

Compliance Update on Massachusetts Paid Family and Medical Leave (MA PFML)

July 2020



MA PFML REVISED REGULATIONS SUMMARY

The Massachusetts Department of Family and Medical Leave (DFML) has been in the process of amending the regulations for the Massachusetts Paid Family and Medical Leave (MA PFML) law, and, on July 24, 2020 issued final revised regulations which include several significant changes, as summarized below.

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SUMMARY OF SIGNIFICANT CHANGES

1. Intermittent leave

The DFML is limiting the smallest minimum increment to 15 minutes under the state program and will not pay benefits for less than 8 hours of accumulated leave; however, it appears that private plans could allow smaller increments and/or payment before 8 hours of leave are accumulated.

The original regulations provided that an employer could require that intermittent leave be taken in increments not smaller than a designated minimum time period but that an employer's designated minimum time period could not be greater than four consecutive hours. The revised regulations provide that intermittent leave "shall be taken in increments consistent with the established policy of the employer or covered business entity uses to account for use of other forms of leave." The regulations also state that the DFML will not pay benefits for increments of less than 15 minutes and that if a covered individual is applying for benefits from the state program, they will not be permitted to apply for payment for benefits associated with intermittent leave until they have 8 hours of accumulated leave time unless more than 30 calendar days has lapsed since the initial taking of such leave.

The final regulations appear to permit intermittent leave in increments as small as 15 minutes for employees participating in the state program. The language suggests that employers can set minimum increments based

upon their “policy” that they use “for other forms of leave.” Unlike the comparable FMLA regulation, the MA DFML regulation does not specify that the employer must use the smallest minimum increment for other forms of leave if the employer has more than one type of leave. That is, the Department of Labor’s regulation under the FMLA provides: “The employer must allow employees to use FMLA leave in the smallest increment of time the employer allows for the use of other forms of leave, as long as it is no more than one hour.” The silence of the revised MA PFML regulation on this point creates ambiguity if an employer has different policies for different leaves that have different minimum increments.

The regulation is also somewhat unclear in terms of whether the DFML will ultimately pay for increments of leave that are less than 15 minutes once an employee accumulates 15 minutes of leave or whether the MA DFML is taking the position that the minimum acceptable increment for leave under the state program is 15 minutes. In addition, while the DFML is limiting the smallest minimum increment to 15 minutes for purpose of payment and will not pay benefits for less than 8 hours of accumulated leave, it appears that private plans could allow smaller increments and/or payment before 8 hours of leave are accumulated.

2. Reductions in benefits

The revised regulations contain three new provisions relating to the reduction of benefits for other periods of leave.

1. The regulations provide that an individual’s annual allotment for MA PFML benefits in any benefit year will be proportionately reduced by the amount of family or medical leave taken by the employee for a qualifying reason during the benefit year.
2. The weekly benefit will be reduced by any paid family or medical leave that an individual receives from any source for a qualifying reason in the 12-month period prior to filing an application for benefits.
3. Leave taken prior to January 1, 2021 (the effective date of leave under the MA PFML) will not count against the individuals’ weekly benefit amount and/or allotment.

The effect of these revisions is unclear. Based on Paragraph 1, it appears that paid or unpaid leave taken during the benefit year for a MA PFML qualifying reason will reduce the employee’s allotment of MA PFML for that benefit year. As a reminder, benefit year is defined under the MA PFML as the 12 month period following the Sunday before the first day of leave and, therefore, looks forward and not backwards. Under Paragraph 2, the weekly benefit amount will be reduced by any paid family or medical leave that an employee receives from any source for leave taken for a qualifying reason in the 12-month period prior the filing of an application for benefits. Therefore, this 12-month lookback only applies to paid leave. Under Paragraph 3, the DFML makes clear that it is not attempting to apply this reduction in benefits to paid or unpaid leave taken prior to January 1, 2021, the first date that leaves are available under the MA PFML law.

