

THE NATIONAL LAW REVIEW

Massachusetts Paid Family and Medical Leave Law - Focus on the Employer “Private Plan” Exemption

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Employers in the Commonwealth are fast discovering that the new Massachusetts Paid Family Leave Law, M.G.L.c. 175M (“MAPFML”), which begins to phase into effect June 30, 2019, asks much of employers, both administratively and, in some cases, financially. These requirements, which we outline at length in our earlier posts ([here](#) and [here](#)), include identifying covered individuals, quarterly reporting, collecting payroll deductions, making payments to the Commonwealth (sometimes out of the employer’s own assets) and providing covered individual notices.

However, the MAPFML also offers employers an opportunity to opt out of either the family or medical contributions under MAPFML – or both – provided that the employer offers a private paid leave plan meeting or exceeding [certain requirements](#). Although many employers hope to take advantage of this exemption, challenges abound.

This post summarizes the requirements of MAPFML and outlines the requirements of the private plan exemptions. We also explain some of the obstacles employers who hope to take advantage of the exemption are likely to encounter.

Before we go down this road, a disclaimer. As of the date of this post, May 22, 2019, the MAPFML regulations have not been finalized. Although deadlines are fast approaching, we are still working with proposed regulations and a hodgepodge of notices, FAQ’s, and summaries. In addition, a number of Massachusetts business leaders, including the Associated Industries of Massachusetts, sent a [letter](#) to Governor Baker, Senate President Spilka and House Speaker DeLeo on May 20, 2019 requesting a delay of the contribution and private plan exemption requirements to October 1, 2019, as well as certain amendments. There has been no official response to the letter from Governor Baker, Senate President Spilka or House Speaker DeLeo as of the date of this post. Given the evolving nature of these rules and the corresponding deadlines, we offer our best interpretation and predictions, but no guarantees.

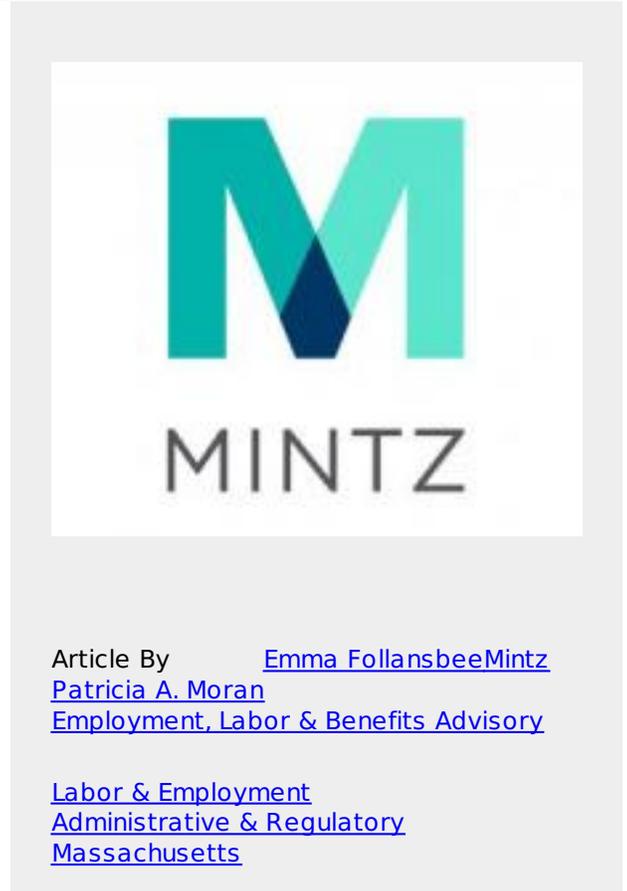
1. Summary of the Law.

As noted above, we have covered the MAPFML at length in our prior posts. Here again are the basics.

MAPFML Benefits

Beginning in 2021, the MAPFML will provide paid family and medical leave benefits to covered individuals in Massachusetts, for a maximum weekly benefit of up to \$850. To be clear, the benefit is distributed by the Commonwealth, but funded through contributions from employees and employers (think of it as a cousin of unemployment benefits). The benefits will phase in as follows:

Beginning January 1, 2021:



- Covered individuals are entitled to up to 20 weeks of paid medical leave per year if they have a serious health condition that incapacitates them from work.
- Covered individuals are entitled to up to 12 weeks of paid family leave per year related to the birth, adoption or foster care placement of a child, or because of a qualifying exigency arising out of the fact that a family member is on active duty or has been notified of an impending call to active duty in the Armed Forces.
- Covered individuals are entitled to up to 26 weeks of paid family leave per year to care for a family member who is a covered service member with a serious health condition.

