BELLO / WELSH LLP

125 Summer Street
Suite 1200
Boston, MA 02110

Main: 617.247.4100
Fax: 617.247.4125
bellowelsh.com

SUMMARY

The Massachusetts Paid Family and Medical Leave Law ("PFML") will provide employees and certain other covered individuals with paid family and medical leave beginning in 2021. Eligible individuals will be entitled to leave for the birth, adoption or foster care placement of a child, for the employee's own serious health condition or to care for a family member with a serious health condition, or for certain purposes associated with a family member who is a covered servicemember. The law provides for partial wage replacement, funded by a payroll tax with contributions from covered individuals, employers, or both, up to a maximum per week benefit. Currently, the maximum benefit is slated to be $850.00 per week; this amount will be subject to yearly review and potential change.

Although there are many similarities between the PFML and the FMLA, there are important differences. Specifically:

- All Massachusetts employers and covered business entities must comply, regardless of size.
- All Massachusetts employees and covered contract workers are eligible, from their first day of employment. Note: a "covered contract worker" is a self-employed individual whose pay is reported on IRS Form 1099-MISC where such contract workers comprise more than 50% of the business entity's workforce.
- Massachusetts employees and covered contract workers remain eligible for 26 weeks following separation from employment.
- Self-employed workers (whose pay is reported on IRS Form 1099-MISC) may opt-in to the Massachusetts system.
- The definition of "family member" is broader than that under the FMLA, and includes spouse, domestic partner, child (including a child for whom the employee stands in *loco parentis*), parent or parent of a spouse or domestic partner, person who stood in *loco parentis* when the covered individual was a minor child, or a grandparent, grandchild, or sibling of the covered individual. Under the FMLA, a "family member" is a spouse, child, or parent (including persons standing in *loco parentis* to the employee or for whom the employee stands in *loco parentis*).

The guidance below is based on the final regulations (effective July 1, 2019), as well as various guidance documents and FAQs published by the Department of Family and Medical Leave (the "DFML").

TIMELINE

- April 29, 2019, the applications for private plan exemptions were made available online at MassTaxConnect
- July 1, 2019, PFML laws and regulations effective; PFML poster must be posted
- September 30, 2019, employers are required to distribute written PFML notices to all employees (and are encouraged to distribute notices to self-employed individuals); covered business entities must distribute written PFML notices to employees and contract workers (whose pay is reported on IRS Form 1099-MISC)
- October 1, 2019, payroll tax deductions begin (unless the company has applied for and been granted a private plan exemption)
- December 20, 2019, applications for private plan exemption for Quarter 1 due
- By no later than January 31, 2020, payments for Quarter 1 (October 1-December 31) remitted
- January 1, 2021, most benefits available (workers' own serious medical condition, bonding with a new child, for exigency as a result of a family member being called to active service, or to care for a family member who is a covered servicemember with a serious injury or illness incurred or aggravated in the line of duty)
- July 1, 2021, all benefits available (to care for a family member with a serious health condition)

KEY COMPONENTS OF THE LAW

1. Coverage and Eligibility

Summary: All Massachusetts employers and covered business entities are subject to the PFML, regardless of size. All Massachusetts employees (including full-time, part-time, temporary and seasonal) and covered contract workers are entitled to benefits from their first day of employment, provided they meet a financial eligibility test. Self-employed workers who are not "covered contract workers" may opt-in.

a. A "covered contract worker" is a self-employed individual whose pay is reported on IRS Form 1099-MISC, where such contract workers make up more than 50% of the business or trade that utilize his or her services.

b. All Massachusetts employers are covered, regardless of size.

c. A "covered business entity" is a Massachusetts business or trade that contracts with self-employed individuals and is required to report the payment for services to such individuals on IRS Form 1099-MISC for more than 50% of its workforce.

d. Covered workers are eligible for benefits from the first day of employment, provided they are "financially eligible." To be financially-eligible for benefits, the individual must have received total wages as an employee or payments for services as a covered contract worker from a Massachusetts employer or business entity amounting to at least thirty (30) times the individual's weekly benefit amount and that are, in the aggregate, not less than $4,700.

e. Services are provided in Massachusetts for purposes of the PFML if the services are either:

   i. performed entirely within Massachusetts, or

   ii. performed both within and without Massachusetts, but the services performed outside Massachusetts are "incidental" to services within Massachusetts (for example, services that are temporary or transitory in nature, or consist of isolated transactions), or

   iii. the services are not localized in any state, but some part of the services are performed in Massachusetts, or

   iv. either the individual's base of operations is Massachusetts or, if there is no base of operations, then the place from which services are directed or controlled is within Massachusetts, or

   v. the individual's base of operations or place from which such services are directed or controlled is not in any state in which some part of the services are performed, but the individual's residence is in the commonwealth.

