



May 24, 2019

Sent via email and in person

Mr. William Alpine, Director
Department of Family and Medical Leave
1 Ashburton Place
Boston, MA 02108

Re: 458 CMR 2.00 Department of Family and Medical Leave M.G.L. c. 175M

Dear Mr. Alpine:

Associated Industries of Massachusetts (AIM) is pleased to provide the following comments to the Department of Family and Medical Leave (DFML) regarding the above-mentioned regulatory proposal.

The Paid Family and Medical Leave Law as passed by the House and Senate and signed by the Governor represents a \$1 billion-dollar new Massachusetts program and tax on Massachusetts businesses and employees. Given the importance of this new benefit to employers and employees combined with the significant resources taken directly from employers, employees and tax dollars¹ to fund this program, we support and believe we must work toward a smooth and successful rollout of this program. A failed rollout would benefit no one.

AIM is committed to working with advocates, members of the business community, the legislature and the administration to support a successful roll out of this new law.

We are appreciative and recognize the coordinated work of several executive branch agencies including the leadership of Secretary Rosaline Acosta with the Executive Office of Labor & Workforce Development, Secretary Michael Heffernan with the Executive Office of Administration and Finance, Commissioner Christopher Harding with the Department of Revenue and numerous agencies and staff that have worked to establish the new Department of Family and Medical Leave.

In particular, we would like to highlight the work of the Executive Office of Labor & Workforce Development on this new program. The Secretary and senior staff have placed a significant amount of focus and urgency to create a new website, conduct a statewide listening tour to hear directly from businesses in their communities, to develop two drafts of regulations in addition to several other guidance documents and materials in addition to a newly updated and released FAQ document² to help businesses with compliance with this new law. Further, the ongoing collaboration with Secretary Acosta, senior staff and members of the business community has made a significant and positive impact on how our Commonwealth will implement the family and medical leave program.

That ongoing communication and collaboration resulted in a recent change that altered the departments original position regarding the roll out of the private option process and timing for

¹ First year cost for state to contribute is approximately \$18M in tax dollars for state employees:

<https://www.telegram.com/news/20190307/tab-for-paid-leave-for-state-employees-put-at-18-million>

² <https://www.mass.gov/info-details/frequently-asked-questions-paid-family-and-medical-leave-exemption-requests>

notification of employees. We would also like to express our appreciation for this recent regulatory guidance changes that the DFML made to allow for greater flexibility for some to consider opting-out of the state program and for employers that opt out, they need not provide benefits until the 1/1/21 effective date for benefits from the state program.³

However, even with those efforts and changes we remain very concerned about the successful launch of this program and would highlight the following concerns

1. **The timing and lack of private sector solutions currently:** Many of the existing private sector plans do not cover terminated employees or other factors related to the new law rendering the opt-out option unavailable to many employers that have historically offered generous benefits. This was a significant aspect of the negotiated law and given the timing many employers may not be able to utilize the opt-out in advance of the effective date.
2. **Notification of employees:** Many AIM members both large and small have expressed a commitment to developing a paid leave program that is compliant with the legislation, fiscally sound and supportive of their employees while still advancing the mission of their company, organization or non-profit in their community. As many AIM members look to develop paid leave programs, they are experiencing challenges in determining if they will select the state plan, a private fully-insured plan or a private self-insured plan. Specifically, the March 29, 2019 draft regulations are still insufficient to clarify requirements under private plans. If our members choose a private plan there are currently no fully insured leave products approved vendors in this market. Lack of product or vendors makes this impossible to calculate administration costs of a private plan at this time. While the extension of the employer exemption application to September 20, 2019 is helpful; however, the employee contributions and notice deadlines should align with the delay in exemption application. It appears backwards that employers provide employee notice of contributions/tax and possibly begin contributions prior to approval from the state. Many employers are trying to make fiscally sound decisions without the full regulations, without approved fully insured products for pricing, and lack of third party administrator/vendors to secure. AIM has heard these concerns from both large and small employers.
3. **The first year of the program as it relates to enforcement:** Similar to the earned sick time law, we would strongly urge that the first year of the program be focused on outreach, education, training and support for employers and employees. We would also urge that any agency charged with enforcement including the Department of Revenue, the Office of the Attorney General and the Department of Family and Medical Leave to provide clear guidance as to what enforcement would look like and what to expect. Given that enforcement could be conducted by three or more state agencies, we would urge that these agencies coordinate so that different enforcement standards are not implemented.

