



Massachusetts Again Proposes Amendments To Paid Family and Medical Leave Regulations

Insights

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The Massachusetts Department of Family and Medical Leave (DFML) recently released proposed amendments to the Commonwealth's Paid Family and Medical Leave regulations, marking yet another proposed change to the state's nascent paid leave program, expected to begin in January 2021. According to DFML, the regulations are intended to clarify procedures, practices, and policies in the administrative and enforcement of the leave law. Though hearings have yet to be scheduled, they will likely be held via video conference due to social distancing requirements and the current state of emergency. Employers should review closely as any changes are likely to impact them and their employees.

Key amendments include:

More Defined Terms

The proposal includes several new defined terms, while augmenting others. New terms include:

- **Accrued Paid Leave:** 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;
- **Active Duty:** means full-time duty in the active military service of the United States and full-time National Guard duty;
- **Application for Benefits:** a request for family or medical leave benefits pursuant to 458 CMR 2.08;
- **Complete Application:** an application for benefits that contains all of the required information from the covered individual pursuant to 458 CMR 2.08(2) and all of the information required from the employer pursuant to 458 CMR 2.08(6). The application for benefits shall be deemed complete when DFML receives the information required under 458 CMR 2.08(6) or 10 business days after DFML requests the information required under 458 CMR 2.08(6) from the employer, whichever is sooner;
- **Former Member of the Armed Forces:** an individual who was a member of the Armed Forces, including a member of the National Guard or Reserves, and was discharged or released under conditions other than dishonorable at any time during the five-year period prior to the first date

the covered individual completes an application for benefits to care for the former member of the Armed Forces;

- **Good Cause:** A demonstration by a party that a failure to comply with a requirement of M.G.L. c. 175M and 458 CMR 2.00 was due to circumstances beyond the party's control;
- **Job Protected Leave:** the period of time described in 458 CMR 2.16(1), immediately following the first date on which an employee commences the taking of any type of leave that is associated with a qualifying reason regardless of whether an application for benefits has been submitted to DFML in connection therewith or whether that leave is paid or unpaid. Employees who do not file an application for benefits with DFML but use any other type of leave paid or unpaid and associated with a qualifying reason, will have their leave run concurrently with the leave period provided in M.G.L. c. 175M;
- **Municipality, District, Political Subdivision or its Instrumentality:** shall include municipal departments such as school departments, police departments, fire departments or public works departments; and
- **Private Plan Administrator:** the third-party administrator of an employer's or covered business entity's private paid family and/or medical leave plan.

The amendments also include revisions to several existing definitions. Notable revisions would include:

- **Base Period:** the last four completed calendar quarters immediately preceding the date an application for benefits is filed with DFML for a qualified period of paid family or medical leave;
- **Chronic Conditions:** have been clarified to require periodic visits twice per calendar. Further, the definition has been expanded to exclude "substance abuse disorders" unless inpatient hospital care is required, or complications develop;
- **Covered Contract Worker:** the definition has been expanded and includes three additional criteria: (c) performs services as an individual entity in Massachusetts; (d) resides in Massachusetts, and (e) is not classified as an independent contractor pursuant to G.L. c. 151A, § 2;
- **Employer:** the definition has been amended to allow municipalities, district, political subdivisions, and instrumentalities, to become a covered employer by notifying DFML pursuant and completing the procedure established by DFML.

Clarity On Independent Contractors

In much-needed clarity for business that utilize independent contractor labor, the proposed amendments would exclude properly classified independent contractors from workforce calculations. This aligns with the revised definition of covered contract workers, which states that a covered contract worker cannot be an individual who is classified as an independent contractor pursuant to M.G.L. c. 151A, § 2.

No Retroactive Charge Backs

The proposed amendments would also include a provision explaining that an employer or business entity that fails to properly assess the allowable deduction from an employee or covered contract worker cannot seek retroactive reimbursement from employees or covered individuals to cover the cost of assessment or charges against the employer. In this situation, costs to cover contributions or charges are the employer's responsibility.

Private Plan Clarity

Application For Exemption

Under the amendments, all entities seeking an exemption would be forced to submit a Request for Exemption through the Massachusetts Department of Revenue's MassTaxConnect system. Importantly, exemptions would only be granted if the private plan applies to the entire workforce. Employers cannot request an exemption for a private plan that only applies a portion of the workforce. However, if an employer or covered entity is approved for an exemption, it is exempt from both remitting contributions and any filing requirements.

Likewise, private plans must begin for all employees and covered contract workers no later than the first day of the first quarter immediately following the date of approval. Requests for exemptions will be reviewed on a "rolling basis" and will become effective no earlier than the quarter following the approval date. The exemptions will be effective for up to one year and require annual renewal.

Employee Appeal Process For Private Plans

Notably, the amendments would expand upon the existing the requirements for exemptions, providing that to be approved for an exemption, a private plan must (i) have an appeals process with the private plan administrator *before* the individual can exercise a right of appeal with DFML; (ii) provide notice to the individual engaging in the appeal of the determination of the appeal and of his or her rights under the private plan as well as the rights afforded the employee or covered contract worker pursuant state law; and (iii) private plans must calculate weekly benefit amount based on the wages earned with the employer or covered entity at the time of an application for benefits.