2. <u>Contributions to the Family and Employment Security Trust Fund</u>

Summary: The paid family and medical leave program is funded through a payroll tax. All covered employers and business entities are required to remit to the Trust Fund contributions on behalf of employees and covered contract workers in the workforce *<u>unless</u>* the employer or business entity has applied for and been granted an exemption. Initial contributions are due on January 31, 2020 (for October through December 2019), and contributions are due on a quarterly basis thereafter.

a. A business or trade must annually determine if it is a "covered business entity," by:

   i. Counting the total number of individuals whose pay was reported on IRS Form 1099-MISC over the previous calendar year, and

   ii. Adding to the individuals whose pay is reported on a 1099-MISC the total number of W-2 employees, including full-time, part-time, and seasonal employees over the previous calendar year.

   iii. If the number of 1099-MISC workers is greater than 50% of the total, then for the following calendar year, the business or trade is a "covered business entity" and the self-employed individuals are "covered contract workers."

b. An employer or covered business entity with an average total Massachusetts workforce of less than 25 persons is not required to pay the employer portion of premiums.

c. The initial contribution rate is 0.75% of all wages (or other qualifying earnings or payments paid to contract workers and reported on a Form 1099-MISC) up to the amount established annually by the US Social Security Administration. Currently, this limit is $132,900, and will be updated by October 1 annually. The total contribution rate is allocated between medical leave and family leave as follows:

   i. 82.5% for medical leave

   ii. 17.5% for family leave

Note: The DFML anticipates that the IRS will conclude that employee contributions should be withheld from after-tax wages; however, definitive IRS guidance for the proper tax treatment of contributions has not been issued.

d. The employer or covered business entity may deduct from each employee and covered contract worker up to 100% of the family leave contribution and up to 40% of the medical leave contribution. An employer or covered business entity may choose to pay and remit all or part of the worker portions of the medical and/or family contributions.

e. If the employer or covered business entity's workforce averaged fewer than 25 covered workers in the previous calendar year, the company is not required to pay the employer's share of the medical leave contribution (60%).

f. Employers with an average of more than 25 employees and covered contract workers in its workforce must remit the 0.75% payroll tax to the Trust Fund, which includes both the worker and employer contribution. Employers with an average of fewer than 25 employees and covered contract workers in their workforce are required to remit only the worker contributions described above, but not any employer contributions.

   Note: The DFML's PFML Contribution Calculator can be found **here**.

g. An employer or covered business entity may choose to deduct differing percentages from different groups of covered individuals, but may not deduct more than the maximum percentages authorized.

h. At the end of each quarter, employers and covered business entities must file an Employment and Wage Detail Report through the Department of Revenue's MassTaxConnect system, and must remit payment within thirty (30) days of the end of the calendar quarter. Directions for registering with MassTaxConnect can be found **here**.

i. Self-employed individuals who are not covered contract workers but voluntarily opt into the PFML program must remit contributions on their own behalf.

3. <u>Notification Requirements / Deadlines</u>

Summary: Employers and covered business entities must display a workplace notice and must provide written notice that provides an opportunity for employees or contractors to acknowledge receipt or decline to acknowledge receipt. Employers and covered business entities should obtain from each worker a written statement acknowledging receipt of the notice or a statement indicating an individual's refusal to acknowledge the notice.

a. By July 1, 2019, all Massachusetts employers and covered business entities must display the workplace poster prepared by the DFML. The workplace poster must be displayed in English and each language which is the primary language of 5 or more individuals in the employer or cover business entity's workforce, if a translation is available from the DFML. A copy of the poster is available **here** and translations will be published shortly.

b. All Massachusetts employers must distribute a written notice of the rights and benefits provided under the PFML by September 30, 2019 to current employees and are encouraged to provide notice to self-employed individuals, who may elect to participate in the PFML program. Covered business entities must distribute a written notice to both current employees and contract workers by September 30, 2019. For new workers, notice must be provided within 30 days of the start of an employee's employment and, for covered business entities, at the time a contract for services is entered into with a 1099-MISC contract worker. The written notice must be given in each individual's primary language and must provide an opportunity for employees or contractors to acknowledge receipt or decline to acknowledge receipt. Template notices published by DFML are available **here**.

