



AMERICAN BENEFITS COUNCIL

May 23, 2019

Filed electronically at: <https://www.mass.gov/forms/comment-on-draft-department-of-family-and-medical-leave-regulations>

William Alpine
Director
Department of Family and Medical Leave
1 Ashburton Place
Boston, MA 02108
William.alpine@mass.gov

Re: Proposed Regulations on Massachusetts Paid Family and Medical Leave

Dear Mr. Alpine:

The American Benefits Council (“Council”) appreciates this opportunity to comment on revised draft regulations issued by the Massachusetts Department of Family and Medical Leave (“Department”) to implement the Massachusetts Paid Family and Medical Leave Act (“PFML”).

The Council is a public policy organization representing principally Fortune 500 companies and other organizations that assist employers of all sizes in providing benefits to employees. Collectively, the Council’s members either directly sponsor or provide services to retirement and health plans that cover more than 100 million Americans. A number of our members are headquartered in Massachusetts and they, together with companies headquartered elsewhere, have many employees who work in Massachusetts.

The vast majority of large employers already sponsor excellent paid leave programs that enable employees to address their own, and their family members’ health needs, as well as to have personal, holiday or vacation time. These programs foster greater productivity and contribute to the success of the business.

As more states enact paid leave laws, it has become increasingly difficult for large, multistate employers to consistently offer and administer paid leave. Many state and local mandates use completely different definitions of terms and have inconsistent recordkeeping requirements and thresholds that trigger coverage or accrual of benefits. As a result, employers have had to design their leave programs to meet administrative and other requirements, rather than meet employer and employee objectives.

Because of the increasing activity by states with respect to employee benefit programs, the Council recently launched its State Law Project, co-chaired by former U.S. representatives Lynn Jenkins (R-KS) and Earl Pomeroy (D-ND). The goal of the State Law Project is to ensure that actions either by the federal government to grant authority to states, or state-initiated activity, do not intentionally or inadvertently impede the design and operation of employer-sponsored benefit plans by companies operating in multiple jurisdictions. Our comments below are in furtherance of making the PFML more efficient, especially for those employers that already provide paid family and medical leave benefits.

TIMING OF IMPLEMENTATION

According to the current schedule, final regulations implementing the PFML are scheduled to be published on July 1, 2019, which is only slightly more than one month after the Department's planned May 23 and 24 public hearings. But the requirement on employers and covered business entities to begin withholding paid family and medical leave contributions from employees' wages and payments made to 1099-MISC independent contractors begins on the same day (July 1, 2019). This means employers have literally no time to prepare for implementation based on the final regulations. It also means that the Department is giving itself very little time to thoughtfully consider comments from stakeholders.

With this in mind, we urge the Department to provide a delay in the July 1, 2019, effective date of at least three months. We also urge the Department to consider good faith or other relief for employers during the first 12-18 months the contribution rules are in effect.

PRIVATE PLAN EXEMPTIONS

An employer may apply to the Department for an exemption if the employer offers paid family and medical leave under a plan conferring the same or better benefits as those provided to employees and covered contract workers under PFML. This is a critical part of the PFML, and as stated above, many employers already provide paid leave programs. The remainder of our comments focus on the private plan exemption.

Deadline for Plan Implementation

The Department has only recently informally indicated that employers that operate a private plan will not need to begin offering benefits under the private plan until 2021 (which is when the Massachusetts plan begins paying benefits), even though the contribution requirement for employers without a private plan will apply on July 1, 2019. This is a welcome change to the Department's prior position but, at the moment, it appears to be expressed only informally. We urge this position to be formalized in the final regulations.

Employer Bond

Under the regulations, if an employer's plan is in the form of "self-insurance," the employer must furnish to the Department a bond running to the Commonwealth. The regulations provide no detail about this bond, other than it must be "in such form as may be approved by the [D]epartment and in such amount as may be required by the [D]epartment." This lack of specificity is very concerning. In fact, the details of the required bond, including the amount and required terms, are exactly the kind of details that should be set forth in regulations that are subject to notice and comment. At the moment, the few details available appear solely on the Department's website.¹ Besides giving employers the opportunity to comment in a formal process, setting forth the details ensures that the bond requirement is applied in a uniform and consistent basis by the Department and that issuers of these bonds can adequately price the risk associated with the bond. Accordingly, we recommend that the Department promulgate proposed rules with respect to the bond which are published for comment.