Beginning July 1, 2021:

- Covered individuals are entitled to up to 12 weeks of paid family leave per year to care for a family member with a serious health condition.
- **Maximum leave entitlement is 26 total weeks in the aggregate of paid family and medical leave in a single benefit year.**

Who is Covered?

Covered Individuals

MAPFML covers all Massachusetts W-2 employees (including full time, part time and seasonal employees), and also contract workers who (i) are reported on 1099-MISC and (ii) are required to remit contributions to the Family and Employment Security Trust Fund. Certain self-employed individuals are also covered. To determine whether an employee or 1099 worker is covered by MAPFML, businesses should consult the test outlined in the draft regulations regarding whether or not an individual's services are "localized within the Commonwealth."

Businesses

In general, all employers doing business in the Commonwealth with more than one employee (generally including multistate employers with employees living or working in Massachusetts) are covered by MAPFML. "Covered Business Entities" i.e., those businesses whose workforce is made up of 50% or more of 1099-workers are also required to comply and remit contributions for their workforce. For more information on multistate employers and covered business entities, see our earlier posts linked above.

Reporting, Calculating and Payment

For each calendar quarter, employers and covered business entities must file an earnings report and remit payroll tax contributions through the Massachusetts Department of Revenue's MassTax Connect System. The first contributions will be made by October 31, 2019. If a business is funding all or part of the payroll tax through contributions from employees or other individuals, payroll deductions must begin on July 1, 2019.

The initial payroll tax is .63% of the first \$132,900 of an individual's earnings, adjusted annually, representing a 0.52% deduction for medical leave and a 0.11% deduction for family leave. Note that the payroll tax is applied to all "wages", as defined under M.G.L. c. 151A §1, meaning salaries, commissions and bonuses, though still subject to the above numeric cap (the 2019 Social Security Cap). Employers or covered business entities with a workforce of 25 or more individuals in the Commonwealth must contribute at least 60% of the medical leave portion of the tax, but need not contribute towards the family leave portion of the tax. Additional contributions towards the tax by employers and covered business entities are optional. For more information on calculating headcount and contributions, see our earlier posts.

Employee Notice Requirements

By June 30, 2019 (extended from May 31, 2019), employers and covered business entities must notify their workforces of MAPFML and obtain an acknowledgment of receipt of notice or a statement indicating the employee's or 1099-MISC worker's refusal to acknowledge the notice (note: this acknowledgement can be obtained in electronic form). Moving forward, employers and covered business entities must provide notice to employees within 30 days of the start of employment and upon entering into a contract for services with a 1099-MISC worker. In addition, by July 1, 2019, employers and covered business entities must post the Department's informational workplace poster. Sample notices and translations issued by the Department, as well as the Department's poster, can be found [here](#).

2. The Requirements of the Private Plan Exemption

Employers and covered business entities who provide a paid leave benefit may be eligible to receive an exemption from collecting, remitting, and paying contributions under the PFMLA law, but this is no easy task. The exemption may be requested for a family leave plan, a medical leave plan, or both. But the exemption contains many requirements, as follows:

The benefits offered to employees by the approved plan must be greater than or equal to the benefits provided by MAPFML. More specifically, the approved plan must meet all the minimum requirements listed below and must not cost employees any more than they would be required to contribute to the state plan under MAPFML.

Family leave benefits – the following minimum terms are required in order for a plan to meet private plan exemption for family leave benefits:

- All employees (full-time, part-time, permanent, or seasonal) must be eligible for family leave benefits.
- The plan must provide a weekly paid benefit amount that is greater than or equal to the benefit provided by the MAPFML program administered by the Department.
- Benefits must include, at a minimum:
 - A minimum of 26 weeks of paid leave during the benefit year to provide care to a family member, as defined by MAPFML, with a serious health condition suffered while on active duty in the armed forces;
 - A minimum of 12 weeks of paid leave during the benefit year if their spouse, child, or parent is a current member of the Armed Forces (including the National Guard and reserves) and is on covered active duty or notified of an impending call or order to covered active duty;
 - A minimum of 12 weeks of paid leave during the benefit year to provide care to a family member, as defined by MAPFML, with a serious health condition; and
 - A minimum of 12 weeks of paid leave during the benefit year to bond with a child during the first 12 months after a child's birth, or the first 12 months after adoption or foster placement of a child under the age of 18.
- The plan must provide job protection while the employee is on qualified leave.
- The plan must provide for continued employer contributions to employment-related health insurance benefits, if any, at the level and under the conditions coverage would have been provided if the employee had continued working continuously for the duration of qualified leave.
- The plan must allow for leave to be taken intermittently or on a reduced leave schedule, with the weekly benefit amount being prorated.
- The plan must specifically state that all presumptions shall be made in favor of the availability of leave and the payment of leave benefits.

