LEGAL BULLETIN

February 12, 2019

CONSTANGY BROOKS, SMITH & PROPHETE LLP

Legal Bulletin #674

HEAD, BOSTON OFFICE

Ellen Kearns
Boston, MA

EDITOR IN CHIEF

Robin Shea
Winston-Salem, NC

Draft regulations interpreting Massachusetts Paid Family and Medical Leave law provide help, but some questions unanswered

By Ellen Kearns

and

Matt Steinberg,
Boston Office

The Massachusetts Executive Office of Labor and Workforce Development has issued **draft regulations** concerning the state's new **Paid Family and Medical Leave law**, which was enacted in June 2018.

A substantial portion of the draft regulations does no more than repeat (essentially verbatim) the operative language from the statute. In addition, the regulations fail to provide substantive guidance on many aspects of the new law, as described below. It is unclear whether these areas will ultimately be addressed in the final regulations set for publication on or before March 31. In the meantime, the Office of Labor and Workforce Development has scheduled eight listening sessions around the state to encourage public input on the draft regulations. A schedule of locations and times is available **here**.

The Paid Family and Medical Leave law covers virtually all employers operating in Massachusetts. Starting in July 2019, the Commonwealth will begin collecting payroll taxes from employers (consisting of both employer contributions and employee wage deductions) to fund the paid leave provisions. Qualifying employees will become eligible to apply for benefits beginning on January 1, 2021.

DON'T MISS OUR WEBINAR

Join **Andy Eisenberg** and **Ellen Kearns** of our Boston Office as they walk you through the draft regulations interpreting the Massachusetts Paid Family and Medical Leave law.

This free webinar is from **1 to 2 p.m. ET on Thursday, February 14**.

Register **here**.

Although the draft regulations leave much to the imagination, they nonetheless would clarify or expand upon the statute in important ways. The highlights are discussed below.

Use of electronic communication

The draft regulations would provide that written communications required under the law "shall be made and transmitted in the manner and form prescribed by the" Director of the state Department of Family and Medical Leave, which may include email, or regular mail for those without "reasonable access" to email.

Employer registration

According to the draft regulations, all employers, self-employed individuals who elect coverage under the statute, and covered business entities would be required to file earnings reports and remit contributions through the Department of Revenue's MassTaxConnect system. If an employer or covered business entity does not have a pre-existing account on the MassTaxConnect system, it would be required to register and establish an account.

Quarterly filings

The draft regulations would require that at the end of each calendar quarter, an employer file a report through the MassTaxConnect system containing each employee's name, Social Security number, and wages earned. The report would also be required to contain the federal employer identification number and the identification number included with withholding tax returns filed pursuant to M.G.L. c. 62B.

If an employer made payments to individuals for services during the calendar quarter that must be reported on IRS Form 1099-MISC, the employer would also have to report the names and Social Security numbers of those individuals, and the amounts of the payments made.

Payroll tax contributions

Under the law, paid leave is funded by a payroll tax. Under the draft regulations, the initial contribution rate would be 0.63 percent of all wages or other qualifying earnings or payments as of July 1, 2019. According to the draft regulations, the 0.63 percent tax would be allocated between the medical leave contribution rate and family leave contribution rate, depending on the respective costs of those programs as determined by the state Department of Family and Medical Leave. According to the Department website, the initial apportionment rate has been set as 0.52 percent for medical leave, and 0.11 percent for family leave (although this apportionment is not specified anywhere in the draft regulations).

Given that employers with fewer than 25 employees in the Commonwealth are not required to pay any portion of the contributions for family or medical leave, the draft regulations contain a detailed explanation of how the employer would calculate its total Workforce Count. First, the employer would "count[ ] the number of employees, including full time, part-time, seasonal, and temporary employees, on the payroll during each pay period and divid[e] by the number of pay periods." The relevant time period for purposes of the calculation would be the previous calendar year. In addition, "[i]f an employer or covered business entity contracted with individuals for services during the pay period and is required to report the payment to such individuals on IRS Form 1099-MISC," the employer would be required to include those individuals, as well.

Employers with 25 or more employees in Massachusetts may deduct some or all of the payroll tax from employee wages as follows:

- *Medical Leave Contributions* – employers may deduct **up to 40 percent** of the total.
- *Family Leave Contributions* – employers may deduct **up to 100 percent** of the total.