Private Plans Issued By Insurance Carriers

The amendments explain that if an employer's or covered business entity's plan is a paid family and/or medical leave plan issued by an insurance carrier, the policy must be issued by a licensed Massachusetts insurance company and the carrier providing the coverage must submit its policy forms to the Massachusetts Division of Insurance for approval.

Denied Exemptions

With regard to denied exemptions, the proposed amendments explain that a request for review of a denial is a form of "discretionary relief" and the determination of DFML is not subject to further administrative appeal. Review requests can be submitted through the MassTaxConnect System on or before the last day of the quarter prior to the effective

Retained Rights For Covered Individuals Under Private Plans

The amendments would also clarify the rights for individuals covered by private plans, explaining that (i) private plan administrator and employer or covered business entity must provide all application for benefits documentation that are retained by the private plan administrator or employer within five business days of the request by DFML in connection with an appeal of a denial of family or medical leave benefits by the employee or covered contract worker, (ii) appeal determinations shall be binding on the private plan administrator and employer or covered business entity; and (iii) individuals covered under a private are not entitled to file an application for benefits with DFML.

Private Plan Termination

Under the proposal, the effective date of termination of a private plan shall be on the first day of the first quarter immediately following the date of the termination or non-renewal. If the employer does not renew an approved private plan, it must continue to provide leave benefits to covered individuals under the same terms and conditions of the private plan for requests that were filed before the private plan ends, or, in the case of intermittent leave, until the end of the employee or covered contract worker's benefit year.

Once an employer terminates or does not renew a private plan, the covered individuals of that employer or covered entity are eligible submit an application to DPFML for benefits. Additionally, following termination/nonrenewal, the amendments state that employers must report prior wages and qualified earnings to the Massachusetts Department of Revenue for the four quarters immediately preceding the termination date of private plan

Benefit Applications

Based on these proposals, a covered individual can file an application for benefits no more than 60 calendar days before the anticipated start date of the requested leave. The employee should give notice 30 days prior to the state date of leave, or, if not possible, as soon as practicable. Notice must be made the employer/business entity before an application for benefits is submitted to DFML.

These amendments would also clarify filing requirements, explaining that individuals filing an application for benefits must provide DFML with (i) proof that the employer has been notified; (ii) the name of the individual taking leave and/or the name of the individual for whom the individual will be caring; (iii) the anticipated start date; (iv) the anticipated length of the leave; (v) the type of leave; and (vi) the expected return date.

Benefits Determinations

The proposed changes would further clarify how benefits determinations will be made, explaining that when making a determination on an application of benefits, DFML will consider (i) whether the covered individual adhered to notice requirements; (ii) the financial eligibility test; (iii) certification supporting the necessity of leave; (iv) whether the individual's request was approved or denied by the employer and the reasons for the determination; (v) whether the individual has taken or plans to take the leave; and (vi) other information deemed necessary. Additionally, under the amendments

take the leave, and (vi) other information deemed necessary. Additionally, under the amendments, benefit approval letters would contain the weekly benefit amount, and denial letters will include the reason for the denial and appeal information.

Benefit Deductions

The amendments would also alter benefit reduction, explaining that that benefit amounts and/or leave allotments will be reduced by wages, wage replacement, or leave that individuals receive from (i) government programs or leave; (ii) state or federal disability benefits laws, (iii) employers or covered entities through private plans; (iv) wages received from another employee, covered entity, or self-employment; or (v) an employer or covered entities disability program. The amendments also allow for benefits to be reduced if the covered individual has outstanding tax or child support obligations.

Under the proposal, accrued paid leave provided by an employer or covered entity would run concurrently with paid family and medical leave. Covered individuals that opt to use accrued paid leave provided by their employer or covered business entity or through an extended sick leave program rather than receive a paid benefit would not be compensated with paid leave benefits while receiving compensation for paid leave or extended sick leave.

In addition, if an employer or covered business entity makes payments to a covered individual during a period of family or medical leave, and such payments are equal to or greater than the amount required under the paid family medical leave regulations, the employer would be reimbursed out of any benefits due to the covered individual or that become due from DFML. However, DFML will not reimburse employers or covered entities if the individual has received a benefit from DFML for the same time period.

Anti-Retaliation Provisions Refined

Under the amendments, employers would be permitted to request additional information related to the use of intermittent leave where the employee's utilization of the leave is inconsistent with the reason for which DFML approved the leave. Such requests would not be considered retaliation.

Likewise, employers would not engage in retaliation if they report suspected fraudulent use of benefits to DFML, so long as they are acting with a bona fide belief that an individual's actions are fraudulent.

What's Next?

The proposed amendments represent another significant change to the processing of leave under a Paid Family and Medical Leave law that has yet to become fully effective. As Massachusetts employers know, many aspects of this law have been changed and delayed since its passage in 2018. Up next for these proposals is a notice and comment period, hearings, and potentially revisions before they become final.

We will continue to monitor further developments and provide updates once the final regulations are issued, so you should ensure you are subscribed to Fisher Phillips' alert system to gather the most

up-to-date information. If you have questions, please contact your Fisher Phillips attorney or any attorney in our [Boston office](#).

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