3. Substitution of accrued paid leave/employer reimbursement

Employees who choose to use accrued paid leave are not eligible for MA PFML benefit for same period of time but their MA PFML allotment will be reduced for the period of leave. Employers may not be reimbursed for payment of accrued paid leave.

The MA PFML regulations provide that an employee who uses accrued paid leave during a period of leave for a qualifying reason is not eligible to receive a MA PFML benefit but that the period of accrued paid leave will run concurrently with any available leave under the MA PFML law. The regulations also indicate that employers are required to inform employees who choose to use accrued paid leave for a MA PFML qualifying leave reason that the period of accrued paid leave will run concurrently with any available leave under the MA PFML. The regulations also state that if an employee chooses to use accrued paid leave they must comply with the

employer's notice and certification processes related to the use of this leave. The regulations provide that upon request from the DFML, employers must report to the DFML the use of accrued paid leave by an employee for a MA PFML qualifying reason. Finally, the regulations make clear that employers are not entitled to be reimbursed by the DFML when an employee elects to use accrued paid leave (as defined in the next paragraph) rather than apply for and use MA PFML benefits.

In the original regulations, there was no definition of accrued paid leave. In the revised regulations, the DFML has defined "accrued paid leave" to be leave earned by or otherwise provided to an employee by the employer including, but not limited to, sick leave, annual leave, vacation leave, personal leave, compensatory leave or paid time off. Accrued paid leave, however, does not include disability policy or program benefits offered by the employer or an employer's paid family or medical leave (PFML) policy or an extended illness bank. The revised regulations provide that an employer who makes payments to an individual during a period of PFML that are equal to greater than the PFML benefit are entitled to reimbursement from the DFML but only if those payments were made from the employer's:

1. Short term disability program
2. Paid family and medical leave program; or
3. Extended illness leave bank

All of these programs must be separate and in addition to any accrued paid leave. Employers are not entitled to reimbursement when they have received an approved exemption request and established a private MA PFML plan or program.

These are among the most significant changes to the regulations, and they have far-reaching impact. If an employee is paid any amount of "accrued paid leave" during a period of leave for a qualifying MA PFML reason, the employee is not entitled to MA PFML benefits for that same period of time but the time will run concurrently with MA PFML and reduce the available time in the benefit year. Further, the employer will not be eligible for reimbursement for these amounts paid. The regulations define accrued paid leave to be typical paid time off policies, such as vacation or sick pay, but does not include income replacement under an employer's short-term disability/salary continuance policy or paid family and medical leave policy.

4. Waiting Period

The revised regulations provide that no MA PFML benefits are payable during the first seven calendar days on which job protected leave begins and that this initial seven-day wait period will count against the total available period of leave in a benefit year. The regulations also provide that when an approved application for benefits involves leave on an intermittent or reduced leave schedule, the waiting period is seven consecutive calendar days from the date of the first instance of leave from the employer, not the aggregate accumulation of seven days of leave. The regulations also clearly state there is a separate seven day waiting period for each application for benefits for MA PFML except that there is no waiting period for paid family leave that immediately follows a period of paid medical leave for pregnancy or recovery from childbirth.

5. Private Plans

The revised regulations contain a number of new provisions relating to private plans as discussed below.

Application for private plan exemption. The revised regulations make clear that an employer may not seek a private plan exemption for only a portion of its covered workforce and that all employees must be included in the private plan.

When coverage begins under private plans. The revised regulations make clear that coverage under a private plan begins for all employees no later than the first day of the first quarter immediately following the date of approval of the private plan exemption or on the date of hire of the employee for private plan already approved and in operation.

