



Massachusetts Paid Family and Medical Leave Law Covers Certain Independent Contractors

The Massachusetts Paid Family and Medical Leave law¹ (“PFML”) created a new paid family and medical leave benefit for Massachusetts employees and certain independent contractors who reside in Massachusetts.

This new law imposes PFML duties on an employer with respect to its Massachusetts employees and certain Massachusetts independent contractors.² It also imposes PFML duties on a “covered business entity” with respect to certain Massachusetts independent contractors. The definitions for key terms, such as employer, employee, and employment are drawn from the state’s unemployment statute, ALM GL ch. 151A.

Massachusetts will begin collecting contributions into a trust fund to provide for such benefits on October 1, 2019.³ Draft PFML regulations were issued on March 31, 2019.⁴

I. Coverage Under the PFML

The PFML regulations, at section xx.01(2), provide that the new law applies to “Massachusetts employers and covered business entities and to Massachusetts covered individuals....” For these purposes, the regulation provision states:

an employer or covered business entity shall be considered a Massachusetts employer or covered business entity with respect to services performed by a covered individual for the employer or covered business entity, and a covered individual shall be considered a Massachusetts covered individual with respect to all services provided within, or both within and without the commonwealth for an employer or covered business entity [pursuant to special rules for allocating multi-state service to a specific state⁵].

(Emphasis added).

The foregoing indicates that only services performed “for” the specific entity at issue are taken into account for purposes of determining whether the entity is a Massachusetts employer or

¹ Mass. Ann. Laws ch. 175M, §§ 1 – 11 (effective January 1, 2019).

² Special rules apply with respect to members of the Armed Forces.

³ The implementation date initially was July 1, 2019, but it was delayed by three months. See, <https://www.mass.gov/info-details/calculate-your-paid-family-and-medical-leave-contributions>.

⁴ The draft regulations are available at https://www.mass.gov/files/documents/2019/03/29/3-29-19%20Draft%20Regulations%20for%20Public%20Comment_0.pdf.

⁵ The proposed regulations, at xx.01(2), provide that a covered individual shall be considered a Massachusetts covered individual with respect to all services provided within, or both within and without the commonwealth for an employer or covered business entity, if

covered entity. This suggests that when an entity engages an individual to perform services for a third-party client, such services would not be considered for these purposes.

Two key relationships for purposes of the PFML are between an “employer” and “employees” and “covered contract workers,” and between a “covered business entity” and “covered contract workers.” Each is discussed below.

A. Employers and Employees and Covered Contract Workers

The statute, at new Mass. Ann. Laws ch. 175M, § 1, defines the term “employee” (subject to certain exceptions) as having the same meaning as provided in Mass. Ann. Laws ch. 151A, § 1(h), namely, “any individual employed by any *employer* subject to this chapter and in employment subject thereto” (emphasis added).

The term “employer” is defined (subject to certain exceptions) as having the same meaning as provided in Mass. Ann. Laws ch. 151A, § 1(i), namely, “any *employing unit* subject to this chapter...” Mass. Ann. Laws ch. 151A, § 8 provides that an employing unit “shall be subject to ... this chapter [if it] [h]as employed in *employment* subject to this chapter on some day in each of thirteen weeks ... in any ... year at least one individual.” Mass. Ann. Laws ch. 151A, § 1(j) defines “employing unit” to mean “any individual or type of organization ... which has ... one or more individuals performing services for him or it within this commonwealth.” Mass. Ann. Laws ch. 151A, § 1(k) defines “employment” to mean “service, including service in interstate commerce, performed for wages or under any contract, oral or written, express or implied, by an employee for his employer as provided in this section and in sections two, three, four A, five, six and eight C.”

The foregoing indicates that for an “employer” to be covered by the PFML, it must have at least one employee performing services for it within the Commonwealth of Massachusetts.

Mass. Ann. Laws ch. 151A, § 2 adopts the following “ABC” test for purposes of determining whether the services an individual performs constitute “employment”:

Service performed by an individual, except in such cases as the context of this chapter otherwise requires, shall be deemed to be employment subject to this chapter irrespective of whether the common-law relationship of master and servant exists, unless and until it is shown to the satisfaction of the commissioner that—

(a) the service is localized in the commonwealth. Service shall be deemed to be localized within the commonwealth if the service is performed entirely within the commonwealth, or the service is performed both within and without the commonwealth, but the service performed without the commonwealth is incidental to the individual's service within the commonwealth; for example, is temporary or transitory in nature, or consists of isolated transactions.