³ [Baker Administration Seeks to Address Critical Problem with Paid Family/Medical Leave](#)

4. **The underlying statute requires clarification and fixes:** The underlying statute and the resulting regulations are interconnected, and we know that further clarification of the underlying statute is necessary in order to ensure greater clarity in the regulations. The coalition letter recently filed with the legislature and the Governor prioritize an initial set of statutory clarifications to support implementation of this law. *(See coalition letter).*⁴

5. **The redrafted regulations:** We do recognize that improvements to the current draft regulations have been made based on feedback from the business community. Further, that recent legislative changes have clarified certain definitions through supplemental budgets as passed by the legislature and signed by the Governor. We do appreciate those efforts to provide clarity to the law and regulations. However, we do urge the DFML to consider AIM’s original comments to the original draft regulations since many of them are still applicable. *(See AIM’s written comments)*

6. **The department’s Small Business Impact Statement filing:** We would urge the Department of Family and Medical Leave to re-review the Small Business Impact Statement filed as part of the notice of the May 23 and May 24 public hearings.⁵ We are concerned that many of the answers to this document raise additional questions. As part of the overall review of the regulations we would encourage the DFML to review them with the Governor’s Executive Order 562 especially Section 6 in mind.⁶

For instance, a few excerpts from the department’s Small Business Impact Statement for 458 CMR 2.0:

Yes <input type="checkbox"/>	No <input checked="" type="checkbox"/>	Will small businesses have to implement additional recordkeeping procedures? Small businesses will need to track time of employees who use paid family or medical leave.
Yes <input type="checkbox"/>	No <input checked="" type="checkbox"/>	Will small businesses have to hire additional employees in order to comply with the proposed regulation? Small businesses whose employees are approved for paid leave may have to hire people to replace them.
Yes <input type="checkbox"/>	No <input checked="" type="checkbox"/>	Does compliance with the regulation require small businesses to hire other professionals (e.g. a lawyer, accountant, engineer, etc.)? The regulations do not impose any additional requirements on small businesses to engage professional service providers.
Yes <input type="checkbox"/>	No <input checked="" type="checkbox"/>	Does the regulation require small businesses to purchase a product or make any other capital investments in order to comply with the regulation?
Yes <input type="checkbox"/>	No <input checked="" type="checkbox"/>	Do any other regulations duplicate or conflict with the proposed regulation?

⁴ The Massachusetts Paid Family and Medical Leave Act has already been amended 3 times since signed into law.

⁵ <http://www.sec.state.ma.us/spr/sprpub/051719c.pdf>

⁶ <https://www.mass.gov/executive-orders/no-562-to-reduce-unnecessary-regulatory-burden>

Regarding specific feedback to 458 CMR 2.00:

Since the law was originally passed by the legislature and signed by the Governor, AIM has conducted several webinars with nearly 1,000 Massachusetts businesses, conducted several surveys of AIM members, conducted several statewide in-person human resource table discussions, fielded hundreds of questions through AIM's hotline, consulted with insurance carriers, consulted with benefits brokers, law firms and other trade and business associations that are all working to support employers efforts to comply with the law.

In our most recent webinar following the departments revised guidance on notification to employees and the process for opting out, we still had hundreds of questions. (*See Attached*)

From those conversations and feedback from AIM members, we would highlight the following issues comments and questions:

1. **Opt-Out process**, and if not approved what happens
2. **Auditing process** by DFML, DOR or Office of the Attorney General.
3. **1099 Notifications.** Of note would urge that this is a significant liability for employers especially since the Massachusetts Supreme Judicial Court ruled that the legislature needs to clarify the Massachusetts Independent contractor law(s).⁷ As reported, the ruling stated "Chief Justice Ralph Gants, joined by two other justices in a concurring opinion, said the state laws today about who is an independent contractor and who is an employee result in "confusion and uncertainty." "With so many different standards, it is difficult for employers to classify their workers properly, even where they intend to comply with the law," Gants wrote."
 - a. For example, we hire a law firm to perform services for us and contractors are more than 50% of our workforce. Do we make contributions to the state and deduct the employee portion? Wouldn't the law firm be making contributions for their employees as well based on their earnings? It appears that it could be a double tax. Also, if we hire Attorney Joe Smith, it makes sense that we could report earnings and contributions for Joe Smith. But, if we hire ABC Law Firm that employs 5 people, how would this be reported?
4. **1099:** Is the requirement to provide notice to **all** 1099 contractors or only if contractors comprise 50% or more of your workforce?
5. **Employer Bond:** The regulations currently lack guidance and companies that offer such services also lack proper information. One bonding company indicated: "*With no bond form available it is almost impossible for a surety company to know what they will be guaranteeing and therefore no bond products currently exist. That being the case, there is not a lot of interest until there is a form. For now it appears we are in a holding pattern regarding the bond as we wait for a form to be designed*"

⁷ https://www.masslive.com/politics/2018/05/sjc_justices_urge_lawmakers_to.html

6. **Tax Treatment:** Definitive guidance from IRS regarding tax treatment as pre-tax vs. post-tax treatment of contributions
7. **Contribution Amounts:** How frequently can a company change their contribution amount? Is a company locked in to an employer/employee split for 12 months or can this be changed on a quarterly basis?
8. **First Year:** What happens if a company pays into the state plan from July 2019 – December 2019 and then more private plans are available on the market? Can the employer apply for an exemption at that point? Will there be an opportunity for a refund of money paid to the state? Is there an annual “open enrollment” period where employers can decide between the state plan and a private plan?
9. **Request to add non-accrued paid time off:** Please add language to allow for employers to offer substitution of paid time off benefits that are not accrued. Section (8) only addresses “accrued” leave. Employers may offer other paid time off benefits that are not accrued such as frontloaded time off or unlimited time off.
10. **Request to allow employees to supplement state benefits with employer provided benefit:** The section addresses only full substitution whereas many employees may wish to supplement MA PFML with partial pay from available paid time off (e.g. personal illness, vacation) in order to receive in aggregate 100% of their average weekly wage. Consider language that would support this option for employers that wish to offer this option to employees. WA just passed Substitute House Bill 1399, page 17, section 8, permitting employers/employees this option for WA PFML.
11. **Paid time off:** Please add language to expressly permit employees to use all forms of paid time off that the employer wishes to make available to employees during the waiting period (e.g. vacation).
12. **Clarify from section xx.08 claim for benefits (8) Leave Allotments:** if an employee may take both 14 weeks of medical leave and 12 weeks of family leave in a single calendar year.
13. **Poster:** Will the Department of Paid Family Leave develop a new poster since the current one references employee contributions which may or may not be withheld?
14. **Notification:** Is there a requirement to re-issue the employee notification on an annual basis and obtain employee acknowledgement? What should an employer do if a sample notification is not available in the employee’s primary language?
15. **Less than 25:** Employers with fewer than 25 employees are confused by the wording of the contributions. Small employers have assumed that employees would be responsible for the full .63%

