New PFMLL Regulations/Big Picture Issues for Employers

The Department of Family and Medical Leave (DFML) just issued final regulations implementing the Massachusetts Paid Family and Medical Leave Law (PFMLL). Employees will become eligible for paid time off under the PFMLL starting on January 1, 2021. Between now and then, we anticipate that the DFML will be issuing additional guidance on the logistics, sample healthcare provider certification forms, and other compliance assistance information and documents. Employers may wish to hold off on finalizing and formally adopting a PFMLL policy and establishing procedures for processing of leave requests pending publication of this further guidance. In the meantime, however, there are plenty of important "big picture" issues for employers to consider now.

The information in this HRW Client Alert is based on our interpretation of the plain language and logical meaning of the regulations; however, it is possible that the DFML will ultimately interpret them differently. This alert is for educational purposes only and is not intended as legal advice. Employers should consult with counsel regarding the specific steps they should be taking now to get ready for implementation of the PFMLL, based on their unique circumstances.

Retooling of Paid Time Off Policies to Maximize the Value of Contributions Paid

Many employers have existing policies that enable their workers to receive pay when they need to be out of work for one of the reasons covered under the PFMLL. For example, a worker needing to take time off to give birth might be able to utilize vacation, sick time, STD, or other existing employer-provided benefits. The particular *type* of paid leave that an employee uses can have a big impact on the ability of both the employer and the employee to get the most financial bang out of their PFML contribution bucks. Here is why.

By our reading of the law and regulations, if an employee receives pay during a PFMLL-qualifying leave through "a temporary disability policy or program" or a "paid family or medical leave policy", the employee can use those employer-provided benefits to supplement (i.e., "top off") their PFMLL benefits, provided that the total amount received would not exceed their average weekly wage. Further, if an employer makes such payments in an amount equal to or greater than the amount the employee would have been eligible to receive under the PFMLL, the employer will be reimbursed for the money that the DFML would otherwise have had to pay. That's a win-win. The employee can get more money while on leave, and the employer can recover some of the cost of providing paid leave benefits.

But if the employee instead receives pay during a PFMLL-qualifying leave through use of "accrued paid leave"— which is defined in the regulations as including sick leave, annual leave, vacation leave, personal time, compensatory leave or paid time off—it appears under the regulations that the employee could not get any PFMLL benefits *at all*. The time off would still count towards the employee's annual allotment of PFMLL leave, but the employee would not receive any money from the DFML. Conversely, employees could

not use accrued paid leave to supplement or "top off" benefits received from the DFML. Employees can use accrued paid leave *or* PFMLL benefits, but not both. To add insult to injury, employers are not eligible for reimbursement of dollars paid to employees as accrued paid time—even in cases where the employer is paying money that the DFML might otherwise have had to pay.

In short, the regulations seem to provide employers with a financial incentive to move paid leave benefits out of the "accrued paid leave" bucket and into the "temporary disability policy" or "paid family and medical leave policy" bucket. Many employers currently make it a point to give extra generous PTO benefits instead of paid family or medical leave, as a way of providing flexibility to their workers. Going forward, employers may wish to consider retooling their benefits programs in order to maximize the ability of their workers to supplement PFMLL benefits and for the employer to receive reimbursement (consistent, of course, with the employer's obligations under other laws, such as the Massachusetts Sick Leave law).

Implementing Clear, Consistent Workplace Rules to Help Defend Against Retaliation Claims

One aspect of the PFMLL that is of concern to employers is the presumption of retaliation. If an employee goes on leave and, during the next six months, the employee is furloughed, demoted, or subject to any other negative job action, the employer is *presumed* to have engaged in unlawful retaliation, unless the employer can show by "clear and convincing evidence" that the action was not retaliation and further that the employer had sufficient independent justification for taking such action and would have in fact taken such action in the same manner and at the same time the action was taken, regardless of the employee's use of leave, restoration to a position, or participation in proceedings or inquiries under the law. Unlike with retaliation claims under most other employment laws, the burden is not on the employee to prove that the employer's actions were retaliatory; instead, the burden is on the *employer* to prove they were not.