Financial eligibility test. The revised regulations indicate that employers with private plans may require an employee to provide verification of wages for purposes of determining whether that employee meets the financial eligibility requirements of MA PFML. In that regard, under the MA PFML law, employees are not eligible for MA PFML benefits unless they have earned enough in the past 12 months from a Massachusetts employer to meet the eligibility threshold for unemployment compensation benefits. This change is significant because in the first draft of the revised regulations, the DFML had proposed private plans would not be able to limit benefits based on the financial eligibility test and would instead have had to provide benefits to all employees regardless of whether they satisfied that test. The DFML changed the revised regulations to permit, but not require, private plan employers to rely on the financial eligibility test. The private plan employer may request verification from an employee on past earnings but will not be able to obtain such data from the DFML or MA Department of Revenue.

Private plan term of approval. The original regulations provided that approved exemptions would be effective for one year and had to be renewed annually. The revised regulations now provide that the DFML may establish a shorter or longer term of approval of the private plan when it deems necessary. The regulations also indicate that if the DFML reduces the approval period of a private plan exemption, it will provide the private plan employer with 60 calendar days' prior notice.

Termination of private plan. The revised regulations also now make clear that if a private plan is terminated, the termination will be effective on the first day of the first quarter following the date of termination or non-renewal. The original regulations provided that an employer that does not renew a private plan must continue to provide and pay benefits under the private plan for the entire duration of leave prior to the effective date of termination. The revised regulations now make clear that upon termination or non-renewal private plan benefits must be continued for requests for leave filed with the private plan administrator with a start date commencing prior to the effective date of termination or non-renewal. The revised regulations also provide that in the case of intermittent leave, the private plan must continue coverage until the end of the employee's benefit year. The revised regulations also indicate that the same principles will apply when an employer terminates participation in the state program and transfers to a private plan. That is, the DFML will continue to provide paid leave benefits to employees for the entire leave duration for leave filed with the DFML prior to the effective date of an employer transferring from the state plan to a private plan. The revised regulations also make clear that if an employer switches from one insurance carrier to another, they must ensure that there are no gaps in coverage.

Private plan appeals process. The revised regulations now require that private plans must provide for an appeals process with the private plan administrator before an employee can exercise a right of appeal with the DFML.

Amount of benefits under a private plan. The revised regulations provide that the weekly benefit amount and leave allotment for an employee covered by a private plan will be based on the covered individual's average working week and the wages with the private plan employer rather than total average weekly wages. This is a

very helpful change for private plan employers who will not have access to information about other wages earned at other employees.

Former employees. The revised regulations contain extensive provisions indicating how claims by former employees will be handled by employers with private plans. The regulations indicate that employees who have been separated from the private plan employer for less than 26 weeks shall file claims as follows:

1. If the individual remains unemployed on the date that an application for benefits is filed, the individual should submit the claim to their former employer; and
2. If the individual has a new employer at the time the application for benefits is filed, the individual shall submit an application for benefits with the new employer.

This was an important clarification for private plan employers and ensures that former employees who obtain employment at a new employer will draw their MA PFML benefits from their new employment. The revision will also prevent potential “double dipping” of the former employee from their prior employer and current employer’s plans. Note that under the MA PFML, if an employee is collecting unemployment this will be offset against the available MA PFML benefit.

6. Filing of application for benefits

Applications for benefits with the state program may not be filed more than 60 days prior to the start of the leave and employees must provide notice to their employers of the need for leave before submitting an application.

The revised regulations make clear that an individual who participates in the state program may file an application for benefits with the DFML no more than 60 calendar days before the anticipated start date of the family or medical leave. The revised regulations also provide that employees must give notice to their employer of the need for family and medical leave prior to filing the application for benefits with the DFML and that the DFML will not accept an application for benefits unless the employee has provided prior notice to the employer absent exigent circumstances.

The revised regulations now contain a provision stating that the DFML may allow an employer or its designee to submit an application for benefits on behalf of an employee. In order to do so, the employer or its designee (i.e., a leave administrator) must be approved by the DFML and agree to adhere to all requirements regarding the processing of claims.

7. Treatment for substance use disorders

Employees may seek treatment for addiction issues and to provide support for covered family members seeking treatment.