16. **Seasonal employers:** Many are struggling with how to calculate seasonality especially as they fluctuate close to the 25-employee count.

17. **Application Process and Denials:** We urge the department to clarify the regulation regarding the application process especially and would require the DFML to explain clearly the reasons for any application denial.

18. **ERISA Plans:** We urge the DFML to reevaluate the regulations in light of ERISA governed plans.

19. **Employee Location:** We urge the department to clarify instances when the program covers an individual. Please see the graph below which describes multiple scenarios, which employers need to figure out if these employees are covered or not. The recently passed legislation to clarify this issue may have addressed some of these questions, however the regulations need to be updated to reflect clear guidance.

Employer Main HQ STATE	Employer Satellite Office STATE	Employee Performs Majority of work in STATE	Employee Lives In STATE	Could Employee be Eligible for PFML?
Massachusetts	N/A	Massachusetts	Massachusetts	YES
Massachusetts	New Hampshire	New Hampshire	Massachusetts	
Massachusetts	New Hampshire	New Hampshire	New Hampshire	
Massachusetts	N/A	Massachusetts	New Hampshire	
New Hampshire	Massachusetts	Massachusetts	New Hampshire	
New Hampshire	N/A	New Hampshire	Massachusetts	
New Hampshire	Massachusetts	Massachusetts	Massachusetts	

20. **Annual application:** We would urge that the department remove the annual recertification process because the company is already required to notify the department with any material changes regarding the private plan.

21. **All Wages:** Clarification regarding “all wages” and wage reporting – Commissions bonuses or actual wages.

22. **Section 45S of the Internal Revenue Code:** Would urge that the regulations to clarify how the reimbursement will work and how to provide information about how the provision interacts with the family and medical leave credit under Section 45S of the IRC.
23. **College students:** While this may require a legislative change, like earned sick time regulations, this population was exempt.
24. **Collective Bargaining Agreements and multi-employer benefits plans:** The regulations do not address these issues and additional legislative changes are required to provide clarity.
25. **Concerned about the expansion of the definition of “healthcare provider”:** To strike the provision allowing medical professionals outside of the United States. This provision may prevent private sector insurers from wanting to participate in the opt-out plans.
26. **Regarding intermittent leave:** We would urge the department to clarify that the healthcare care provider must indicate that intermittent leave is recommended or required.
27. **Appeals process** needs further clarification.
28. **Reimbursement:** Statute indicates process for reimbursement of benefits paid by self-funded employers that make contributions to state trust but the regulations do not include mention of the process.
29. **Determining total employee count:** Need reasonable look back or reporting requirements especially for employers that hover around 25 employees to avoid the need to constantly alter PFML programs.
30. **Both parents work for the same employer/covered business entity:** Is there any additive effect as under the Parental Leave law, so that their combined leave cannot be more than a single covered individual’s maximum of 26 weeks in a benefit year?
31. **Job restoration:** Does someone that goes out on leave but never makes a claim have job restoration?
32. **Adverse action:** Would an employee that does not meet the attendance policy prior to any leave be eligible for an attendance bonus or would not providing it be considered an adverse action?
33. **Terminated employee:** Do terminated employees have job protection?
34. **Surety Bonds:** Can the regulations place a cap on the surety bonds?
35. **Operations:** Is there a max amount of workforce that can be out at the same time
36. **Contribution rate:** Can the regulations cap the rate?

We look forward to working with you and members of the Department of Family and Medical Leave in addition to the Executive Office of Labor & Workforce Development to achieve a clear set of regulations prior to July 1, 2019.

Should you have any questions please do not hesitate to contact me.

Sincerely yours,

A handwritten signature in blue ink that reads "Brad MacDougall". The signature is written in a cursive, flowing style.

