

Massachusetts Paid Family and Medical Leave Contribution Date (July 1, 2019) Approaches: What Massachusetts Employers Need to Review and Recommended Actions

1. BACKGROUND

In June 2018 the Massachusetts legislature passed the Massachusetts Paid Family Medical Leave law (the law). The law grants significant new employee rights and paid leave to Massachusetts employees generally. Claims for paid leave will not be eligible or processed or paid until January 1, 2021. Paid leave will then be available to employees for their own serious health condition (up to 20 weeks); the serious health condition of a family member or time for birth and bonding (up to 12 weeks) or to care for a family member injured during military service (up to 26 weeks). In order to be eligible, an employee must have approximately 15 weeks or more of earnings and have earned at least \$4,700 in the 12-month period before they apply for leave.

2. Issuance of Regulations and State Guidance

Although the law was passed in June 2018, the state did not release regulations and guidance until January 23, 2019. The regulations are subject to a public comment period which will conclude in late March and then they will be subject to a public hearing within 60 days afterwards. The state has created a Paid Medical and Family Leave website and is currently conducting public hearings on the regulations across Massachusetts. **Here is the bottom line: as of today, the regulations are not final and some of them could be modified.**

Under the law, the paid leave program consists of (1.) medical leave and (2.) family leave. Funding of either the medical or family leave components is derived from employee and employer contributions. Employees with fewer than 25 employees, however, *are excused from the employer contribution requirement*. The law imposes on employers additional new compliance obligations (ex. employee notice, employee sign off, continued employer health insurance premium contribution during leave) as well.

3. FMLA PLUS, PLUS, PLUS!

Although there are many similarities with FMLA, there are some significant new employee rights and protections for Massachusetts employees under the law *that exceeds* FMLA requirements. Additionally, Massachusetts employers that are small enough to currently escape compliance with FMLA will essentially now have to comply with the substance, and a lot more, of FMLA under the new state law. Fortunately, employers still have ample time to become familiar with new employee protections and rights and which will take effect on January 1, 2021. For now, the most immediate concern employers should focus on is what type of paid leave program do they wish to offer and how are they going to fund the program?

4. Recommended Actions

A. Sign Up for Guidance and Alerts from the Massachusetts Department of Paid Family and Medical Leave.

The state, through the Department of Family and Medical Leave, hopes to release an employer tool kit in April along with applications for employer exemption from the state funded program option. The tool kit will have, among other things, required employee notices. An employer can sign up for alerts about those releases by going to **MassPFML@Mass.gov**. You can also submit questions through the website as well.

B. Determine Whether You Are A Small or Large Employer.

Your Massachusetts employee headcount will determine whether you have to make a required employer medical leave contribution. Employers with fewer than 25 Massachusetts employees can require their employees to make 100% of the required contributions for the medical leave component and 100% of the family leave component. Employers with 25 or more Massachusetts employees are required to remit an employer contribution for medical leave but are not required to make an employer contribution for family leave.

Here is how you determine your employer size under the law. Your Massachusetts workforce employee head count is determined by the previous calendar year (2018). You must count all Massachusetts employees (FT, PT, seasonal, temporary, etc.) on the payroll during each pay period. An employer must also count individuals to whom it paid during a pay period and reported the payment on IRS Form 1099-MISC. You then divide that aggregate number by the number of pay periods to determine whether you are at the 25 Massachusetts employee threshold.

Finally, Massachusetts municipalities are excused from the law but can opt in. The state anticipates having an opt in application available sometime in April.

C. Determine, Before July 1, 2019, What Type of Program Funding Option You Will Follow.

An employer has three program funding choices under the law:

1. State program
2. Self-funded private program
3. Fully insured private program

Section 11 of the law, requires an employer to apply for an exemption from the state program contributions with the Department of Family and Medical Leave if the employer wishes to pursue a self-funded or a fully insured option. An employer with a very generous corporate leave policy that exceeds the financial requirements (\$850 maximum weekly benefit) of the state program

may want to consider opting to self-fund. Self-funding would also require the purchase of a bond that runs to the state of Massachusetts. Unfortunately no insurance carrier has yet to offer a fully insured program solution at this time since the regulations are not final. Many employers are considering participating in the state funded program option for 2019 and then switching to a fully insured option when they become available in the marketplace. The state recently communicated that it expects to release an exemption application in April if an employer wishes to pursue either a self-funded option or a fully insured option.

