

# Massachusetts Paid Family and Medical Leave: Ready or Not, Here it Comes!

Suzanne W. King  
October 6, 2020

## Agenda

- Overview of leave benefits
- Policy considerations
- Applicability of PFML to COVID-19-related absences
- Procedural reminders



## OVERVIEW OF LEAVE BENEFITS



## Refresher on Leave Benefits

- Effective January 1, 2021
  - Up to **20** weeks of medical leave for employee's serious health condition
  - Up to **12** weeks of family leave to bond with a child or because of qualifying exigency
  - Up to **26** weeks of family leave to care for a family member who is a covered service member
- Effective July 1, 2021
  - Up to **12** weeks of family medical leave to care for a family member with a serious health condition
- Aggregate total = 26 weeks/benefit year

## PFML Leave Allotments



## Serious Health Condition

- “Serious health condition” means:
  - (a) inpatient care in a hospital, hospice, or residential medical facility; or
  - (b) continuing treatment by a health care provider
    - Incapacity and treatment
    - Pregnancy or prenatal care
    - Chronic conditions
    - Permanent or long-term conditions
    - Conditions requiring multiple treatments
- Treatment by a health care provider includes a telehealth visit (as well as an in-person visit)
- A substance use disorder may be a serious health condition; but absence because of the employee’s use of the substance, rather than for treatment, does not qualify for leave

## Family Member SHC vs Bonding Time

- **Total of 12 weeks** per benefit year to:
  - Care for a family member with a serious health condition
  - Bond with your child during the first 12 months after birth, adoption, or foster care placement
  - Care for a family member who is a covered service member because of a qualifying exigency arising out of active duty or impending call to active duty in the Armed Forces
- Not 12 weeks for each reason up to 26 weeks!

## Leave for Birth and Bonding



## A Few Details

- Leave allotment per *benefit year*
  - The period of 52 consecutive weeks beginning on the Sunday immediately preceding the **first day** that job-protected leave commences for the individual
    - Backward looking vs forward looking
    - If your FMLA policy is backward looking, ok to leave that as is
  - Example: Employee on leave for heart condition beginning on 3/15 for 3 weeks and then again on 6/1 for 8 weeks.
    - On 3/15, the first day the leave commences is 3/15
    - On 6/1, the first day the leave commences is still 3/15, so the employee has already used 3 weeks against the 20-week allotment

## A Few More Details

- Law requires various leaves to run *concurrently*
  - **Recommend taking full advantage of this!!**
- Intermittent leave available for:
  - employee’s own SHC if medically necessary
  - bonding time if employer and employee mutually agree
  - qualifying exigency
  - family member’s SHC or care for covered service member if medically necessary

## PFML, MPLA, & FMLA

	PFML	MPLA	FMLA
<b>Eligibility</b>	Subject to unemployment insurance benefits; work in MA; meet financial eligibility test; and comply with the benefit claim procedures	Full-time who has worked at least three consecutive months	Worked at least 12 months, at least 1,250 hours during 12 months before leave, and employed at a worksite with 50 or more employees within 75 mile radius
<b>Leave Benefits</b>	<ul style="list-style-type: none"> <li>• Up to 20 weeks for employee’s serious health condition</li> <li>• Up to 12 weeks to: care for family with serious health condition; bond with a newborn or newly placed child; or to care for qualifying exigency</li> <li>• Up to 26 weeks to care for a family who is a covered service member with a serious illness or injury</li> <li>• Aggregate total of no more than 26 weeks</li> </ul>	Up to 8 weeks <i>per child</i> for birth or placement of child for adoption (i.e., 16 weeks for twins, etc.)	<ul style="list-style-type: none"> <li>• Up to 12 weeks for employee’s or family’s serious health condition; childbirth, placement of child for adoption or foster care; qualifying exigency</li> <li>• Up to 26 weeks to care for family who is a covered service member</li> </ul>
<b>Benefit Year</b>	A period of 52 consecutive weeks beginning on the Sunday immediately before the first day of leave	Substantially close to birth or placement	A 12-month period (e.g., rolling backward or forward, calendar, etc.)

## PFML, Parental Leave, & FMLA

	PFML	MPLA	FMLA
<b>Pay During Leave</b>	Weekly benefits are calculated, using the state average weekly wage, with the maximum weekly benefit at 64% of the state average weekly wage, as determined each year	Not required	Not required
<b>Substitution/ Supplement</b>	Employees may choose to use accrued paid leave rather than receiving PFML income benefits (note: leave will run concurrently if the employee is notified of such)	Employees may choose to use accrued paid leave	Can require use of accrued paid leave
<b>Interaction with Other Leave</b>	Run concurrently if for the same qualifying reason	Run concurrently if for the same qualifying reason	Run concurrently if for the same qualifying reason