Bradley A. MacDougall
Vice President for Government Affairs
Associated Industries of Massachusetts (AIM)

Questions from AIM Members During May, 2019 Webinar:

Could you explain further the concept of where a company will keep the employee deductions until the benefit start? The state is paying the employee, so I don't understand the need to potentially create a separate bank account for the deductions.
You are referencing these payments as deductions. Aren't they a tax?
Regarding Wage Replacement, how does 52,000 come to 84% replacement? 52,000 is 1,000 weekly. First portion is capped at 50% of SAWW or 691.71*80% plus additional 50% of remaining. I am showing that they would only receive 707.52 or 70.8%
Will the benefit be taxable?
is bonding on top of the 26 weeks or is it included?
if you are giving a signing bonus 6-12 months in advance of an employee starting would a possible leave fall under this signing bonus company?
If the "prospective" 1/1/21 letter from insurance company is issued in Sep '19, does that tie our hands to the incumbent and prevent a change of carriers in 2021?
When do we start withholding from EE? How is the Q1 contribution due 10/31/19? Are we forecasting who will be on the payroll in Q1 of 2020?
Will a PDF of this presentation be available to us?
We have 12 employees in MA and 69 in CT. Our corporate office is in CT. What size employer will we be considered?
Regarding the Employer Notice To Employee, there seems to be some ongoing confusion regarding whether or not you are required to obtain a signature from each employee or just give them the opportunity to sign an acknowledgement. Which is it? Also, does it make a difference if you are not passing the cost onto employees but instead covering 100% of it as the employer?
WORKERS THRU PLACEMENT AGENCIES WHO MAY BE WITH US FOR A FEW DAYS OR MANY MONTHS - DOES THIS APPLY TO THEM THRU US
So If you have a plan to file for an extension do you still have to take deductions as of 7/1/19 anyone?
So will people revise their Short Term plans to include Family paid leave-or will that be kept separate, and you can opt out of medical, but pay into the state for the Family leave
How do you process payroll deductions for a 1099 employee?
Can we deduct EE "contributions" from 1099 consultant payments to vendors living in MA?
Do we know if the deductions will be on a pre-tax or post-tax basis?

<p>If we decided to pay 100% of the contribution rates for medical and family, can we make changes to that in future? If so, how much notice would we have to give employees with regard to any new payroll deductions?</p>
<p>Off set with accrued sick time? How does this work?</p>
<p>The wage base being used is the social security but what type of taxable wages? Wages subject to social security or those that are subject to unemployment?</p>
<p>If we are applying for an exemption, do we have to take deductions and contribution to DPFML trust starting in July?</p>
<p>I have 3 employees in other states - may I enroll them to participate in Mass. PFML with the State also?</p>
<p>Can I opt out now and opt in later? What happens with contributions to DPFML if I don't opt in until later?</p>
<p>When I filled in the state online calculator, answering the 1099 question with a headcount of 2, the system stated that only W2 employee data was needed, is that because there is a higher min. number of 1099s requirement?</p>
<p>Any suggestions on how to respond to employees who have no family members that they would take leave for, but who we would be taxed for this benefit?</p>
<p>If we keep our STD policy, will employees be able to collect from both the STD and state plan?</p>
<p>When we distribute the Notice to Employees do we say that employees MUST return the acknowledgement by July 1?</p>
<p>If employer with less than 25 employees offers 3-month maternity leave with only 1 month paid can employee receive 3 month paid leave from state as well? so total of 4 months paid leave.</p>
<p>If I have a MA employee who is paid by two separate companies, does this employee have to pay into the plan from both?</p>
<p>What happens if an employee refuses to signed acknowledgment of receiving the notification?</p>
<p>Our 1099's are all for our Board of Directors (not employees) will this cover them as well?</p>
<p>Is there a cap in wages of \$132,900.00?</p>
<p>Could we opt-in initially and then opt-out at a later date?</p>
<p>Do we need to add a policy in our handbook?</p>
<p>We have a voluntary STD plan with no employer contribution. Please confirm this does not have any effect.</p>
<p>Where can I find out if it would be more cost effective to opt out?</p>

Regarding the July 1 start date for payroll deductions, are payments based on wages earned starting on July 1 or on wages paid on July 1 that might have been earned in June?
We have many EIN's associated with our MA locations. Do we need to list all of the EIN's on the employee notification or can we just indicate that employees should use their company's EIN under our parent company?
Can an employer offset the payment from the state so that the employee is made whole, but not "double dip"?
2 questions: 1: do we know yet if these deductions are before or after tax? and 2: If i have an employee that works in MA but lives in RI, do I have to make the deductions?
Will the slideshow be Emailed to participants? Great information with lots of checklists!
Does a business need to 'opt out' even if it is too small to be affected by the legislation.
Has there been any actuarial assessment regarding whether or not the .63% will cover the cost of the program?
If you plan to opt out and then a year later determine that you would not, would you need to pay the taxes that would have been paid if not opting out?
Employer Notice to Employee page 2 of 4 if the company is going 60% ER 40% EE on the Medical Leave page 3 of 4 if the company elects 0 is it 11% that is reported on the page that the employee is responsible for deductions?
if an employer opts out, how long does the top out last for, on year
If we have our own insurance plan, how do we cover employees when they leave? Isn't that part of the requirement?
If we have our own insurance plan, how do we cover employees when they leave? Isn't that part of the requirement?
If we have our own plan, how do we cover EEs when they leave?
We mailed out 26 W-2's last year due to turnover but only had a maximum of 20 employees working at once. Are we considered less than 25 employees?
will the deductions be pre-taxed?
when do you start deducting from new hires? immediately?
I assume you can withhold employee contributions beginning 7/1/2019 even if self insuring?
Will this PFML apply to individuals that live in MA but work in another state? (We have employees who live & work in MA, but others who live in MA and work in another state).