Medical leave benefits – the following minimum terms are required in order for a plan to meet private plan exemption for medical leave benefits:

- All employees (full-time, part-time, permanent, or seasonal) must be eligible for medical leave benefits.
- The plan must provide a weekly paid benefit amount that is greater than or equal to the benefit provided by the MAPFML program administered by the Department.
- A minimum of 20 weeks of paid medical leave must be available per benefit year if an employee is unable to work due to a serious health condition.
- The plan must provide job protection while the employee is on qualified leave.
- The plan must provide for continued employer contributions to employment-related health insurance benefits, if any, at the level and under the conditions coverage would have been provided if the employee had continued working continuously for the duration of qualified leave.
- The plan must allow for leave to be taken intermittently or on a reduced leave schedule, with the weekly benefit amount being prorated.
- The plan must specifically state that all presumptions shall be made in favor of the availability of leave and

the payment of leave benefits.

Importantly, any exempt plan must also provide benefits to those employees who are no longer employed with a business, so long as they otherwise meet the financial eligibility requirements of the law (i.e., the plan covers unemployed former employees who apply for benefits for family leave for up to 26 weeks after separation from employment, or until they obtain other employment, whichever is sooner).

The plan must also contain the following rights and protections for employees:

- The right to an appeal to the Department if their application for benefits under the private plan is denied;
- The right to job protection during any leave taken; and
- Protections against retaliation from taking leave or exercising other rights under the PFMLA law.

There is an annual application and approval process. The application consists of many questions and requires the calculation and submission of many data points. The application must generally be approved in advance of the quarter prior to the quarter in which it will take effect, with the exception of Quarter 1, 2019 (i.e. July 1 to September 30, 2019), which may be effective on July 1, 2019 so long as it is approved by September 20. Exemptions must be renewed annually.

Self-insured plans must be bonded. The amount varies by the size of the workforce. For every 25 employees covered by a business, MAPFML requires a bond value of:

- \$19,000 for qualifying family leave plans
- \$51,000 for qualifying medical leave plans
- \$70,000 for qualifying plans for both family and medical.

The Department recently clarified that businesses seeking a private plan exemption may complete their application prior to submitting proof of bond coverage. An exemption application will not be denied solely because the business has not yet provided the Department with proof of bond coverage. A bond form for self-insurers and remittance instructions will be available from the Department at a later date.

Fully-insured plans must be covered by policy issued by a Massachusetts licensed insurance company.

There are penalties for noncompliance.

The Department has reserved the right to withdrawal approval of a plan for a variety of reasons, such as (i) failure to pay benefits; (ii) failure to pay benefits timely and in a manner consistent with the public plan; (iii) failure to maintain an adequate security deposit; (iv) misuse of private plan trust funds; (v) failure to submit reports that may be required by the department; or (vi) failure to comply with the MAPFML statute or regulations.

An employer or covered business entity that fails to maintain a private plan as approved by the Department may be assessed a penalty of up to 0.63 percent of its total payroll for the period it failed to maintain the approved private plan, and may also be required to repay to the Trust Fund in the total amount of benefits paid to covered individuals who received benefits from the Trust Fund.

Employer must maintain an “adequate security deposit”.

This requirement appears in the regulations as grounds to withdraw approval of private plan, but is not mentioned in the exemption application, and it is not otherwise clear what the Department means. For those businesses that plan to collect contributions from their employees to fund the private plan, this could mean the business must keep a separate, adequately financed fund for benefits. It could also be a reference to the required surety bond discussed above.

Plan changes must be reported. An employer must notify the Department in writing at least 30 days before any proposed changes to the terms or conditions of an approved private plan.

3. Should employers apply for the exemption?

While we appreciate the Commonwealth’s attempts to give employers flexibility, the exemption process contains some significant challenges. Here are several that we have identified so far.

- ***It doesn’t get an employer out of everything.*** The exemption relieves employers from collecting, remitting, and paying contributions to the Department under the MAPFML law. But it does not exempt an

employer from notifying their workforce of MAPFML benefits. In addition, private plans are still subject to audit and oversight by the Department, and as the draft regulations currently state, have the right to appeal the denial of benefits before the Department and other Massachusetts state courts.