## Reductions in Benefits from the Department

Unless the aggregate amount exceeds the average weekly wage, the weekly benefit amount for a period **shall not be reduced** by the amount a covered individual receives from:

1. a temporary disability (**STD or LTD**) policy or program of the employer;
2. a paid family or medical leave policy of the employer (i.e., **paid parental leave**); or
3. any wages received from another employer

**In other words, employers can supplement PFML with paid parental leave or STD with no reduction in benefit up to 100% of average weekly wage!**

## Substitution of Accrued Paid Leave for Benefits from the Department

In contrast to STD and paid parental leave:

- Accrued paid leave cannot supplement PFML
- **In other words, use of accrued paid leave replaces PFML**

*Accrued paid leave* means sick time, vacation, and/or PTO but not STD or paid family leave

## Example of Rules for Reduction vs Substitution

Assume employee makes \$1800 per week; has 4 weeks of PTO; is eligible for STD which covers 60% of pay up to a max of \$2000 per week; and works for an employer that does not have a private PFML plan. He has requested 3 weeks of PFML leave for a hernia repair surgery.

1. State PFML benefit = \$850 per week
2. STD will pay an additional \$230 per week, with *no reduction* in PFML benefits
3. Total paid under PFML + STD = \$1080 per week
4. As an alternative, employee can choose to use 3 weeks of PTO in order to receive full pay, but cannot supplement the \$1080 per week with PTO
5. If PTO is used for a hernia repair, the 3 weeks counts against the 20-week allotment



## Birth on January 15, 2021. How much PFML leave is available?

- Up to 18-20 weeks for birth and bonding
  - 6-8 weeks of medical leave for employee's own serious health condition
  - 12 weeks of bonding time (i.e., family leave for the birth)
- Additional 6-8 weeks remaining for other types of leave in the benefit year
- This is in addition to any unused vacation or sick time available under those policies

## Birth on October 1, 2020. Is employee still eligible for PFML leave on January 1, 2021? **YES!**

- Paid parental leave taken prior to January 1, 2021 cannot be retroactively designated as PFML leave.
  - Of course, in October, she will have MPLA available (8 weeks), which will run concurrently with FMLA if eligible
  - Those leaves will be exhausted by the end of 2020
- PFML allows parental leave **during the first 12 months** after birth or placement for adoption or foster care, so no barrier to using PFML beginning 1/1/21
  - So, 12 weeks available for bonding as of 1/1/21

## Birth on December 10, 2020: How much PFML leave is available?

12/10-12/31

- 3 weeks MPLA
- 3 weeks FMLA

Beginning 1/1/21

- 5 weeks of MPLA
- 9 weeks of FMLA
- 15 -17 weeks of PFML (3-5 SHC + 12 bonding)

## POLICY CONSIDERATIONS



## PFML Policy

- Eligibility
- Reasons for and lengths of leave
- Maximum leave per benefit year
- Definition of serious health condition
- Interplay with other leave(s)
- Intermittent leave or reduced leave schedule
- Notice of leave
- Pay during leave
- Substitution of employer-provided paid time off
- Supplementing leave benefits, if available
- Continuation of benefits during leave
- Returning to work
- No retaliation



## Other Leave Policies

### Review current policies

- FMLA, Sick Time, MA PLA, Medical, Personal Leave
  - Clearly indicate leave runs concurrently with PFML to the greatest extent possible
- PTO or Vacation Time Policy
  - Cannot require use of vacation or PTO during PFML
  - But, specify that vacation/PTO does not accrue during PFML
  - Explain substitution rules (can substitute but not supplement if using state plan)
  - Clarify that any leave for PFML-qualifying reason will be counted against leave allotment under PFML even if PTO/vacation is used

## Short Term Disability

Do you still need STD for MA employees?

- Consider \$850/week max under state plan – how many of your employees make more than \$66,000?
- Consider duration of current STD/LTD benefits – if you currently cover 26 weeks, going to 20 weeks will be a takeaway

But, also consider the cost of providing both PFML and STD

## Paid Parental Leave

**IF** you offer a paid parental leave policy now, consider:

- Do you still need it after PFML leave goes into effect?
  - Do you have employees in other states?
  - Do you currently provide more than 12 weeks of paid parental leave?
- Do you want PFML and employer-provided paid parental leave to run concurrently?
  - Recommend having employer-provided paid parental leave **supplement** PFML

## Options for Existing Employer-Provided Paid Parental Leave

Assume employer policy currently provides 6 weeks of paid parental leave for men and women for *bonding*:

1. Employer policy supplements PFML to provide 100% pay for 6 weeks;
2. The 6 weeks of pay under employer policy supplements more than 6 weeks of PFML (i.e., using the dollar value the employer would have spent on 6 weeks of 100% pay until it is fully exhausted)
3. Employer policy is available after PFML is exhausted (for a total of 18 weeks of paid bonding leave, i.e., PFML + employer-provided)
4. Get rid of employer-provided paid parental leave

Not addressing the overlap between PFML and employer-provided paid parental leave may give employees an argument that they can have both sequentially!