The revised regulations now contain a provision dedicated to leave for substance use disorders. Under the revised regulations, leave is available for treatment of substance use disorders and care of a family member who is receiving treatment, but leave is not available related to use of the substance. The revised regulations also make clear that regardless of the right to leave for treatment, employers may take employment action based on substance use, under established, non-discriminatory policies. This is a welcome clarification to the draft regulations which stated that substance use disorders are not serious health conditions absent inpatient hospital care or complications. The revised language better aligns with the federal FMLA and provides the

ability for employees to seek treatment for addiction issues and to provide support for covered family members seeking treatment.

8. Rules regarding processing of intermittent leave

Employers must provide monthly wage reporting to the DFML and employees must verify hours of leave taken each week.

The revised regulations have added provisions relating to the processing of requests for payment for intermittent leave. The regulations provide that for each request for payment associated with intermittent leave, the employee must verify with the DFML the hours of leave taken each week in order to receive benefit payments.

The revised regulations also now include a provision stating that employers must furnish information to the DFML of wages paid to an employee on a monthly basis or at other intervals deemed necessary by the DFML, and that the DFML may seek a refund from the employee or offset future benefit payments where the DFML determines that the employee has received wages or from both the employer and from the state PFML program. This provision is intended to prevent an employee from reporting a day of intermittent leave to the DFML in order to receive MA PFML benefits when, in fact, the employee was already paid by the employer for that period of time.

The regulations also provide that the benefit year for an employee who has received benefits for an intermittent leave will begin following an approval by the DFML of the application for continued benefits on the Sunday immediately preceding the first absence following the exhaustion of the prior benefit year.

9. Employer rights

The revised regulations contain new provisions that grant employers certain rights related to an employee's approved leave. These new provisions include the following:

- An employer may seek a medical certification of the employee's serious health condition following the expiration of an initial period of incapacity cited in the healthcare certification or where an intermittent leave has extended for a period of more than six months from the approval by the DFML, whichever occurs first.
- If an employee's use of approved intermittent leave is inconsistent with the DFML's approval, it will not be considered retaliation for an employer to request additional information related to the use of leave.
- The non-retaliation provisions of the MA PFML do not limit an employer's ability to reasonably communicate with an employee who is approved for leave benefits.
- A "negative change" for purposes of the presumption of retaliation does not include "trivial" or subjectively perceived inconveniences that affect de minimis aspects of an employee's work.

- If an employer gives the DFML notification of a bona fide belief that, the employee has committed fraud in connection with an application for benefits this does not give rise to an action of retaliation or presumed retaliation.
- A negative change resulting from an employer' application of preexisting employment rule or policy is deemed to be clear and convincing evidence sufficient to rebut a presumption of retaliation.

10. Employee rights – Job protected leave

Leaves for qualifying reasons are job-protected even if an employee does not apply for benefits.

The revised regulations provide that employees are entitled to the job protection and anti-retaliation provisions of the MA PFML if they take leave for a qualifying reason even if they do not submit a claim for MA PFML benefits. In addition, this job protected leave will run concurrently with leave available under the MA PFML. These provisions are very significant changes to the original regulations. Employees now get the job protections of MA PFML if their leave is for a qualifying reason regardless whether they file for an application for MA PFML benefits but this leave – whether paid or unpaid – will reduce their available PFML allotment.

11. Employees with multiple employers

The revised regulations make clear that an individual with multiple employers is not required to take PFML from each employer during a single period of paid family or medical leave.

Find the final Massachusetts Paid Family and Medical Leave regulations [here](#).

Read more about MA PFML by visiting our website at www.sunlife.com/mapfml.

Join us for a [webinar on August 13, 2020 at 2:00 p.m. ET](#), to learn more about the final regulations, and next steps for Clients to comply and be ready for January 1, 2021.

Consider Sun Life as your private plan administrator. Call your Sun Life employee benefits representative or Client Relationship Executive.

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