Note: Employers or covered business entities who had already notified their workforce prior to the delay of the effective date for contributions are required to provide a rate update sheet explaining the new dates and contribution rates. Sample update notices are available **here**. Although this supplemental notice does not have to be signed by the covered individual, employers must keep a record of distribution of the supplemental notice.

4. **Private Plan Exemptions**

Summary: Employers and business entities may receive an exemption from contributing to the PFML Trust Fund if the company provides paid leave benefits to its workforce that are greater than or equal to the benefits provided under the law. Benefits may be provided through purchase of a private plan from an insurer or by self-insuring. At this time, however, insured private plans are not available. Before deciding to self-insure, companies should consider the drawbacks of this approach, which include the requirement that self-insurers post a significant bond, as well as other administrative difficulties.

a. Companies may apply for an exemption from the medical leave or family leave contribution, or both. Applications for an exemption are currently available on MassTaxConnect. Companies may apply for a private plan exemption only once per quarter.

b. Applications for exemption for the first quarter contributions (beginning October 1, 2019 and payable by January 31, 2020) must be filed by December 20, 2019. Thereafter, applications will be accepted and reviewed on a rolling basis, and will be effective no earlier than the quarter immediately following the date of approval. Companies that apply for an exemption after December 20, 2019 will be required to contribute as of October 1, 2019, but may stop contributing on the first day of the quarter following approval. If the DFML denies an exemption application after October 1, 2019, the company will be responsible for remitting the full contribution amount for the period from October 1, 2019 even if it has not commenced payroll withholding.

c. Exemptions will be effective for one year, and may be renewed annually. Benefits under an approved private plan must be maintained for all covered individuals until the effective date of termination or non-renewal of the approved private plan. An employer or covered business entity that does not intend to renew its approved private plan at the effective date of termination must notify covered individuals and the DFML no later than 30 calendar days prior to the effective date of termination. An employer or covered business entity that does not renew an approved private plan must continue to provide paid leave benefits under the same terms and conditions of the private plan for the entire duration of the leave for a claim that began prior to the effective date of termination.

d. To qualify for an exemption, a private plan must confer all of the rights and benefits available under the PFML to all employees and covered contract workers, throughout their employment (and for up to 26 weeks after separation) including:

    i. Providing family and medical leave for the reasons permitted under the PFML, for the maximum number of weeks required by the law;

    ii. Providing wage replacement during all family and medical leave of at least the amount required by the PFML;

    iii. Allowing leave to be taken intermittently or on a reduced schedule as authorized by the PFML;

        Note: An employer may require that intermittent leave be taken in increments not smaller than a designated minimum time period, which may not be greater than four consecutive hours.

    iv. Imposing no additional conditions or restrictions on the use of family or medical leave beyond those explicitly authorized by the PFML and implementing regulations; and

    v. Providing that the cost to individuals covered by the private plan will not be greater than the cost that would be charged to individuals under the state plan.

e. An individual covered by an approved private plan is entitled to the rights and protections provided by the PFML, which are substantially similar to the rights and protections under the FMLA including the protection from retaliation. For purposes of the PFML, any negative change in the terms or conditions of employment that occurs during leave or during the 6-month period following the leave is presumed to be retaliation. Moreover, all presumptions must be made in favor of the availability of job-protected leave and the payment of benefits.

f. Employers and covered business entities with approved private plans must retain all reports, information, and records related to the approved plan (including those related to all claims for benefits) for three years.

g. The DFML may audit any approved private plan and/or require periodic reporting to ensure that a private plan complies with the requirements of the PFML or other state or federal law. An employer or covered business entity that fails to maintain a private plan, or fails to maintain or renew a private plan approved by the DFML for future payment of leave benefits scheduled to begin on January 1, 2021, may be assessed a penalty in an amount equal to its total payroll for the period during which it failed to maintain the plan, multiplied by the then-current annual contribution rate, and may also be required to repay to the Trust Fund the total amount of benefits paid to employees and covered contract workers who received benefits from the Trust Fund. An employer or covered business entity which fails to maintain or renew a private plan approved prior to January 1, 2021 may be responsible for retroactive contributions to the Trust Fund. However, the DFML may waive or modify any penalty or assessment imposed or due upon a showing of good cause.