Application Process

Similar to the bonding requirement, the proposed regulations provide very little detail regarding the exemption process. We are particularly concerned with the lack of information regarding denials and the process for appeals. The regulations do not require the Department to clearly explain the reason for the denial. Further, the regulations provide only for a "supplementary review" and do not clearly indicate that an appeal will be decided by a supervisor or other individual other than the individual or individuals that made the initial determination. Nor do the proposed regulations set forth a minimum amount of time that an employer has to submit an appeal. We recommend that the Department promulgate proposed rules regarding the exemption process.

¹ <https://www.mass.gov/info-details/exemptions-from-paid-family-and-medical-leave-for-private-plans>.

Annual Reapplication

Under the regulations, an exemption based on the offering of a private plan is “effective for one year and may be renewed annually.” Although not entirely clear, this suggests that an employer must reapply for an exemption every year. An annual recertification process appears to be a serious waste of Department resources, when the certification can simply be evergreen unless and until the employer’s private plan is materially modified or terminated, especially since the rules already require an employer to notify the Department in writing at least 30 days before any proposed changes to the terms or conditions of an approved private plan. We recommend that once an employer private plan is approved, no recertification be required provided the plan is not materially modified in a manner that makes the private plan no longer eligible for the exemption.

Rules Governing Private Plans

Under the proposed regulations, the Department is given significant power over the administration of plans of private businesses. For example, if an employee is denied benefits because the employee does not meet the requirements of the plan, the employee is given the right to appeal that denial to the Department and/or a court. In addition, the Department may withdraw approval for a private plan if the terms or conditions of the plan have changed. The regulations set out a non-exhaustive list of causes for termination of the exemption, some of which are extremely vague (“failure to pay benefits timely and in a manner consistent with the public plan”) or which appear punitive (a single failure to pay benefits to one individual could result in termination of the exemption). It is not clear that the withdrawal can be appealed. As noted above, the rules also require an employer to provide 30 days advance notice before *any* proposed changes to the terms or conditions of an approved private plan. We have serious concerns that these rules will be applied inconsistently, that disgruntled employees could abuse the process, and that employers will be unnecessarily constrained in their ability to manage their workforce.

We urge the Department to rethink these rules.² For example, while we appreciate the Department needs to be informed about changes to a private plan which make the plan no longer eligible for the exemption, we do not believe it is appropriate to require advance notice for *any changes* in a private plan if those changes do not affect whether or not the private plan meets the requirements for an exemption. Second, to the extent that the Department is reviewing a denial of benefits, the employer’s determination that the employee is not eligible under the terms of the plan should be provided deference and should not be questioned unless clearly erroneous.

² We recognize that some of the provisions of the proposed regulation come from the law itself. Nonetheless, we urge the Department to use its authority to implement the law in a way that is workable, does not impermissibly interfere with good faith administration of benefits, and which does not unnecessarily open the regulations to legal challenge.

Our concerns are even more serious in connection with a private plan that is considered an employee welfare benefit plan under the federal Employee Retirement Income Security Act (ERISA). Although many paid leave programs will not be considered welfare plans subject to ERISA, some will be, particularly those that use a separate funded arrangement to provide benefits.³ In the case of a paid leave plan that is subject to ERISA, any state law which relates to the plan would be preempted, including an employee's right to appeal benefit denials to a state regulatory agency or a requirement to provide advance notice to a state agency before any amendments to the plan are adopted. Accordingly, the final regulations should provide an exemption for an ERISA-governed plan.

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Thank you for your consideration of our comments. Should you have any questions or wish to discuss our comments further, please contact me at (202) 289-6700.

Sincerely,

A handwritten signature in black ink that reads "Ilyse Schuman". The signature is written in a cursive, flowing style.

Ilyse Schuman
Senior Vice President, Health Policy

³ Massachusetts v. Morash, 490 U.S. 107, 120 (1989); Department of Labor Advisory Opinion 2004-08A (July 2, 2004). Whether a plan providing vacation or other paid leave benefits is subject to ERISA will depend on the terms of the plan and the extent to which assets are held in a bona fide separate fund with a legal obligation to pay plan benefits.