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Massachusetts Paid Family and Medical Leave Law: How to Comply With Upcoming Deadlines

By June 30, 2019, employers must provide individualized notice to each employee (and potentially each contractor) in the state.

In 2018, Massachusetts enacted the Paid Family and Medical Leave (PFML) law, which provides a right to up to 26 weeks¹ of combined family and medical leave in each benefit year, and pay during such leave, to eligible employees, former employees, and self-employed individuals in Massachusetts. All private employers in Massachusetts are covered. Pay during such leave is administered by the state and funded through employer and employee-funded contributions that employers must remit to the state on a quarterly basis. The earliest that such leave and pay benefits will be available is January 1, 2021.

This *Client Alert* focuses on the upcoming deadlines and the following four steps that employers should consider to meet the compliance requirements:

1. Post conspicuous notice of the PFML law in the workplace
2. Provide individualized notice to employees and covered contractors and obtain written acknowledgement by June 30, 2019
3. Begin payroll deductions by July 1, 2019, and remit contributions each quarter
4. File for a private plan exemption by September 20, 2019, if desired

1. Post Conspicuous Notice of the PFML Law in the Workplace

Employers must conspicuously post in each workplace in Massachusetts a notice of leave and pay benefits available under the PFML law. The notice must be posted in English and in each language other than English that is the primary language of at least five workers of that workplace, if the notice is available from the Massachusetts Department of Family and Medical Leave (the Department) in such language.

The Department currently maintains a [PFML mandatory workplace poster](#) in multiple languages, including: English, Arabic, Chinese, French, Haitian Creole, Italian, Khmer, Korean, Lao, Portuguese, Russian, Spanish, and Vietnamese.

2. Provide Individualized Notice to Employees and Covered Contractors and Obtain Written Acknowledgement by June 30, 2019

Timing and Recipients

By June 30, 2019, and thereafter within 30 days of hire, employers must provide individualized notice in writing to all employees in Massachusetts. This includes any employee to whom the employer issues an IRS Form W-2 for performing services in the state, whether full-time or part-time, and whether the employee is regularly employed or employed on a seasonal or temporary basis.

In addition, self-employed individuals who reside in Massachusetts and whose payments are required to be reported on an IRS Form 1099-MISC (“contractors”) are also entitled to individualized notice by June 30, 2019, *only if* such contractors are individuals and represent more than 50% of the employer’s total workforce (both employees and contractors combined) in the state (“covered contractors”).

Put more simply, if an employer has more contractors than employees in Massachusetts, then the contractors are covered contractors entitled to notice by June 30, 2019, just like employees. Thereafter, new covered contractors are entitled to individualized notice at the time they enter into a contract for services.

Even if an employer does not engage enough individual contractors vis-à-vis the number of employees in the state to render the contractors covered contractors entitled to notice, the Department encourages employers to provide notice of the PFML law benefits to all contractors in Massachusetts, to make them aware that they may opt in.

Delivery of the individualized notice is deemed completed only when the employee or covered contractor provides his or her written acknowledgement of receipt, or signs a statement indicating his or her refusal to sign such acknowledgement. It will not be sufficient to merely provide notice by the deadline. Accordingly, employers should obtain each employee’s and covered contractor’s written acknowledgement of, or written refusal to acknowledge, the individualized notice by June 30, 2019.

If an employee or covered contractor fails to acknowledge receipt, the Department will consider the employer to have fulfilled its notice obligation if it can show there was an opportunity to acknowledge or decline to acknowledge receipt in writing.

Employers should modify their onboarding processes in Massachusetts to ensure that all new employees and newly engaged covered contractors are timely provided the required notice. The failure to provide proper notification may result in a \$50 fine per employee or covered contractor upon a first violation and a \$300 fine per employee or covered contractor for subsequent violations.

Content and Form of Individualized Notice

Individualized notice must be provided in writing and contain specific information provided or approved by the Department in the employee’s or covered contractor’s primary language and must contain an explanation of rights, the contribution amounts, the employer’s name and mailing address, and other required information. Such notice may be in paper form or electronic.

