



FOLEY  
HOAG LLP

A photograph of a desk setup. A blue folder is on the left. A gold clip is on top of a white document. A black pen with a gold tip is on the right. The document has the text 'FAMILY LEAVE' and 'EST FORM' visible.

FAMILY LEAVE  
EST FORM

# Massachusetts Paid Family and Medical Leave

Christopher Feudo and Erin Olesen

- Coverage and Exclusions
- Contributions and Deductions
- Employee Benefits and Employer Obligations
- Interaction with Other Leaves, including Reimbursement
- Exemptions



- **280-attorney firm founded in 1943** with offices in Boston, New York, Paris and Washington DC
- Focused on providing **senior-level attention** to each client
- Practice mix comprises a powerful blend of **regional, national and international expertise** and clients
- Long history of attorneys working together effectively to ensure that clients in diverse industries benefit from our **collective expertise**, receiving **comprehensive advice** in an **efficient** manner

## Industries served



Cannabis



Education



Energy, Cleantech & Climate



Healthcare



Investment Management



Life Sciences



Professional Services



Sovereign Governments



Technology

- Passed Summer 2018 – Grand Bargain to avoid ballot question
- Benefits funded thru state trust fund
  - Payroll Deductions + employer contributions → fund → wage replacement
  - Employers can opt out *if* equivalent plan
- Most employees eligible for paid family and medical leave; self-employed opt in
  - Definitions for *types* of leave – largely parallel FMLA (20 weeks medical)
  - Eligibility much broader – counts pay from previous employees
  - Independent Contractors covered if misclassified
- Contributions started in October 2019
- Benefits begin January 2021 – fully available July 2021

- Virtually ALL employers with Massachusetts employees
  - [“If you employ Massachusetts workers, you'll be required to comply”](#)
- “Covered Business Entity” – Company that engages high proportion of independent contractors
  - Number of MA ICs – more than 50% of MA Workforce
  - Note – ICs count only if they do not meet UI IC test
- Employees must meet a financial eligibility test
  - earnings in the past 12 months equal or exceed 30 times weekly benefit amount and >\$4,700
- Does not need to have worked for same employer – or even be employed – just in MA
  - Pay attention with new employees! If from MA may be eligible

- Excluded employment parallels unemployment statute
  - Churches, certain religious organizations
  - Railroad industry
  - Newspaper sales and delivery
  - Commission-only real estate brokers, insurance agents
  - Student and trainee workers for non-profit or public institutions
  - NOTE that some exclusions by *type* of work not entity
  - Excluded entities (e.g. religious orgs) may be able to opt in
- H-2A visa holders (seasonal agricultural workers) also excluded

- General rule of thumb: if covered by unemployment, covered for PFMLA
  - Careful – unemployment may involve cross-state agreements
- Employees covered when:
  - Service localized in MA
  - Service is NOT localized anywhere else but:
    - Base of operations in MA
    - No base of operations, but place from which service is directed or controlled is in MA
    - No base of operations or place from which service is directed or controlled , but employee lives in MA and performs some work in MA
- Ongoing questions – remote work

- ICs must meet financial eligibility test and work for “Covered Business Entity”
- ICs will not be included if they qualify as an IC under MA Unemployment Statute
  - Test is different than under Wage Act
- IC must also live AND work in MA
- Self-employed ICs can still elect coverage
  - Have contributed for 2 of last 4 completed quarters
  - Commit to contribute for at least 3 years





- Professional Employment Organizations (PEOs) often provide human resources, payroll, and other services for small/medium sized businesses.
- Often – employer of record for taxes
- Under PFML – PEOs should file individual filings for each client, never a consolidated return including all clients.

- Contribution percentage – kept at 0.75% through September 2021
  - 17.5% family leave contribution
  - 82.5% medical leave contribution
  - Up to Social Security Cap
- Employers with <25 exempted from medical leave portion – keep in mind if below but close to 25
  - Employer contribution 60% of medical leave otherwise
  - Employer can elect to cover employee portion

- Continue to notify new employees – within 30 days
  - Failure to do so – fines
    - \$50/per – first violation
    - \$300/per – after
- DFML has a [webpage](#) for reporting failure to notify and enforcement is ongoing
- Tax treatment of contributions and deductions not clear – no formal DFML position.
- As of October 2020, still awaiting IRS guidance – guidance on state PFML contributions listed as 2020 priority



Leave Reason	Maximum Amount
For the employee's own serious health condition	20 weeks
For the birth or placement for adoption or foster care of a new child	12 weeks
For care for a family member's serious health condition	12 weeks
For a qualifying exigency arising out of the fact that a family member is on active military duty or has been notified of an impending call or order to active duty in the Armed Forces	12 weeks
For care for a family member's serious health condition incurred in active duty serving in the Armed Forces	26 weeks

- 80% of wages up to 50% of State Average Weekly Wage (SAWW)
- 50% of wages beyond 50% of SAWW, max 64% of SAWW

- Job protection – reinstate to the same position.
  - If not available, an equivalent position with the same status, pay, employment benefits, length-of-service credit and seniority
  - Not required if job (or equivalents) unavailable due to reasons unrelated to leave – e.g. economy, COVID-19 closures
- Health insurance continuation at same level and conditions if had not taken leave
  - If changes unrelated to leave (e.g. new plan) – OK
- No retaliation – presumed if adverse employment action within six months of return from leave (rebuttable presumption)
- If self-insured plan (exemption) – must provide benefits, procedural protections, etc same as public plan

- Employees should *notify* Employer AND Department within 30 days or as soon as is practicable
  - Start and end date, type, length
- Employees submit *claim* to Department only
  - May require medical certification or other documentation
  - If self-insured plan, employer processes claim
- Right to appeal denial within 10 days

- Runs concurrently with FMLA, MA Parental Leave (unpaid), and Sick Leave
- May allow but not require employees to use accrued sick leave, vacation, or other paid time off
- Existing STD/LTD plans likely will not qualify for exemption
  - Carriers can coordinate STD and PFML to avoid double dipping
- Employee use of paid leave must be reported to DFML – will be deducted from total weeks eligibility.

- Employers who pay paid leave benefits during PFML-eligible period can receive reimbursement up to amount of PFML benefits employee would have otherwise received
- Only applies to employers participating in public plan
- Vacation and sick leave do not count – cannot be reimbursed
- STD, long-term sick leave “bank” are covered & reimbursable
- Mechanics of this still unclear



- Either self-insured or private plan (via carrier)
- Self insured – employer processes claims, pays benefits, etc
  - Another option – third party administration of plan
  - Bond amount required has decreased significantly – per **25 ees**, \$6,000 for family leave; \$10,000 for medical; \$16,000 combined
  - Self-Insured Declaration Document (SIDDD) also now required
- Private plan – carrier administers and pays claims; charges employer and/or employee
  - Be careful – cannot exceed employee deductions under state plan
  - Dept of Insurance has approved list of insurers offering plans
- Exemptions take effect in the quarter immediately following when exemption was granted – can still apply

- Developments are still ongoing – IRS’s 2020 Priority Guidance Plan – expected to address state PFML contributions and benefits
- PFML and COVID-19 – medical coverage starts as FFCRA leave ends; unclear if PFML will cover COVID-19
- Clarification from DFML on reimbursement payments?
- Possibility of Federal law?
  - Extension of FFCRA – question about interaction, reimbursement
  - Nationwide PFML – less likely in the immediate future



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