## PFML vs Employer-Provided Parental Leave for Bonding

Assume employee earns \$1000 per week and current employer-provided parental leave policy provides 100% pay for 6 weeks:

- Employer currently will pay \$6000 in total
- PFML state plan will pay \$715 per week, for a total of \$4290
  - Employer can supplement the \$715 per week up to a total of \$1000 for 6 weeks (total cost = \$1710)
  - Or, employer can supplement the \$715 up to a total of \$1000 per week for the full 12 weeks (total cost = \$3420)
  - Or, employer can permit use of its policy after the PFML (total cost = \$6000, but ee is out for a total of 18 weeks for bonding)
  - Or, employer can eliminate employer-provided paid parental leave

## Retaliation

- **Presumption of retaliation:** Any negative changes in the seniority, status, employment benefits, pay, or other terms or conditions of employment of an employee:
  - Which occurs any time during a PFML leave or **during the 6-month period following the leave**
- **Rebutting the presumption:** **clear and convincing evidence** that employer had **sufficient, independent justification** for taking such action and would have in fact taken such action in the same manner and at the same time
  - Manage performance on a timely basis!!
  - Document performance management

## APPLICABILITY OF PFML TO COVID-19 RELATED ABSENCES



## Leave Available for A COVID-19 Related Medical Condition

COVID-19 diagnosis likely considered "serious health condition"

- Up to 20 weeks for employee's own diagnosis
- Up to 12 weeks to care for a family member diagnosed with COVID-19 (effective July 1, 2021)

## PFML for COVID-19 Related Absences (Non-Medical)

### Leave Available

- If child is < 12 months and day care is not available due to pandemic, up to 12 weeks available for "bonding time"

### Leave Unavailable

- Federal, state, local business closure order
- Federal, state, local, health care provider self-quarantine order/recommendation with no symptoms

## PROCEDURAL REMINDERS



## Employee Notice Requirements

- At least 30 calendar days' notice to employer or as soon as practicable if delay is beyond employee's control
- Follow employer's usual and customary notice and procedural requirements for leave, absent unusual circumstance
- Can be required to contact a specific individual to request leave
- Must notify employer prior to an application to the Department
- The Department may delay or deny benefits for employee's failure to comply with the notice requirements



## Planning Medical Treatment

- Employee must consult with the employer in advance of an application to the Department
- Must make a reasonable effort to schedule treatment so as not to disrupt unduly the employer's operations, subject to approval of a health care provider



## Employee Application to the Department

- Must file an application for benefit with the Department, using forms prescribed by the Department
- May file an application no more than 60 calendar days before the anticipated start date of leave
- Must be supported by a certification supporting that the leave is for a qualifying reason
- The Department will be accepting applications for paid family leave to bond with a child starting on December 2, 2020. (Benefits can be taken starting on January 1, 2021.)

## Reimbursement from the Department

- Employers are eligible for reimbursement
  - For payments made to an employee during PFML leave that are equal to or greater than the weekly benefit amount that the Department would have paid
- To qualify for reimbursement, payments must have been made from the employer's:
  - temporary disability (STD or LTD) policy or program;
  - paid family or medical leave policy (including paid parental leave); or
  - extended illness leave bank
- Reimbursement is not available for employers with an approved private plan
- Reimbursement not available for sick, vacation time

## Renewal of Fully Insured PFML Exemption

- Current exemption is for period from October 1, 2019 through December 31, 2020.
- The Department will start accepting renewal applications on November 20, 2020.
  - Renew exemption in MassTaxConnect
  - Provide your policy form number via an Insurance Declaration signed by your carrier on or before December 31, 2020
- If no intention to renew, contact the PFML Contact Center (617-466-3950) or send e-message via MassTaxConnect

## Renewal of Self-Insured PFML Exemption

- Current exemption is for the period from October 1, 2019 through September 30, 2020.
- Submit a renewal application in MassTaxConnect before September 30, 2020, with:
  - A copy of the required revised surety bond form with the bond amount calculated; and
  - A self-insured declaration document
- CY 2021 bond formula
  - Family leave exemption required surety amount
    - \$6,000 \* (total workforce/25)
  - Medical leave exemption required surety amount
    - \$10,000 \* (total workforce/25)
  - Combined exemption required surety amount
    - \$16,000 \* (total workforce/25)
- If no intention to renew, contact the PFML Contact Center (617-466-3950) or send e-message via MassTaxConnect



## Presenter

Suzanne W. King  
sking@pierceatwood.com

100 Summer Street  
22nd Floor  
Boston, MA 02110

One New Hampshire Avenue  
Suite 350  
Portsmouth, NH 03301

PH / 617.488.8159