(b) the service is not localized in any state, but some part of the service is performed in the commonwealth and (i) the individual's base of operations is in the commonwealth or, if there is no base of operations, then the place from which such service is directed or controlled, is within the commonwealth, or (ii) the individual's base of operations or place from which such service is directed or controlled is not in any state in which some part of the service is performed, but the individual's residence is in the commonwealth.

- (a) such individual has been and will continue to be free from control and direction in connection with the performance of such services, both under his contract for the performance of service and in fact; and
- (b) such service is performed either outside the usual course of the business for which the service is performed or is performed outside of all the places of business of the enterprise for which the service is performed; and
- (c) such individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed.

The failure to withhold federal or state income taxes or to pay workers compensation premiums with respect to an individual's wages shall not be used for the purposes of making a determination under this section.

(Emphasis added).

A "covered contract worker" is defined as "a self-employed individual for whom an employer or covered business entity is: (i) required to report payment for services on IRS Form 1099-MISC; and (ii) required to remit contributions to the Family and Employment Security Trust Fund pursuant to [new Mass. Ann. Laws ch. 175M, § 6]." This definition is circular. New Mass. Ann. Laws ch. 175M, § 6 provides that an employer or covered business entity is required to make a PFML contribution with respect to an employee or "covered contract worker." But the provision does not identify any criteria that a self-employed individual must satisfy in order for an employer or covered business entity to be required to make a contribution on the individual's behalf.

B. Covered Business Entities and Covered Contract Workers

New Mass. Ann. Laws ch. 175M, § 1 defines the term "covered business entity" to mean "a business or trade that contracts with self-employed individuals for services and is required to report the payment for services to such individuals on IRS Form 1099-MISC for more than 50 per cent of its workforce." The term "self-employed individual" is defined in new Mass. Ann. Laws ch. 175M, § 1 to mean "a sole proprietor, member of a limited liability company or limited liability partnership or an individual whose net profit or loss from a business is required to be reported to the department of revenue; provided, however, that such individual resides in the commonwealth."

The foregoing indicates that an independent contractor will qualify as a "self-employed individual" for purposes of the PFML, if the individual, during the previous calendar year: (i) resided in Massachusetts, and (ii) was required to file a Massachusetts business income-tax return (i.e., earned net business income for the calendar year of at least \$600 that was taxable in Massachusetts).⁶

⁶ The Massachusetts Department of Revenue, at <https://www.mass.gov/service-details/learn-about-business-and-professional-income>, provides: "If your net profit from self-employment is \$600 or more, you need to file and report your net profit or loss from a business."

The statute does not define the term “workforce.” The regulations define the term narrowly. The regulations provide that the determination of whether a person constitutes a “covered business entity” for purposes of the PFML is made each year and is based on the following fraction (the denominator of which represents the “workforce”), expressed as a percentage:

$$\frac{\text{total number of self-employed individuals with whom the business or trade contracted for services during each pay period in the previous calendar year and was required to report the payment for such services on IRS Form 1099-MISC}}{\text{total number of self-employed individuals [in numerator] + total number of employees, including full time, part-time, and season employees, that the business or trade employed during each pay period in the previous calendar year}}$$

If the percentage is >50%, the entity is a “covered business entity” presumably for the current calendar year.⁷

The regulations define the term “workforce” (the denominator) as excluding anyone outside of Massachusetts and any independent contractors who do not earn at least \$600 during the calendar year. This means that for an out-of-state company, with no Massachusetts employees, that does business with a few independent contractors who (i) reside in Massachusetts, (ii) perform services in Massachusetts, and (iii) earn at least \$600 during a calendar year, the calculated “percentage” will always be 100% – even if the company has hundreds of employees and does business with thousands of independent contractors outside of Massachusetts. The statutory language does not appear to support this interpretation.

The regulations add significant administrative burden and complexity to the calculation by requiring a company to count individuals for purposes of the fraction on a pay-period by pay-period basis. Thus, in calculating the numerator and the denominator, a company with bi-weekly pay periods will need to make 26 separate calculations and then add them all to calculate the total for the year. This will require a very fact-intensive analysis to determine the specific pay periods for which a self-employed individual can be counted. For example, consider a company that engages a self-employed individual during pay period #1, the individual performs services during pay period #s 2-3 and receives payment for the work during pay period #4. It is not clear how to determine the pay periods for which the individual is to be counted. Neither the statute nor the regulations define the term “contracted for services,” which is the term the regulations use to describe the self-employed individuals to be counted as providing services during a pay period for these purposes. The statute does not appear to contemplate such a burdensome and complex calculation.

