

HRW CLIENT ALERT

September 24

2020



HIRSCH
ROBERTS
WEINSTEIN LLP

Aligning Your FMLA Policy with the New Massachusetts Paid Family and Medical Leave Law: Now is the Time to Consider Changing Your 12-Month Rolling Look-Back

Overview

Massachusetts employers subject to the federal Family and Medical Leave Act (FMLA) may be wondering whether and how to amend their existing FMLA policies for consistency with the new Massachusetts Paid Family and Medical Leave Law (PFMLL), under which employees will be eligible to take paid medical and family leave starting on January 1, 2021. There is still time to adjust FMLA policies, but one aspect of a typical FMLA policy might require prompt attention: the method for calculating the 12-month period applicable to an employee's leave entitlement. Most employers use the "rolling look-back" method, but this option is not available under the PFMLL. If an employer wishes to change its FMLA policy to align with the PFMLL in this area the employer must bear in mind that FMLA regulations require **60 days' notice** to employees before making a change.

Twelve-Month Measurement Periods Under the FMLA and PFMLL

Under the FMLA, an employer generally has four choices for determining how the applicable 12-month leave entitlement period is calculated. Most employers have opted to use a "rolling" 12-month period measured backwards from the first date of an employee's leave. Under this method, sometimes called the "rolling look-back" method, if an employee requests four weeks of FMLA leave beginning on October 31, the employer would look-back 12 months from October 31 to the previous November 1 to calculate how much FMLA leave the employee has used and therefore how much of the employee's annual leave entitlement remains.

Under the PFMLL, however, employers cannot use the "rolling look-back" method. Instead, they must measure the leave entitlement period over 52 weeks starting from the Sunday immediately preceding the first day that job-protected leave commences. So, for example, an employee who requests PFMLL leave beginning February 1, 2021 would have their 12-month eligibility period measured forward between Sunday, January 31 and the following January 30. This approach is more consistent with the option under the FMLA to measure the leave year by looking forward from the first date of FMLA leave. The Department of Labor also takes the position that an employer can select a 12-month period required by state law. <https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/whdfs28h.pdf>

This is a key difference between the two laws that many employers may wish to align in their policies.

What Would a Change Mean?

Aligning the methods of calculating the 12-month eligibility period between the FMLA and PFMLL will provide administrative consistency. That said, it will also have the potential effect of creating FMLA leave eligibility on January 1, 2021 for some employees who might otherwise not have had FMLA eligibility under the 12-month rolling look-back method. This is not likely to have a significant impact because such an employee would be eligible for leave under the PFMLL regardless, and the two leaves will run concurrently.

All things being equal, most employers would likely prefer to retain their 12-month rolling look-back method, but this simply is not an option for the PFMLL in Massachusetts. For multi-state employers, FMLA regulations fortunately do allow different calculation methods in different states where one state has a required methodology for its own local family and medical leave law.

60 Days' Notice

Employers who do wish to change their FMLA measuring period should be aware that FMLA regulations require that an employer wishing to change its method of calculating the 12-month eligibility period must “**give at least 60 days notice to all employees.**” In addition, the transition “must take place in such a way that the employees retain the full benefit of 12 weeks of leave under whichever method affords the greatest benefit to the employee.” 29 CFR § 825.200 (<https://www.law.cornell.edu/cfr/text/29/825.200>)

Sample Notice Language

An employer wishing to change its FMLA policy in time for the January 1, 2021 PFMLL roll-out must provide notice to employees soon. Sample notice language appears below:

Effective January 1, 2021, the Company will be changing the way it determines eligibility for leave under the federal Family and Medical Leave Act (FMLA). Like most employers, the Company has historically determined FMLA leave eligibility using a 12-month rolling look-back method, which means that when an otherwise eligible employee requests FMLA leave the company has looked back 12 months from the first date of the leave to determine how much of the employee's total annual leave entitlement is still available. But beginning January 1, 2021, we will be using a different method in order to better align with the method required by the Commonwealth of Massachusetts for leave under the state's new Paid Family and Medical Leave Law (PFMLL). Specifically, beginning January 1 we will measure the 52-week period looking forward from the Sunday immediately preceding the date the employee first takes FMLA leave. The Company will be providing more information in the months ahead about the new PFMLL, as it is a significant new paid leave program, and employees no doubt have many questions. In the meantime, we are required by federal law (29 CFR 825.200(d)(1)) to provide this notice of a change to our FMLA leave policy. Again, the change is being made to align our FMLA leave eligibility determinations with the required eligibility methodology under the new state paid leave law. Between now and January 1, the Company will apply whichever calculation method affords the greatest benefit to the employee. If you have any questions, please contact human resources.

For Questions/More Information

If you have questions, or would like compliance assistance, please contact a member of the HRW PFMLL Team:

- Kathleen Berney: kberney@hrwlawyers.com / 617-348-4335
- Janette Ekanem: jeakanem@hrwlawyers.com / 617-348-4327
- Ari Kristan: akristan@hrwlawyers.com / 617-348-4365
- Rich Loftus: rloftus@hrwlawyers.com / 617-348-4360
- Liz Monnin-Browder: liz@hrwlawyers.com / 617-348-4349
- Pete Moser: pmoser@hrwlawyers.com / 617-348-4323
- Charlotte Petilla: cpetilla@hrwlawyers.com / 617-348-4353
- Cathy Reuben: creuben@hrwlawyers.com / 617-348-4316
- Dave Wilson: dwilson@hrwlawyers.com / 617-348-4314