The Department has made available two form notices — [one for employees](#) and [one for self-employed individuals](#) — for employers to use to fulfill such notice obligations. The Department currently maintains such forms in English, Arabic, Chinese, French, Haitian Creole, Italian, Khmer, Korean, Lao, Portuguese,

Russian, Spanish, and Vietnamese. Employers who wish to use their own forms are permitted to do so, provided the required information is included.

The Contribution Amounts

As noted above, each individualized notice must state the covered individual's contribution amount and the employer's contribution amount, if any. The contribution amounts will depend on the following considerations:

For whom is the individualized notice being prepared?

An employer's obligation to withhold and/or remit contributions is limited to employees and covered contractors. An employer is not obligated or permitted to withhold or remit contributions on behalf of contractors who are not covered contractors; however, employers may, and are encouraged to, provide individualized notice to such contractors. If an employer does provide notice to non-covered contractors using the Department's form for self-employed individuals, the employer should check the box indicating that the employer is not a covered business entity under the law, and no contribution amounts should be designated.

What is the size of the employer's workforce in the state?

The size of an employer's workforce in Massachusetts will determine whether the employer is responsible for funding a portion of the Total Contribution Amount (as defined below). Employers who employ fewer than 25 employees and covered contractors in the state are not required to fund any portion of the Total Contribution Amount. Employers who employ 25 or more employees and covered contractors in the state are required to fund the employer portion (60%) of the Medical Leave Contribution (as defined below).

Contractors who are not covered contractors (as defined above) are excluded when assessing an employer's size under the PFML law. When counting employees and covered contractors, count the average number of such workers from the prior calendar year (January 1 to December 31).

What are the contribution rates and would the employer like to voluntarily pay for any portion of the Total Contribution Amount?

The PFML law will impose a 0.63% tax on earnings (the Total Contribution Amount) beginning July 1, 2019. Of the Total Contribution Amount, 82.5% is the medical leave contribution component (82.5% of 0.63%, or 0.52% of earnings) (the Medical Leave Contribution), and the remaining 17.5% is the family leave contribution component (17.5% of 0.63%, or 0.11% of earnings) (the Family Leave Contribution). These rates are expected to change from year to year, as the Department's director is tasked with fixing the rate for each upcoming calendar year by October 1 of the preceding year.

An employer can require that the employee and covered contractors pay for up to 40% of the Medical Leave Contribution and up to 100% of the Family Leave Contribution through payroll deductions. An employer may, however, alleviate all or some of the burden otherwise borne by the employee/covered contractor, by agreeing in the individualized notice to fund the Total Contribution Amount (which may be reduced by 60% of the Medical Leave Contribution depending on the employer's size), or a portion of such amount.

To illustrate the contributions due under the PFML law, for every \$1,000 paid to an employee or covered contractor:

- The Total Contribution Amount is \$6.30, of which the Medical Leave Contribution is \$5.20 and the Family Leave Contribution is \$1.10.
- An employer may require the covered individual to pay the entire Family Leave Contribution (\$1.10) and 40% of the Medical Leave Contribution (\$2.08) through payroll deductions, or the employer may voluntarily fund some or all of such contributions.
- No one is required to pay the remaining employer portion (60%) of the Medical Leave Contribution (\$3.12) if the employer has fewer than 25 employees and covered contractors. But if the employer has 25 or more employees and covered contractors, the employer is required to pay such amount, which cannot be borne by the employee/covered contractor.

Contributions are capped at the Social Security wage cap, which is updated annually. The cap for 2019 is \$132,900. At this contribution cap, the maximum annual Total Contribution Amount is \$837.27.

Examples

To illustrate some of the concepts discussed above, including when an employer's contractors are covered contractors, how to determine an employer's size, and the effect of such determinations on the employer's notice and contribution obligations, consider the following three examples:

Example 1

In the prior calendar year, an employer employed an average of 25 W-2 employees performing services in Massachusetts and engaged an average of 20 individuals on a Form 1099-MISC basis who resided in Massachusetts. Because the contractors do not represent more than 50% of the employer's total workforce, the contractors are not covered contractors. This means (i) the employer is required to remit contributions for its Massachusetts employees only, and (ii) with a workforce of 25 (comprising 25 employees and no covered contractors) in the preceding year, the employer is not exempt from the obligation to pay the employer portion (60%) of the Medical Leave Contribution. The employer is obligated to timely remit to the state 100% of the Medical Leave Contribution and 100% of the Family Leave Contribution for its current employees in the state, and the employer can require that up to 40% of the Medical Leave Contribution and up to 100% of the Family Leave Contribution be fully paid by such employees through payroll deductions. All employees in the state must receive individualized written notice by June 30, 2019, and the employer is encouraged, but not required, to provide individualized written notice to its contractors residing in Massachusetts as well.