how do you determine how 1099 contractors effect our workforce. is it based on number of contractors per quarter, hours etc.
how do they determine contractors being able to opt into our plan
Will employers who receive an exemption have any payroll deductions refunded to them
Can you clarify who is an eligible 1099-Misc worker--just those residing in MA?
Can you apply for an exemption for just salaried and not hourly?
Is there a waiting period for intermittent time? And what is the minimum time that can be used? (ex.-1 hour or more?)
Regarding retaliation, are there exceptions for gross negligence?
A general question regarding employee job protection. We are an temporary employment service. Our assignments vary in duration. We do not have a leave policy for this reason. We can't hold a temporary job open. We can return employees to a similar position. Will this be an issue for us with the state?
How long does an employee need to be employed by company before they are eligible for PFMLA?
Would LTD also be included in the total benefit duration? Our STD is 12 weeks and LTD would pick up after that.
How do we handle the parole deduction if we expect to apply for an exemption? Do we deduct on 7/1 and then reimburse if application is approved?
I'm trying to understand the rational of having current, private, STD insurance and the state option. I know its open ended, but is the benefit for both coverages to be a more attractive benefit to the employee?
Are you suggesting that an STD policy or ASo STD program could be adjusted to meet the medical leave component of the law?
If we currently have over 25 people but later go to under 25 does that mean at that time the employer doesn't have to contribute 60%? If under what does the employer have to contribute
What happens if they refuse acknowledgement
So if we have fewer than 25 employees does the employee contribute the complete 100% instead of the 60/40 split
Can we get or download a copy of this presentation slides?
Is there an opt out option for owners of companies who are the sole shareholders of an S-corporation?
If you are applying for an exemption and get approved after July 1. Do you start deductions prior to exemption approval?
when will you know if the deductions are going to be before or after taxes?

Isn't it acceptable to advise an employee that the employer is thinking about a private plan and will update them?
Has the MA DFML announced that the payment date is 10/31/19? If so, do you know where that announcement can be found?
Are you suggesting that an STD plan can qualify as a private plan? It will have to cover absences for serious health condition and will be very limited in the amount of medical information that can be required and must permit intermittent leave and must pay benefits to all employees regardless of hours worked and must also pay employees for up to 26 weeks after they depart employment. (Along with a variety of other requirements).
If you have less than 25 employees and do not need to contribute the employer portion, and the employee is maxed, who pays the rest?
do we have a copy of the slides?
can you choose the state plan now then switch later with private option?
do we need to display all of them or have them available electronically on an employee portal?
does it run concurrent with FMLA and MA Parental?
If you opt out, can you opt back in later or vice versa.
what is the 1099-misc portion mean??
why 2 differing costs; medical vs family? how do you determine which to deduct for?
1099 subcontractors are not employees, they shouldn't be a part of the count?
we have not short term paid by the the company - but the employees do buy if they want one and pay for it themselves, how do we fit into this?
How would independently contracted sales persons, who may sell the products only periodically and are on a commission basis, and who would be "covered contract workers" because they comprise more than 50% of an employer's workforce, be handled in terms of deductions and contributions under the PFML? Commissions vary and in some commission, cycles may have zero income.
We are a company under 25 employees. When we opt out of the Medical leave portion does that raise the individual's share from 40 to 100% of the 52% payroll deduction?
What about employees covered under a Collective Bargaining Agreement.
If you have 1099 and they number fewer than 25 totals are they able to NOT contribute?

In other words, just to confirm there are no exceptions for any # of "employees" even if they are all 1099r's
Can you repeat the part about SS max starting July 1st? Did you say we start at zero then or is it YTD at that point?
Is the "refuse to accept" wording on the form? Or do we have to create a 2nd form?
So with the essential functions, are you saying we can get verification before they return from paid leave?
Do we know if deduction is pretax yet?
Will benefits used be taxable to employee? does it make a difference if employee pays some of the cost?
How does an employee file for a claim?
Can you mandate employee take earned paid sick time during waiting period before benefit payments kick in?
Do you think that these sessions will have any impact on if the state will delay the start dates?
Does the Notice (like the poster) need to be in the EEs primary language only if there are 5 or more EES who speak that language?
For companies that plan on covering the full cost of the contribution (therefore no deductions through payroll) would the company just calculate the the liability and remit the funds to the state? How will state validate the amount?
We have employees that are on NH unemployment but are paid out of MA and pay MA state tax. Would they qualify for this new MA law, since they pay unemployment in NH?
Who pays the employer Medical Leave portion when you have less than 25 employees
Former employees: Last 26 weeks prior to what date?
do non-profits have ability to select reimbursable method like UI
if we are located in MA but have employees who live in other states, are they entitled to this?
How will employer have access to who is eligible for PFL?
Are new hires eligible immediately after hire if they have met the earnings requirement from a previous employer?
How often is the average state weekly wage updated?