According to the draft regulations, after the employer has filed its quarterly report, the Department would calculate the total contribution owed by that employer. The contribution would have to be paid within 30 days of the end of the calendar quarter.

Self-employed individuals

The draft regulations would allow self-employed individuals to elect coverage under the new law, make contributions, and receive family and medical leave payments.

Private plans

Under the statute, employers may apply to the Department for approval of a private plan to meet their obligations under the Paid Family Medical Leave law. The draft regulations provide that applications for such private plans "will be accepted by the Department on a rolling basis," but would have to be renewed annually. They would also require employers to notify the Department in writing at least 30 days before making any changes to the terms or conditions of the plan. Unfortunately, the draft regulations provide little additional guidance in this area, stating only that private plans must comply with all Department regulations and must confer all of the same rights, protections, and benefits provided to employees under the law.

Although the statute doesn't address what benefits a private plan must make available to "individuals with whom the employer contracts for services" (and fails to specify which contractors are covered by this term), the draft regulations would require the employer to either (1) provide the same benefits to those contractors that it provides to its other employees, or (2) make contributions to the public trust fund as provided by the law.

Finally, the draft regulations suggest that private plans that meet or exceed the requirements for exemption but are denied an exemption "due to an apparent error" would be entitled to "supplementary review" by the Department.

Benefit claims process

The draft regulations include detailed procedures for the filing of benefits claims:

> **Employee notification:** In keeping with the language of the statute, employees are required to provide employers with 30 days' notice of the anticipated start date of leave, length of leave, and type of leave applied for. If the employee is unable to provide 30 days' notice due to extenuating circumstances, notice would be required as soon as practicable.
>
> **Department notification to employer:** The statute also provides that within five days of the employee's submission of the claim, the Department "shall" notify the employer. The draft regulations would add that the Department's notice will state the type of leave applied for, its expected duration, whether intermittent leave is involved, and any other information necessary to process the claim.

Claim for benefits: Under the draft regulations, the employee would be required to provide the following information when filing a claim for benefits:

- employee identifying information (such as an SSN)
- employer name and identification number
- the nature of the leave
- the expected duration of the leave
- whether the leave will be continuous or intermittent
- the date that the employer was notified
- any denied, granted, or pending requests for leave for a qualifying reason from the employer during the benefit year
- evidence of family relationship if the leave involves family leave or leave relating to active duty military service by a family member
- completed certification (as described below).

If a claim is filed more than 90 calendar days after the start of the leave, the covered individual may receive reduced benefits in the discretion of the director.

Employee certification: The statute provides that all claims for benefits must be supported by a certification showing that the leave serves a covered purpose. The language in the draft regulations describing each of the certifications is substantially identical to the language in the statute. Consistent with the statutory language providing that the Department "shall not require documentation of certification beyond the requirements established in this [law]," the type of certification required depends upon the type of leave requested.

Department request for information from the employer: The draft regulations would expand upon the statute's certification procedure by setting out the Department's process for requesting information from employers in connection with a claim for benefits. The Department would be able to request the following information:

- wages or earnings for the past 12 months
- a description of the employee's position
- whether the employee works a full-or part-time schedule
- amount of paid leave already taken for a qualifying reason during the current benefit year, and

- a description of the employer's paid leave policies, whether the employee has received paid leave during the current benefit year, and whether the employee will receive any paid leave benefits from the employer during the requested leave period.

Employers would have only five calendar days to provide the Department with the requested information.

Approval of payments for benefits

The draft regulations propose the following for benefits claims that have been approved:

The Department would provide contemporaneous notice to the individual and to the employer of the approval or denial of a claim for paid benefits. The approval notice would include (1) the reason for the approved leave benefits, (2) the duration of the approved leave benefits, (3) for intermittent leave, the frequency and duration of the leave benefits, and (4) the expiration of the approved leave benefits.

The employee or covered individual would still be required to comply with any attendance and call-in procedures established by the employer or covered business entity.

The employee or covered individual would be required to work with the employer or covered business entity so that the leave will not unduly disrupt the entity's operations.

Employers would be allowed to communicate with employees or covered individuals while they are out on paid leave.

If an employee takes leave on an intermittent or reduced schedule and fails to work during the agreed-upon times, or fails to return to his or her regular work schedule after the leave period expires, the employee may be subject to discipline.