D. If You Elect the State Program Funding Option Or You Are Going To Self-Fund and Require Employee Contributions... Start To Work On An Expected Budget.

Here are the current parameters for employee/employer contributions:

1. Contributions cannot be required beyond the base income limit for taxation set by the Social Security Administration each year. For 2019, the figure is \$132,900.
2. Employers with 25 or more employees will be required to remit a total contribution of 0.63% of eligible payroll (capped at the base income limit for social security set by the Social Security Administration). That 0.63% total contribution is broken down as follows:
 - a. 0.52% (or 82.5% of the 0.63) is for medical leave contribution of which the employee's share is 40% and the employer's share is 60%
 - b. 0.11% (or 17.5% of the 0.63) is the family leave contribution of which the employee can be required to contribute 100%.
3. For employers with fewer than 25 employees, the entire (100%) medical leave contribution and family leave contribution will come from the employee. The small employer must direct the employee contributions to the state if it participates in the state program option.
4. In regards to employee contributions, the state currently advises that the employee contribution must be on a post-tax basis. The state reports that it is discussing with the IRS the issue of making the employee contribution pretax.
5. Depending upon an employer's benefit culture, an employer does have the ability to pay the employee contribution as well and designing a paid leave program, with identical employee rights, that is at least as generous, or even more generous, as the state funded program option.

E. If You Are Going to Participate in The State Program Option, Make Sure You Are Registered on DOR Tax Connect.

If you are a Massachusetts employer, it is assumed that you have an account with the Massachusetts Dept. of Revenue (DOR) Tax Connect System. If not, you must register with the DOR and create an account. At the end of each calendar quarter, the employer must file an earnings report through the DOR tax connect system. The earnings report will include, among other things, wages paid data for identified employees. The DOR will determine the

contributions for each employer, based on the earnings report, and will advise the employer of the required contribution payment. The employer will have 30 days from the end of the quarter to remit payment.

There are no employer aggregation or control group rules. Each company with its own EIN has its own responsibility.

At the moment, the state advises that employer contributions for the state program are not tax deductible business expenses. The state is discussing the issue with the IRS.

F. Between Now and 2021, Spend Time To Learn The New Employee Protections, Employer Obligations and Leave Benefit Coordination

As stated earlier, the paid benefit component of the law is just one aspect of the law. The law also creates significant new employee rights and protections and employers obligations. If you are going to self-fund or later pursue a fully insured program option, you may want to consult with an employment law attorney to make sure your program honors all of the new employee rights. Finally, the new law has a number of benefit offset provisions and guidance on how it would coordinate with an employee on, for example, FMLA, Short Term Disability or Massachusetts Maternity Leave. You have time to learn these new requirements.

G. Sign Up For the Upcoming Marsh McLennan Agency Webinar On This Topic.

We expect to be issuing an invitation in short order for our **April 10th** webinar featuring George Thompson, our Vice President of EH&B Compliance, and Corey Higgins, an Employment law partner with the firm of Mirick O'Connell. The webinar will discuss the program funding options as well as an employer's new compliance obligations and the new protections that employees will have under the law.

H. Additional Resource Links Below:

1. Paid Family Medical Leave for employers FAQ | Mass.gov
2. <https://www.mass.gov/info-details/paid-family-medical-leave-for-employers-faq>
3. Paid Family Medical Leave for employees FAQ | Mass.gov
4. <https://www.mass.gov/info-details/paid-family-medical-leave-for-employees-faq>
5. Department of Family and Medical Leave | Mass.gov

6. <https://www.mass.gov/orgs/department-of-family-and-medical-leave>
7. The Law: MGL c.175M as added by St. 2018, c.121