will benefits under disability or leave be taxable income at time of claim
Two questions: Is the person's average weekly wage gross or net?
We offer employees the option to purchase short term disability, but the Company does not contribute.
And I find it hard to believe that the state average weekly wage is $\$1383.41 * 52 = 71937.32$. Does that make sense?
can we ask for the anticipated frequency and duration for use of intermittent PFL?
Does the Dept. FML determine the qualifying purpose?
Do covered family members include step-parent, step-sibling, step-child?
Is there a limit on how many people can claim PFL to care for the same person?
I didn't think Massachusetts recognized "domestic partners" officially...?
I may be misunderstanding, but does this new law mean for an employee that makes say \$15.00 per hour, is eligible to now be PAID for the 12 weeks of FMLA?
How do you make FMLA coincide with MA PFML leave if the latter is likely triggered on a different date for each employee?
will employees simply look to take summers off?
Are the dates in that last example incorrect?
Is the waiting period 7 consecutive days?
What happens to health insurance during the leave period? Is the employee contribution still taken out of their leave checks?
You probably also said this, but will this be done like unemployment where the employee goes on the MA website to apply?
Can wer require employee to produce proof of relationship (since PFL can be provided to some many relationships). Specifically, proof of domestic partnership?

will this apply to STD as well if that benefit is paid by the employer?
Is the employer allowed to stop PTO accruals while an employee is out on PFML?
since implementation doesn't happen until 2021, while folks are paying in from 2019-2021, employers should still keep offering current STD to keep employees covered, right?
if leave runs concurrent with FMLA can we enforce the policy of requiring employees to take paid leave
Can we require PTO to be used during elimination period? I understand not during paid portion of leave, but I was curious if the EP was an exception.
MA sick time accrual is based on hours worked and if on leave how can sick time continue to accrue
What is needed for documentation from the employee when then come to an employer asking for this leave?
Is it expected that Short Term Disability insurance may phased out by most employers?
Is there a cap on how much an individual is required to contribute to the fund through payroll deductions (this is the case for NY PFL).
Honestly, this is not making too much sense. Do you have what the actual possible DOLLARS will be?
What provisions has the state made for employees who are tipped and do not have enough earned money to cover taxes?
Does the employee need to be full-time or is this available to all?
Is the 25 employee requirement MA employees only?
Do employees who work in another state remotely from their home have to pay?

Has ADP already figured out how to deal with this? And speaking of the Grand Bargain, do you know if they are also calculating holiday pay correctly at 1 and 4/5 rather than time and half starting in July?

EMAC is not through Mass Tax Connect, it is paid through Quest - so will this be paid by Tax Connect or Quest, can you please clarify, your comment

Contributions based on 2nd Quarter wages, or projected 3rd quarter wages?

Do employees need to begin paying in July this year as well as employers? Or only employers?

So is this basically a new tax on employees that they are charged, regardless of whether they use it or not?

The draft regs, those need to be posted to employees by the 31st??

Our paid medical leave requires employees to exhaust their sick time first (6 days), but there is no waiting period to use the benefit. Will this exhaustion of sick time make us not eligible for the reimbursement?

If we want to pay the tax for employees when will we elect that?

Is this paid leave for those who reside in MA or to those who work in MA - or both?

This only applies to those who physically work in MA, right? We have field sales people in other parts of the country.

How do small firms know how much to fund?

How do you handle someone who lives in NH but works in MA. Would they still be eligible because they work in MA?

I have an LLP with 6 owners and 25 employees; our employee headcount moves between 23-27. How will we apply the less than 25 rule? Per quarterly report?

would every employee be taxed including seasonal/variable employees?

Which employees are eligible for this leave: MA employees only? and full-time, part-time and temporary?

is the benefit received by the employee taxable income?

Do Employers collect from the employees effective July 1st?
Would per diem employees (ie Substitute Teachers) qualify for coverage?
Can I request FMLA for a family member (mother-father) who lives in another country?
Can you talk more about former employees' eligibility
Good afternoon - how does this effect employees who work in MA, but reside in other states, such as RI or NH?
How does this affect employers who have multi-state jurisdiction? Example: only 10 employees in MA with a full headcount of 70 EEs in company
If the company is located in mass but an employee lives in Florida do they qualify for this leave
can you limit the amount of employees who request the leave at the same time?
we are a staffing agency, how can we guarantee job if our client doesn't want them back?
If employee elects to use available paid-time-off to supplement FML, will that be accounted against the leave benefit?
If you cannot collect under both STD and PFLMA it would make sense for all employers who provide STD to discontinue benefit as they are paying for two separate programs am I understanding that correctly?
Is the tax that can be withheld on regular earnings only. No bonus or incentives?
If you are headquartered in MA, but have out of state employees, are those employees are eligible?
Will the owner of company be subject to the employee withholding from PR?
Employee payroll tax is paid in the appropriate states
do you think the rate will change in subsequent years per employer or will it be same rate .63 for all employers
We are a MA employer with offices in other states. Are they eligible?
Is PFL for employees who live in MA; or work in MA only? We have NH, RI and CT employees who commute to MA.