Change in circumstances: The draft regulations also address what would happen in the event that there is a change in circumstances after a claim for benefits has been approved:

Both the employee and employer would be obligated to inform the Department about any change in circumstances that would justify an extension, reduction, or other change to the period of paid leave or amount of benefits. The change request would have to be submitted using forms prescribed by the Department.

A claim for an extension of benefits would have to be filed 14 calendar days before the original date on which leave was to expire. For leave extension requests, the employee would be required to describe the need for the extension, the duration of the extension, and the date on which notice for the request for extension was provided to the employer.

The employee would also be required to submit a new certification demonstrating the ongoing need for leave.

> As with original leave requests, the Department would notify the employer within five business days of a request for any leave extension. Once notified, the employer would have the same five-day period to provide any information requested by the Department.

Claim denials and appeals

The statute provides that "[t]he Department shall establish by regulation a system for appeals, pursuant to chapter 30A, in the case of a denial of family or medical leave benefits." Consistent with that mandate, the draft regulations set forth the following procedure:

> An individual would be allowed to appeal a denial of family or medical leave benefits to the Department, including a denial of benefits under a private plan.
>
> The request for an appeal would have to be filed within 10 calendar days of the party's receipt of notice of the determination. The Department would be authorized to extend the 10-day filing period where an individual establishes to the satisfaction of the Department that circumstances beyond the individual's control prevented the filing of a request for an appeal within the prescribed 10-day filing period.
>
> Employees would be allowed to request an appeal hearing. Hearings would be conducted in accordance with the procedures prescribed by M.G.L. c. 151A, section 39(b), which governs appeals in unemployment cases. The Department would issue a written decision affirming, modifying, or revoking the initial determination within 30 days of the hearing.
>
> After the Department makes a decision on the appeal, an individual aggrieved by the decision would have the right to appeal it in District Court within 30 days of receipt of the Department's final decision.

Attestations and false statements

The draft regulations state that individuals applying for benefits would be required to attest to the truthfulness of all statements and submissions made to the Department. An individual who willfully makes a false statement or representation, or who withholds material facts, would not be eligible to receive benefits.

Some help, but questions remain

The Department has noted that its draft regulations were published "for the purpose of early public input only." Although the draft regulations fill in some important gaps in the statutory provisions, they leave many questions unanswered. For example, the draft regulations omit any meaningful explanation of the interactions between employers' existing paid leave policies and the receipt of benefits under the law. The draft regulations are also silent about how private plans should operate. For example, is the employer allowed to make employee wage deductions at the rates promulgated by the Department? Are employers allowed to invest the funds, as in an ERISA-governed retirement plan? What if there is a shortfall in the employer's private leave benefit fund? What if there is a windfall?

We hope that the final regulations will address these issues.

LEGAL BULLETIN

February 12, 2019

Legal Bulletin #674

This is a publication of Constangy, Brooks, Smith & Prophete, LLP. The information contained in this newsletter is not intended to be, nor does it constitute, legal advice. The hiring of a lawyer is an important decision that should not be based solely upon advertisements. Before you decide, ask us to send you free written information about our qualifications and experience. No representation is made that the quality of the legal services to be performed is greater than the quality of legal services performed by other lawyers. This email could be considered advertising under applicable laws.

IRS Circular 230 Notice: Federal regulations apply to written communications (including emails) regarding federal tax matters between our firm and our clients. Pursuant to these federal regulations, we inform you that any U.S. federal tax advice in this communication (including any attachments) is not intended or written to be used, and cannot be used, by the addressee or any other person or entity for the purpose of avoiding penalties that may be imposed under the Internal Revenue Code.

www.constangy.com
Toll free 866.843.9555

Constangy, Brooks, Smith & Prophete, LLP

Constangy, Brooks, Smith & Prophete offers a wider lens on workplace law. We have counseled employers exclusively since 1946. With offices in 15 states, we are one of the largest labor and employment law practices in the U.S. Constangy has been named as a top firm for women and minorities by organizations including Law360, the National Law Journal and **Vault.com**. Many of our more than 190 attorneys have been recognized by leading authorities such as Chambers & Partners, Best Lawyers in America® and Martindale Hubbell. Find out more about us online at **www.constangy.com** or follow us on Twitter @ConstangyLaw.

Office Locations

Alabama, California, Colorado, Florida, Georgia, Massachusetts, Minnesota, Missouri, New Jersey, New York, North Carolina, South Carolina, Tennessee, Texas, and Virginia.