MASSACHUSETTS ISSUES UPDATED PAID FAMILY AND MEDICAL LEAVE REGULATIONS

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By: Mark D. Pomfret

The Massachusetts Department of Family and Medical Leave (DFML) recently published the final version of the amended Massachusetts Paid Family and Medical Leave (PFML) regulations. These regulations modify the original PFML regulations that went into effect on 1 July 2019.

The amended regulations include the following noteworthy updates:

SUBSTANCE ABUSE

Family or medical leave may now be taken for treatment of a substance use disorder by (i) a health care provider, (ii) a provider of health care services on referral by a health care provider, or (iii) a program licensed or approved by the Massachusetts Department of Public Health. An employer may not take action against an employee for exercising his or her right to take leave for such treatment. However, if the employer has an established policy that it applies in a nondiscriminatory manner, which has been communicated to all employees and which states that under certain circumstances an employee may be terminated for substance use, the employee may be terminated pursuant to that policy whether or not the employee is presently taking leave. An employee may also take leave to care for a covered family member who is receiving treatment for a substance use disorder.

PRIVATE PLAN APPEALS PROCESS

Private plans must include an internal appeals process that employees can use before exercising their right to appeal to the DFML. The internal appeals process must afford employees at least ten calendar days from receipt of a denial to initiate an appeal. However, employees may take additional time to submit appeals if circumstances beyond the employees' control prevent them from appealing in a timely manner. Employees must be given notice of their rights to pursue appeals under the internal appeals and the DFML appeals processes.

PARTIAL EXEMPTIONS

While employers that offer PFML benefits equaling or exceeding those provided under the Massachusetts statute and regulations are eligible to apply for a private plan exemption, employers may not apply for an exemption on behalf of only a portion of their covered workforce. However, employers may apply for an exemption from the requirement to make contributions for medical leave coverage, family leave coverage, or both.

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SUBSTITUTION OF EMPLOYER-PROVIDED PAID LEAVE

Covered individuals who use accrued paid leave provided by their employer shall not receive any PFML benefits during the time they use such accrued paid leave.

FORMER EMPLOYEES

A covered individual that has been separated from an employer for fewer than 26 weeks and remains unemployed on the date that an application for benefits is filed must submit an application for benefits with the individual's former employer. A covered individual that has been separated for fewer than 26 weeks and has become employed by a different employer at the time that an application for benefits is filed must submit an application for benefits with the individual's current employer.

NOTICE

DFML will not accept an application for benefits unless it includes proof that an employee provided no less than 30 days' notice to the employer prior to the start of the employee's leave (unless circumstances beyond the employee's control prevented the employee from doing so).

INTERMITTENT LEAVE

Intermittent leave shall be taken in increments consistent with the established policy the employer uses to account for use of other forms of leave. However, the DFML will not pay in increments of less than 15 minutes. Further, covered individuals are not permitted to apply for payment for benefits associated with intermittent leave until they have eight hours of accumulated leave time, unless more than 30 calendar days has passed since the covered individual initially took such leave.

RETALIATORY PRESUMPTION

The presumption of retaliation in the original regulations (that applied if an employer implemented any “negative change” in a worker's employment within six months after his or her leave or return to work) does not apply to “trivial” changes or “subjectively perceived inconveniences” in an employee's work. It also will not apply if an employer reports to the DFML the employer's bona fide belief that such employee committed fraud in connection with the employee's application for benefits. In addition, violations of employment polices/rules will rebut the presumption of retaliation.

K&L Gates is advising clients on the parameters of the Massachusetts PFML program and is prepared to assist employers as they navigate compliance with the law.

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KEY CONTACTS



MARK D. POMFRET
PARTNER

BOSTON
+1.617.261.3147
MARK.POMFRET@KLGATES.COM

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