Would employees enroll in COBRA while they are on leave?
Does eligible employees include part time employees as long as they have met the unemployment insurance standard?
If we use a PEO (employer of record), do employees who live and work outside Massachusetts qualify for the MA PFML?
Benefits - What if your policy states you accrue PTO based on hours "worked"
Does the employer get any say if the employee can take the leave?
what will happen if/when when the "fund" runs out of money?
so state will manage the medical leave claims with follow up doctors, etc. like private insurers do now for STD
Who determines if there is really a compelling condition that qualifies a person for leave? For example, a medical situation requires HIPAA protection - does the state approve, or is it the employer (or agent)?
Do all employees contribute? and what if the employee never uses this benefit ?
I was asking about anticipated frequency and duration of flare ups..... I know for the most part, appts can be coordinated. Thank you!
would you assume all employee that have a new born during the last 9 months of 2020 will also be able to take off the first 12 weeks of 2021 to bond with their newborn
DPs are recognized. You can get a certificate.
Does/can the employer continue to pay wages during the 7 day waiting period.
Please send questions and answers out to participants. This Q&A is excellent, but I have to leave the session now.
If we only go over 25 employees two months of the year must we pay the .312 for those two months or the whole year?
if someone leave is coming to an end, the employer ask the employee to work from home & will get paid, would this cause issue with the benefits?
If we are a MA employer and have a store in NH with employees that live and work in NH. Do they have to pay into the fund

PFML adopts the definition of "wages" as per MGL 151A. Does Section 1 (B) thereof include employer contributions to 401k as "wages?" If so, is too broad a definition. As an employer with 39 employees, currently in process of developing a 401k plan and determining the level of employer contributions, having to include those contributions in the calculation of the Wages for PFML puts a chilling effect on employer 401k contributions and creates a "both or none" decision for employer. Attracting and retaining employees is improved through a generous 401k design, and such a requirement would negatively impact our retention and time to fill vacancies. Additionally, payroll system is not set up to include 401k contributions by employer in a wage calculation. This would create an onerous and unreasonable reporting burden on the employer. I suggest "gross earnings" instead. Thank you.

The DFML just posted a website Q&A that, by our reading, is FLAT OUT WRONG. But maybe we are missing something.

The posting states:

Are non-profit organizations, religious institutions, and colleges and universities employing students required to comply with the PFML law?

Yes. While the PFML law refers to and relies upon M.G.L. c. 151A in many respects, types of employment that are exempt under the unemployment law are covered for purposes of the PFML law.

DFML seems to be interpreting the law as saying that employment deemed exempt under the unemployment law is deemed covered under PFML. That does not appear to us to be consistent with the plain language of the PFMLA. As set forth in more detail below, the statute states that, to be covered under PFMLA, you must be in a type of employment that is “subject to” chapter 151A, the unemployment law. Thus, by definition, if a type of employment (such as employment of certain student workers) is not subject to the unemployment statute, it cannot be subject to PFMLA.

Here is a more detailed analysis:

The definitions section of the PFMLA (Section 1) defines a covered individual as an employee who meets the financial eligibility requirements of c. [151A](#), Sec. 24(a) provided that all such employment had been with an employer in the Commonwealth.

Employee is defined in the PFMLA as having the same meaning as in c. [151A](#), sec 1(h).

Employee is defined in c. [151A](#), Sec. 1(h) an any individual employed by any employer subject to this chapter and in employment subject thereto.

Employment is defined in c. [151A](#) as any service performed for wages or under any contract by an employee for his employer as provided in Sections 2, 3, 4A, 5, 6 and 8C.

- Section 2 addresses independent contractors.
- Section 4A addresses farm workers, domestic workers, religious workers and other miscellaneous workers.
- Section 5 deals with reciprocal arrangements with other states.
- **Section 6 is the relevant section here.** It provides that “the term ‘employment’ shall not include” certain enumerated activities. Subsection k of Section 6 provides as follows (emphasis added):

Service performed in the employ of a school, college, or university, if such service is performed by a student who is enrolled and is regularly attending classes at such school, college, or university, or by the spouse of such a student, if such spouse is advised, at the time such spouse commences to perform such service, that the employment of such

Clarification Issues for Applying Paid Family & Medical Leave (PFML)

5/2/19

Contributions/Employer-Employee Issues for July 1, 2019:

1. Assessment:

- a. Should organizations implement the assessment on July 1st or the first pay period/date in July?
- b. Does the fee that we can charge for medical leave need to be .312% and .208% or can it be rounded up to .31% and .21%?
- c. If this tax is based on the Social Security Wage base up to the first \$132,000 salary amount, shouldn't it run on a calendar year concurrent with tracking to Social Security? With it starting on July 1, there was some concern that it was understood to be run on a state fiscal year which would be incompatible with payroll systems. Wages are tracked by tax year.
- d. We need clarification on the Department of Family & Medical Leave (DFML) calculating the total quarterly contribution. Are employers sending an encrypted file to the state? Paper? What sort of data is required to be sent to the state?
- e. How should large systems with multiple organizations that have separate Tax Identification Numbers (TIN) / Federal Employer Identification Numbers (FEIN) track the assessment for employees who split time between those organizations?
- f. How will employers receive an invoice from the state on the tax due? Will it be detailed by employee or one lump sum? What if there is a discrepancy between the taxes due and what the employer believes their taxes due are?
- g. Will each entity that submits get a separate invoice by EIN number?

2. Collective Bargaining Agreements (CBA)

Our members working with CBAs have expressed significant concerns about the implementation of this law.

