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Massachusetts Department of Family and Medical Leave Finalizes Revised Regulations: Here's What You Need to Know

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Earlier this spring, the Massachusetts Department of Family and Medical Leave (the "Department") issued revised regulations for Massachusetts Paid Family and Medical Leave ("MAPFML"). The regulations impact employers contributing to the state fund and employers seeking a private plan exemption. The MAPFML becomes effective January 1, 2021. This post outlines the major changes to the final regulations and, if relevant to your organization, can be read in conjunction with our companion post addressing the changes to the private plan exemption requirements.

The Regulations Revise Definitions of Key Terms

"Covered Contract Worker" – The initial regulations created significant confusion about whether an employer was required to remit contributions and provide benefits to its independent contractors. The new regulations now codify the Department's guidance on this topic, making it clear that a worker who is properly classified as an independent contractor under M.G.L c. 151A § 2 is not a "covered contract worker" within the meaning of MAPFML. The revised definition also clarifies that a "covered contract worker" must perform services for an employer as an individual entity and reside within Massachusetts. If an individual is properly classified as an independent contractor, he or she is not considered part of an employer's workforce for purposes of MAPFML eligibility. However, as many Massachusetts employers are aware, properly classifying workers as independent contractors is a particular, and sometimes difficult analysis.

"Intermittent Leave" – The revised regulations clarify that the Department will not provide benefits for intermittent leave of less than 15 minutes. Note that employers may continue to increment amounts consistent with their existing established policies. An employee cannot apply for payment of benefits for intermittent leave from the Department, until the employee has taken at least 8 hours of accumulated leave, unless more than 30 calendar days have passed since the employee initially took leave.

Significant Changes are Made to Private Plan Exemptions Requirements

Partial Exemptions - While an employer may still apply for a private plan exemption for only medical leave, only family leave, or both medical and family leave, an employer *cannot* apply for an exemption for only part of its workforce. All of an employer's employees and covered contract workers must be entitled to benefits under a private plan in order for the Department to approve an exemption request. The revised regulations make clear that employers cannot offer private plan benefits to only exempt or highly paid employees, for example.

Calculation of Benefits - Employers must calculate an individual's benefit amount at the time the employee applies for benefits (i.e., based on the employee or covered contract worker's then-current wages or qualified earnings). If an individual is working for multiple employers at once, the benefit to which the employee is entitled, will be calculated separately for each employer or covered business entity.

Private Plan Appeals Process – A major change to private plan applications is the inclusion of an internal appeals process, which must provide employees and covered contract workers with a means to appeal a decision about benefits prior to exercising their appeal rights with the Department. The requirements of a private plan appeals process include:

- The private appeals process must give an individual at least 10 calendar days to file an appeal from the receipt of notice of a determination;
- The private plan appeals process must extend a 10-calendar day filing period where an individual establishes that circumstances beyond the individual's control prevented the filing of a request for an appeal within the initial 10-day filing period;
- An employer is also required to provide a notice to the individual concerning any determination under the private plan as part of the appeals process. The notice must detail the individual's rights both under the private plan and the state's MAPFML leave; and
- After engaging in an internal appeals process, employees still maintain their right to appeal to the Department or in a district court. If an employee files an appeal through the Department, employers have five business days to furnish the individual's application and related documents to the Department. Any decision by the Department is then binding on the employer or third-party private plan administrator.

Decision Not to Renew A Private Plan, Dissolution, Acquisition or Merger – The revised regulations provide guidance on what an employer should do in the event it chooses not to renew a private plan, or it dissolves, merges into another entity, or is acquired by another entity:

- An employer or covered business entity that does not renew or decides to terminate a private plan exemption must report prior wages and qualified earnings to the Department for the four quarters immediately preceding the termination date of the exemption. The employer or covered business entity must also comply with specified notice obligations.
- An employer or covered business entity that dissolves or undergoes an acquisition or merger after having received approval for a private plan must notify the Department within 60 calendar days of the dissolution, merger or acquisition, or as soon as "reasonably

practicable" with "sufficient documentation" to allow the Department to determine the effective date of termination of the private plan. The employer must also list all employees and covered contract workers who are affected, and provide the name and Federal Employer Identification Number of any acquiring entity that will be assuming employees or covered contract workers affected by the dissolution, acquisition or merger. If a private plan is not renewed, employers must coordinate collecting and remitting contributions to pay into the state fund.

Clarity is Added to the Application for Benefits Process

Requirement to Notify an Employer – The Department makes clear that an employee's application for benefits from the Commonwealth will not be approved unless the applicant has first notified the employer or covered business entity of the need for leave. If an applicant does not follow the notice requirements outlined in the regulations or the employer's own notice procedure, and no unusual circumstance explains the reason for having failed to provide such notice, benefits may be delayed or denied. Employees or covered contract workers must submit proof that notice was submitted to their employer or covered business entity in advance of taking leave, which includes the date notice was provided to the employer or covered business entity. This revision will help employers effectively manage their workplace demands and quell any employer concern that an individual would seek and be granted benefits from the state without the employer's knowledge.

Employers or Covered Business Entities May Apply for Benefits on Behalf of Individuals – The Department is permitting employers, covered business entities or applicable designees to submit an application for benefits on behalf of a covered individual. This is likely a lifted burden for applicants attempting to navigate an already complex leave process, and will permit an employer or covered business entity to streamline and account for benefits with greater ease. Employers are not required to undertake this application process and employers who choose to do so should ensure that this practice is applied uniformly for all covered members of its workforce.

Reductions in Benefit Amounts – When making a determination of leave benefits, the regulations make clear that covered individuals will *not* receive benefits for any period in which they choose to use employer-provided "accrued paid leave." In addition, a benefit amount may be reduced by any benefits received on behalf of an employer or covered business entity through a private plan, any paid or unpaid leave, wages (received through an employer, covered business entity, or through self-employment), or wage replacement, that a covered individual on family or medical leave receives from any source for the same qualifying reason in the 12-month period prior to filing an application for benefits (except for a qualifying reason that occurred prior to January 1, 2021), and benefits may be reduced by any outstanding tax obligation or child support obligation.

Revisions to Retaliation Language Exclude Trivial Inconveniences

MAPFML provides for an employee-friendly presumption of retaliation if an employee or covered individual suffers a "negative change" to their seniority, status, employee benefits, pay or other terms and conditions of employment, during leave, or within 6 months after having taken leave. The same 6-month protected period is extended when an employee participates in proceedings or inquiries in association with taking leave. Now, the regulations provide that a negative change shall not include "trivial, or subjectively perceived inconveniences that affect *de minimis* aspects of an employee's work," putting some guardrails on what should be considered a negative change. In addition, a bona fide belief of fraud in connection with an employee's application for benefits, reported by an employer

to the Department, shall not be considered retaliation.

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Massachusetts employers have been anticipating and preparing for MAPFML benefits for over a year. Employers should review the final regulations, provide appropriate notice to their workforce, and either prepare to continue contributions to the Commonwealth or revise the private plan application and renew bond obligations.

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