Neither the statute nor the regulations contain a *de minimis* threshold. Thus, a literal reading of the statute and regulations suggests that an employer or covered business entity with at least one covered contract worker providing services in Massachusetts or one Massachusetts employee who performs services in Massachusetts would need to comply with the PFML with respect to that individual. Whether an out-of-state company that contracts with only a few independent

⁷ The regulations, interpreted literally, indicate that a determination made in year 2 is based on the above-referenced fraction using data from year 1, and that the determination is effective for year 3. Regulation section xx.03 defines the numerator and the denominator as based on data for the “previous” calendar year and states that the determination is effective for the “following” calendar year. Thus, assuming the current year is year 2, the calculations would be based on data for the “previous” year (year 1), and the determination will be effective for the “following” year (year 3).

contractors to provide minimal services in Massachusetts, where each earns only an amount slightly above \$600 during a year, would have sufficient nexus with the Commonwealth for it to assert jurisdiction over the company is an open question.

II. Required Contributions Under the PFML

New Mass. Ann. Laws ch. 175M, § 6(a) requires an employer and a covered business entity to remit to the Family and Employment Security Trust Fund specified contributions for each employee and covered contract worker.

New Mass. Ann. Laws ch. 175M, § 6(b) provides that a self-employed individual *who elects PFML coverage*⁸ is responsible for all PFML contributions owed based on that individual's income from self-employment.

With respect to PFML contribution amounts, new Mass. Ann. Laws ch. 175M, § 6 provides that the department of family and medical leave shall specify the PFML contributions rates each year for the medical-leave portion and the family-leave portion of required contributions. Contributions are required with respect to a covered individual's earning not exceeding a specified wage-based limit.

New Mass. Ann. Laws ch. 175M, § 6(c) provides that for the *medical leave* portion, an employer (or covered business entity) can deduct up to 40 per cent of the contribution required for an employee (or covered contract worker) from that employee's wages (or covered contract worker's earnings), and shall remit the full contribution required to the trust fund. For the *family leave* portion, an employer (or covered business entity) can deduct up to 100 per cent of the contribution required for an employee (or covered contract worker) from that employee's wages (or covered contract worker's earnings) and shall remit the full contribution required to the trust fund.

A special rule, at new Mass. Ann. Laws ch. 175M, § 6(d), provides that an employer employing less than 25 Massachusetts employees (for these purposes, self-employed individuals are treated as "employees") are not required to pay the employer portion of premiums for family and medical leave, and need only remit the employee (or covered contract worker) portion of such contributions. The special rule does not apply to a covered business entity.

III. Required Disclosures Under the PFML

New Mass. Ann. Laws ch. 175M, §4 requires each employer and covered business entity to post in a conspicuous place on each of its premises a specified workplace notice prepared or approved by the department describing the PFML benefits available. It also requires each employer to issue to each employee not more than 30 days from the beginning date of the employee's employment, specified written information concerning the PFML that is provided or approved by

⁸ Section 2(j) provides that a self-employed individual may elect coverage and become a covered individual for an initial period of not less than 3 years by filing a written notice of election with the department and making the required contributions to the Family and Employment Security Trust Fund. A self-employed individual who elects coverage is not eligible for benefits until that individual has made such required contributions for at least 2 calendar quarters of the individual's last 4 completed calendar quarters.

the department. Finally, the provision requires each covered business entity to provide to each self-employed individual with whom it contracts, at the time such contract is made, specified written information concerning the PFML that is provided or approved by the department.

An employer or covered business entity that fails to comply with the foregoing disclosure requirements is subject to the following penalties:

- for a first violation, a civil penalty of \$50 per employee and per self-employed individual with whom it has contracted, and
- for each subsequent violation, a civil penalty of \$300 per employee or self-employed individual with whom it has contracted.

IV. Compliance Timeline

The following is a compliance timeline the department of family and medical leave provided at <https://www.mass.gov/guides/prepare-for-paid-family-and-medical-leave#-step-2:-determine-your-2018-massachusetts-workforce->

- Hang up your PFML poster
- By Sept. 30, notify your covered individuals in writing of PFML law and benefits
- Beginning Oct. 1, make payroll withholdings based on contribution rates
- By Jan. 31, 2020, complete quarterly filings and submit contributions through MassTaxConnect

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If you have any questions or would like to discuss the foregoing, please contact us at info@iecoalition.org.

The foregoing is intended solely as general information and may not be considered tax or legal advice; nor can it be used or relied upon for the purpose of (i) avoiding penalties under any taxing statute or (ii) promoting, marketing or recommending to another party any transaction or matter addressed herein. You should not take any action based upon any information contained herein without first consulting legal counsel familiar with your particular circumstances.