Example 2

In the prior calendar year, an employer employed an average of 12 W-2 employees performing services in Massachusetts and engaged an average of 13 individuals on a Form 1099-MISC basis who resided in Massachusetts. Because the contractors represent more than 50% of the employer's total workforce, all contractors residing in the state are covered. This means (i) the employer is required to remit contributions for all employees and contractors residing in Massachusetts, and (ii) with a workforce of 25 (comprising 12 employees and 13 covered contractors) in the preceding year, the employer is not exempt from the obligation to pay the employer portion (60%) of the Medical Leave Contribution. The employer is obligated to timely remit to the state 100% of the Medical Leave Contribution and 100% of the Family Leave Contribution for its current employees and contractors in the state, and the employer can require

that up to 40% of the Medical Leave Contribution and up to 100% of the Family Leave Contribution be fully paid by such employees and contractors through payroll deductions. Individualized written notice is required to all employees and contractors in Massachusetts by June 30, 2019.

Example 3

In the prior calendar year, an employer employed an average of 15 W-2 employees performing services in Massachusetts and engaged an average of 15 individuals on a Form 1099-MISC basis who resided in Massachusetts. Because the contractors do not represent more than 50% of the employer's total workforce, the contractors are not covered contractors. This means (i) the employer is required to remit contributions for its Massachusetts employees only, and (ii) with a workforce of 15 (comprising 15 employees and no covered contractors) in the preceding year, the employer is exempt from the obligation to pay the employer portion (60%) of the Medical Leave Contribution. The employer is obligated to timely remit to the state 40% of the Medical Leave Contribution and 100% of the Family Leave Contribution for its current employees in the state, and the employer can require that all contributions be fully paid by such employees through payroll deductions. All employees in the state must receive individualized written notice by June 30, 2019, and the employer is encouraged, but not required, to provide individualized written notice to its contractors residing in Massachusetts as well.

3. Begin Payroll Deductions by July 1, 2019, and Remit Contributions Each Quarter

Under the PFML law, employers are required to remit the Total Contribution Amount for employees and covered contractors to the state on a quarterly basis through their MassTaxConnect account. Contributions for earnings paid to employees and covered contractors in the July 1 through September 30, 2019, period are due by October 31, 2019.

To the extent the employer requires its employees and covered contractors to fund any portion of the Total Contribution Amount (*i.e.*, up to 40% of the Medical Leave Contribution and up to 100% of the Family Leave Contribution), such withholding from payroll must begin on July 1, 2019.

If an employer chooses to fully fund the Total Contribution Amount, no deductions from payroll are required. In this case, the employer is required to fully fund and remit the Total Contribution Amount (*i.e.*, 0.63% of total earnings, less 60% of the Medical Contribution Amount for small employers, in the July 1 through September 30, 2019, period) for all employees and covered contractors, if any, by October 31, 2019.

4. File for a Private Plan Exemption by September 20, 2019, if Desired

An employer may already provide or may wish to provide paid medical and/or family leave benefits to covered individuals. The PFML law allows employers to apply for an exemption from the obligation to collect, remit, and pay contributions if the employer maintains a private plan that provides the same or better rights, protections, and benefits afforded by the PFML law. Employers may apply for an exemption from the Medical Contribution Amount, the Family Contribution Amount, or both components of the Total Contribution Amount, by applying for such an exemption each year through the employer's MassTaxConnect account. The deadline to file a private plan exemption for the first quarter contributions is September 20, 2019.

If you have questions about this *Client Alert* or other questions about the PFML law not addressed here, please contact one of the authors listed below or the Latham lawyer with whom you normally consult:

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Endnotes

¹ The PFML law provides for up to 12 weeks of family leave (but up to 26 weeks to care for a covered service member) and up to 20 weeks of medical leave in each benefit year, subject to a maximum of 26 weeks of combined family and medical leave in a benefit year.