended regulations and update policies and procedures as necessary
- Review employee policies regarding substance abuse
- Make sure proper notice has been provided to current employees
- Fully insured private plan exemption renewal application period opens Nov. 30, 2020
- Beginning Dec. 2, 2020, MA employees can start applying for paid family leave benefits to bond with a child



# THANK YOU!

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