h. An employer or covered business entity that maintains a private plan may require employees to contribute to the private plan up to the amount allowed for state-provided benefits. Employee contributions (as withheld from wages) must be kept in a separate bank account.

i. If the private plan is self-insured, the company must furnish a bond running to the state. The surety company issuing the bond must be authorized to transact business in the Commonwealth. The amount of the bond is based on the workforce size; for every 25 employees covered by a business a bond must be posted in the amount of $19,000 for qualifying family leave plans, $51,000 for qualifying medical leave plans, or $70,000 for qualifying plans for both family and medical leave. A bond form for self-insurers and remittance instructions will be available from the DFML at a later date.

j. The DFML may withdraw approval for a private plan when terms or conditions of the plan have been changed or violated. Causes for termination of plan approval include, but are not limited to, failure to pay benefits timely and in a manner consistent with the public plan, failure to maintain adequate bond coverage, misuse of private plan trust funds, adverse changes to the financial condition or licensure status of the employer or covered business entity, private plan insurer, or surety company responsible for a bond, failure or refusal to respond to requests for information that may be required by the DFML, and failure to comply with the PFML law and regulations, or other state or federal law applicable to the private plan.

5. **Rollout and Entitlement to Family and Medical Leave Benefits**

Summary: The plan will be administered by the DFML. As the first leave entitlement does not begin until January 1, 2021, DFML this is a high-level summary which will be updated closer to the effective date of the leave entitlements.

a. Beginning on January 1, 2021, a covered individual may take paid leave of up to 20 weeks for the worker's own serious health condition; up to 12 weeks for the birth, adoption, or foster care placement of a child; up to 12 weeks due to an exigency as a result of a family member being called to active service; or up to 26 weeks, to care for a family member who is a covered servicemember with a serious injury or illness incurred or aggravated in the line of duty.

b. Beginning on July 1, 2021, a covered worker may also take up to 12 weeks of leave to care for a family member with a serious health condition.

c. In the aggregate, individuals are eligible for a maximum of 26 weeks of paid family and medical leave in a single benefit year.

d. There is an initial seven (7) day waiting period during which no benefits are payable, and this waiting period does count against the total available period of leave in a benefit year.

   Note: Where the approved leave will be on an intermittent or reduced leave schedule, the waiting period shall be seven consecutive calendar days (and not the aggregate accumulation of seven days of leave).

6. **Weekly Benefit Amount**

Summary: The current maximum benefit is $850 per week; all benefits will be reduced by the amount of compensation received from unemployment, workers' compensation (subject to certain exceptions), any other state or federal temporary or permanent disability benefits law, or the employer's permanent disability policy.

7. **Interaction with Other Benefits and Leave Entitlements**

Summary: PFML runs concurrently with leave taken under other Federal and State leave laws. Employees may choose to use accrued employer-provided paid leave rather than applying for the PMFL benefit; however, such leave will run concurrently with the leave period provided for by the PFML law. An employer may not require an employee to exhaust sick, vacation, or personal time prior to or while taking PFML leave.

8. **Statutory Damages and Penalties**

Summary: The PFML is a remedial statute and, as such, is intended to be liberally construed, with all presumptions made in favor of the availability of job-protected leave and the payment of benefits.

   a. Failure to comply with the notice and posting requirements may result in fines of $50 per employee or contractor for a first violation and $300 for each subsequent violation.

   b. An aggrieved current or former employee or covered contract worker may institute a civil action in Superior Court within 3 years of an alleged violation. Courts may order injunctive relief, reinstatement, up to treble damages, and reasonable costs and attorneys' fees.

9. Immediate Action Items

   a. Determine whether and to what extent you will deduct contributions from the pay of employees and covered contract workers.

   b. If you use a payroll company, coordinate with your provider to discuss implementation of payroll tax deductions.

   c. Begin updating related internal policies.

   d. Determine whether to apply for private plan exemption.

   e. Register with MassTaxConnect.

   f. By July 1, 2019, post the required PFML poster.

   g. By September 30, 2019, distribute required written notice (for employers, must distribute to all employees and encouraged to distribute to self-employed individuals; for covered business entities, must distribute to all employees and contract workers).

   h. On October 1, 2019, begin payroll tax deductions (unless the company has applied for a private plan exemption).