The new regulations offer employers a practical and simple way to meet that burden. The regulations state that an employer's application of a "preexisting employment rule or policy shall be deemed to be clear and convincing evidence." Put simply, if an employee is terminated and the employer can point to a specific, pre-existing policy that the employee violated, the employer has the proof they need to defend against a retaliation claim. But if the conduct at issue is not specifically addressed by a policy or rule, defense of the claim may be more difficult (and expensive).

In light of this provision, employers may find it useful to review furloughs, terminations, and other negative job actions that they have taken in the past. If there was no specific policy or rule that addressed the circumstances leading to the action, the employer may wish to consider adopting one now, in case they need to take similar action in the future against an employee who has used paid family or medical leave.

Policies That Dovetail with the PFMLL

At various points in the regulations, employers are given the flexibility to do certain things, but only if they have a preexisting policy to that effect. Now is therefore a great time for employers to consider adopting such policies or improving them if they are already in place. Some of the policies specifically referenced in the regulations include:

- **Fitness for duty certificates**: Per the regulations, employers can require an employee returning from leave due to a serious health condition to provide a fitness for duty certificate, but only if the employer has a uniformly-applied policy or practice that requires all similarly-situated employees to do so.
- **Increments of intermittent leave**: The regulations state that intermittent leave shall be taken in increments consistent with the established policy that the employer uses to account for use of other forms of leave.
- **Employee communication requirements**: Per the regulations, absent unusual circumstances, an employee can be required to comply with an employer's usual and customary notice and procedural requirements for taking leave.

- **Substance use on the job**: The regulations provide that if an employer has an established policy, applied in a non-discriminatory manner and communicated to all employees, that provides under certain circumstances that an employee may be terminated for substance use on the job, the employer can apply that policy even if an employee is taking leave due to a substance use disorder.

These are just a few examples of policies that employers may wish to implement or tighten up now, to have the most control over the PFMLL implementation process and to provide greater consistency and clarity.

Conclusion

Final regulations are out, and the DFML is expected to be issuing additional guidance and forms prior to January 1, 2021. Pending that further guidance, it may be a bit early for employers to formally adopt a policy that specifically addresses the PFMLL, beyond the information already provided in the poster and legally required notices. In the meantime, however, there is plenty that employers can do now to get ready. The members of the HRW PFMLL Team stand at the ready to assist employers with such tasks as:

- Reviewing the employer's existing suite of leave-related benefits and assessing whether any changes are in order to maximize the employee's ability to receive and supplement PFMLL benefits and the employer's ability to receive reimbursement for paid leave benefits that they already provide;
- Implementing or updating other workplace rules and policies so that they better align with the PFMLL;
- For unionized workforces, proposing and bargaining over any necessary changes to existing collective bargaining agreements and/or union-sponsored benefit programs;
- Establishing procedures for coordinating the various types of paid time off to which workers are eligible under federal and state law (PFMLL, FMLA, sick time, Mass. Parental Leave law, etc.), company policy, and/or employment contracts;
- Education, training, and solicitation of input from Human Resources and senior management team members on PFMLL implementation procedures; and
- Pending further guidance from the DFML, beginning work on a PFMLL policy and procedures for handling employee leave requests.

For Questions/More Information

For any questions, please contact a member of the HRW PFMLL Team:

- Cathy Reuben: creuben@hrwlawyers.com / 617-348-4316
- Kathleen Berney: kberney@hrwlawyers.com / 617-348-4335
- Janette Ekanem: jekanem@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
- Charlotte Petilla: cpetilla@hrwlawyers.com / 617-348-4353
- Dave Wilson: dwilson@hrwlawyers.com / 617-348-4314