- **Major plan updates are required.** Employers who hope to satisfy the exemption using their existing short term disability or other leave plans are finding that these plans fall short of the above requirements. Notably, existing plans generally do not (1) provide coverage for seasonal employees, (2) provide benefits beyond “disability” (e.g. for family leave), (3) provide for job protection, (4) provide a guarantee that “all presumptions shall be made in favor of the availability of leave and the payment of leave benefits” for employees, or (5) cover certain former employees. Moreover, in some instances, employees may be entitled to both short term disability payments and MAPFML benefits, depending on whether the aggregate of the two are greater than an employee’s average weekly wage.
- **Absence of compliant products.** Self-funded plans must obtain a surety bond. As outlined above, the Department has clarified that absence of a bond will not (at this time) result in the denial of an approved exempt plan, however many employers have yet to identify where or how to purchase such bonds. Similarly, any insured plans must be purchased through carriers licensed in Massachusetts, but few, if any insurance carriers have had the time to create such a product. At this time, not only are employers unsure of whether these products will be available, but also how much they are likely to cost.
- **The application process is tedious and an exemption must be renewed annually.** While not insurmountable, this process hoists one more administrative burden onto employers, and there is no guarantee of approval.
- **There are many questions about Q1 2019.** As noted above, so long as an employer obtains approval by September 20, 2019, the approval will apply retroactively for the entire Q1 2019 (July 1, 2019 to September 30, 2019). But if the plan is contributory, how are Q1 employee contributions handled pending approval? How are employer and employee contributions made to the Commonwealth if the plan is not approved? Without these answers, it seems that, realistically, employers who intend to use the exemption in Q1 2019 should have an approval in hand before that quarter starts.
- **ERISA.** The Employees Retirement Income Security Act of 1974, as amended (ERISA), imposes several requirements on plans subject to ERISA, such as reporting, disclosure, claims procedure, document, fiduciary, and trust requirements. Is an exempt plan subject to ERISA? Consider the following:
 - Benefits paid through an employer’s general assets under payroll practices are generally not subject to ERISA. This exemption generally works for most paid leave, vacation and short-term disability plans, and could apply to an exempt private plan.
 - But consider this. If plan accepts employee contributions, it unlikely that the DOL would consider the benefits to be “payable from the employer’s general assets”. More likely, the DOL would consider the plan to be covered by ERISA and consider the employee contributions to be “plan assets” which must be held in trust until paid.
 - However, if a plan is insured (i.e. funded through an insurance policy), ERISA generally does apply.
 - Or does it? There is an exemption in ERISA for plans maintained “solely for the for the purpose of complying with applicable workmen’s compensation laws or unemployment compensation or disability insurance laws.” But this exemption only applies to certain parts of ERISA (not, for example, ERISA’s claims procedure requirements), and it is unclear whether a private plan established to meet PFMLA would qualify.
 - There is also an ERISA exemption for insured “voluntary plans,” which are employee-pay-all insurance products. However, under the voluntary plan exemption, the employer’s involvement must be limited to publicizing the program, and employee involvement must be “voluntary”. It seems unlikely that a PFMLA private plan would satisfy the “voluntary plan” exemption.

In sum, unless a private plan is funded entirely by a business through its general assets, ERISA is likely to apply. An employer who seeks to use the private plan exemption must carefully consider whether ERISA will apply and, if necessary, prepare to meet ERISA’s requirements.

- **It may not save money.** Depending on the size and nature of a workforce, establishing, maintaining, and funding a plan may cost as much (if not more) than simply paying into the Commonwealth, especially since the exemption does not relieve the employer from all MAPFML requirements.

4. Alternative Approaches

Given the various drawbacks of the exemption process, many employers have decided to forego the exemption (at least for now). Some employers have adopted a “pay and modify” approach. Under this approach, employers plan to file quarterly earnings report and remit quarterly contributions beginning July 1, 2019, and meet employee notice requirements effective June 30, 2019. Then, between now and January 1, 2021, employers will review their existing leave policies and consider whether they want to eliminate their private benefits or make modifications to synchronize benefits with the MAPFML. Other employers, rather than maintain a private plan, have decided pay more than the minimum employer payroll contributions towards the payroll tax, thus relieving employees of the burden of an additional payroll deduction.

5. **Next Steps**

The first effective date of the MAPFML is around the corner! Employers are advised to assess their current leave policies assess the requirements of MAPFML, and establish a plan of action.

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