

Massachusetts Department of Paid Family and Medical Leave Releases New Draft Regulations

By Matthew D. Freeman, Brian E. Lewis & Matthew C. Chambers

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Meet the Authors



Matthew D. Freeman

Principal

617-367-0025

Matthew.Freeman@jacksonlewis.com



Brian E. Lewis

(He/Him)

Principal

617-367-0025

Brian.Lewis@jacksonlewis.com



Matthew C. Chambers

As the January 1, 2021, start date for [benefit availability under the Massachusetts Paid Family and Medical Leave Act](#) (PFMLA) looms, the Massachusetts Department of Family and Medical Leave (DFML) on May 8, 2020, released proposed amendments to its regulations governing the PFMLA.

The proposed amendments are consistent overall with the DFML's responses to inquiries made and input provided by the business community and members of the public, as well as Jackson Lewis attorneys, over the winter.

In addition to accepting informal comments on its proposed regulations, the DFML will hold a formal comment period before enactment and plans to schedule a public hearing, which may be virtual.

Further Guidance on Private Plan Exemption

The proposed amendments provide further guidance on the application and approval process for a potential private plan exemption to the law. This includes information on partial exemptions, timing, plan requirements, and plan administration and compliance.

Details of Benefit Application and Approval Process

The proposed amendments provide more information on the leave application process. For example, it clarifies that the seven-day waiting period for benefits is counted as initial consecutive calendar days for intermittent leave. They also state that there is no waiting period during the transition from pregnancy or recovery medical leave to bonding or family leave.

The proposals include a requirement for further substantiation of the need for leave for individuals applying for benefits. This includes proof their employer was notified of their need to take PFML. If the leave is due to a family member's serious health condition, that family member's name and Social Security number must be provided.

The proposed changes also contain a provision that allows (but does not require) employers to apply for benefits on behalf of employees. Many members of the business community inquired about this during listening sessions with the DFML.

Limitations on Paid Leave Reimbursement Clarified

The proposed amendments provide an important clarification on existing employer leave policies. They clarify that the limited basis on which employers may be eligible for reimbursement (available for paid leave provided to employees such that employees need not utilize state DFML benefits) must be *separate and in addition to* any sick leave, annual leave, personal leave, vacation time, or accrued paid time off (PTO) made available to employees. Accrued paid leave provided under an existing

(He/Him • Matt)

Associate

Matthew.Chambers@jacksonlewis.com

Related Services

Disability, Leave and Health
Management

sick leave, annual leave, personal leave, vacation time, or accrued PTO policy will *not* be eligible for reimbursement.

Retaliatory Employer Presumption Narrowed

The proposal amendments include a framework for courts to refer to in determining whether unlawful retaliation occurred. The framework addresses some of the concerns of the business community. Significantly, guidance on the six-month “retaliatory employer” presumption explains that the presumption applies whenever the employer makes a “negative change” in the terms and conditions of employment (such as status or pay) of an employee who has taken PMLA leave. The presumption can be overcome only by “clear and convincing evidence” that the change was not retaliatory and instead, is supported by independent justification.

The proposed changes clarify that trivial or subjective inconveniences that affect only *de minimis* aspects of an employee’s work are not considered a “negative change.” They also provide that application of a pre-existing employment rule or policy constitutes “clear and convincing evidence” to overcome the presumption. In addition, reporting a bona fide belief that an employee has committed fraud in seeking benefits to the DFML will not give rise to a presumption of retaliation.

Jackson Lewis attorneys will continue to monitor these developing changes and provide updates. Please reach out to a Jackson Lewis attorney if you would like to submit comments to DFML or have questions about this or other workplace developments.

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