- a. With the law and regulations phrased as permissible and requiring that the law run concurrently with an existing CBA, will organizations be required to bargain the cost sharing? This would result in disparate treatment of employees in one organization.
- b. Given the timing to reopen a CBA and/or reach agreement with an existing open contract, is there an exemption for employees until it can be bargained?

c. For governmental providers whose contracts are not open, will they be subject to the mediation and fact-finding process or can we just bargain to impasse?

3. Tax issues:

a. Will the deductions from employees' paychecks be pretax or post tax?

b. Are the state benefits received (up to \$850) to be handled by the Commonwealth similar to unemployment income? It would appear that the benefit is described as income replacement, but we assume it should be treated for tax purposes as income.

Claims Process Issues

4. HR Concerns:

a. While the proposed regulations indicate that the state will provide notice to both the individual and employer of an approved claim, it appears the state is limiting the information to be provided to only the reason for the leave, duration of the leave, and expiration of the approved leave. There is no mention of the benefit amount that shall be paid during the approved leave. Employees will have questions about the amount they will be receiving. Letting both the employee know (similar to unemployment compensation) and the employer know the approved amount of the benefit will help employees and reduce the administrative burden on the Commonwealth to answer these questions. There also may be other benefit implications for the employee that would require the employer to know the benefit amount.

b. How will the state notify employers once a claim has been submitted? While the regulations indicate that there may be an electronic communication to employees (with paper as an alternative for persons lacking reasonable access to or the ability to use electronic communications), there is no information as to how employers will be able to choose an option and where the information will be sent.

c. While the regulations provide for a certification of the medical and family leave by the person applying for benefits, what is the process for the state to validate and will the approval by the state be submitted back to the employer as well for use as part of administering federal medical leave and other leave benefits to which the employee may be entitled? Will the state use the federal medical certification form so that there is only one form in use for both Family & Medical Leave Act (FMLA) and PFML??

d. While it is clear that the PFML will run concurrently with leave taken under FMLA, MA Parental Leave Act, and Earned Sick Time (EST) laws, there are various tracking requirements by the employer for each. So how will information be communicated to the employer and will there be a requirement to provide the state information on what other benefits are received by the employee?

e. The proposed regulations (pertaining to approval of payment for benefits) indicate that the state will list the information that will be provided to individuals and employers in the

approval notice. The list does not include what the average weekly wage is for either the claim or the awarded benefit. Can this be added to the notice?

f. Under the new PFML, how much time will be allowed for multiple births (i.e., twins, triplets)? The regulations are silent so will it be 20 weeks regardless of the number of babies born?

g. While the regulations provide some information on how an employee-paid short-term disability (STD) benefit coordinates with the PFML, it would be helpful to provide a bit more detail, including examples. Also given the delay in the regulations, many insurance carriers have not been able to finalize their products for Division of Insurance approval. Will there be a delay to the July 1st assessment start date if an employer is seeking an exemption? Would any consideration be given to delay the assessment by 3-6 months after July 1st?

In the draft regulations, page 25, section xx.12, the waiting period reads:

(7) Initial Seven Day Wait period. No family or medical leave benefits are payable during the first seven calendar days of an approved initial claim for benefits. The initial seven day waiting period for paid leave benefits will count against the total available period of leave in a benefit year. (this is in section xx.12 Weekly Benefit Amount)

Based on the definition of waiting period under Washington PFML, we want to confirm how the PFML waiting period for Massachusetts will work. In MA in order for an employee to meet the waiting period criteria, does the employee need to be physically absent from work continuously for 7 calendar days, or does the employee have to be absent for a period within a set 7 day period to be eligible for benefits? For example, an employee begins a leave on a Wednesday. Does that employee need to remain out of work continuously Wed, Th, Fri, Sat, Sun, Mon, & Tues to be eligible for MA PFML benefits OR if an employee starts a leave on a Wednesday that falls within a prescribed 7 calendar days (e.g. the preceding Sun through Sat) that would meet the waiting period requirement?

Also, it's still not clear to me if a birth mother would be entitled to medical leave for pregnancy disability followed by family leave to bond with the newborn. For example, for a normal pregnancy/deliver, would a birth mother be eligible for eight weeks of medical leave for her own condition followed by 12 weeks of family leave to bond with the newborn? Or, would the medical/family leave run concurrently so the birth mother would only be entitled to up to 12 weeks?

Could department amend the FMLA definition part to include the specific request to define employer by the FMLA definition rather than the FEIN definition? Defining employer by "FEIN" creates undesirable redundancies and confusion in more complex organizations (such as ours) where employees are co-employed by multiple affiliates with different FEIN's.

Specifically, the question is whether employee PFML contributions should be withheld from short-term disability (STD) benefits.

Currently, the draft regulations permit the employee contributions to be withheld from qualifying earnings, defined as:

- 1) *Wages paid to an employee*
- 2) *Payments by covered business entities to covered contract workers*

3) *Earnings from self-employment for self-employment individuals.*

The member company has indicated that insured STD benefits are treated as “wages” for federal wage tax withholding and employment tax purposes. However, that is as defined in the Internal Revenue Code and IRS regulations. So one cannot presume that an insured STD benefit would be considered “wages” for purposes of the Massachusetts PFML program.”