

# Employee Relations LAW JOURNAL

## **Paid Family and Medical Leave Under New Massachusetts Law**

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*Massachusetts employers should now be in compliance with the Massachusetts Paid Family and Medical Leave, which came into effect October 1, 2019, for payroll deductions. This article provides a comprehensive overview of the law and the final regulations, guidance, and other information issued by the state.*

Massachusetts employers should now be in compliance with the Massachusetts Paid Family and Medical Leave (“PFML”) program, which became effective October 1, 2019, for payroll deductions. This article provides a comprehensive overview of the law, the final regulations, guidance issued by the Massachusetts Department of Family and Medical Leave<sup>1</sup> (“Department”), and the latest PFML developments and information recently released by the Department.

On October 1, 2019, employers began to make payroll deductions to fund the state-administered PFML program. Eligible workers may take paid leave for most of the purposes covered by the PFML Law starting on January 1, 2021, and for all of the purposes starting on July 1, 2021.

In June 2019, the Massachusetts legislature announced a three-month delay to the start of PFML contributions (extending the deadline from July 1 to October 1, 2019) to address additional questions raised by the law and the final regulations<sup>2</sup> promulgated by the Department. The Department has continued to release developments and additional

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information regarding PFML and the implementation of the program, which is described below.

## **WHAT IS THE PFML?**

The PFML provides that certain workers in Massachusetts may receive paid leave for family leave, an employee's health condition and service member-related events. The Department administers the paid leave through a Family and Employment Security Trust Fund ("Fund"). Employers and employees contribute to the Fund, and the Department administers payments to the employee.

## **WHAT TYPES OF LEAVE DOES THE PFML LAW PROVIDE?**

There are three types of paid leave:

1. To care for a family member who has a serious health condition or to bond with an employee's child following birth or placement for adoption;
2. To care for the employee's own serious health condition; and
3. To address any qualifying exigency arising from a family member who is on active duty and who has been notified of an impending call or order to active duty, or to care for a family member who is a covered service member.

## **HOW LONG IS THE LEAVE?**

The law provides for 12 weeks of paid leave to care for a family member or to bond with a child, 20 weeks for the employee's own health condition and 26 weeks for service member-related events. The leave is capped at 26 weeks per benefit year. A benefit year is the 52-consecutive-week period beginning the Sunday after the first day that PFML is used by the employee.

An employee's PFML allotment is based on the number of hours or days the employee typically works. For example, if an employee works a part-time schedule of variable hours, the amount of PFML that a covered individual is entitled to is determined on a pro rata basis. If an employee's schedule varies from week to week, pay is calculated based on a weekly average of the employee's scheduled hours over the 12 months prior to taking leave under the PFML.

## **WHO IS A “COVERED INDIVIDUAL” UNDER THE PFML?**

All full-time, part-time, permanent and seasonal employees who perform work in Massachusetts (even if they do not live in Massachusetts) are “covered individuals” under the PFML, provided that they are also eligible for coverage under the Massachusetts unemployment insurance law. To meet the PFML law’s financial eligibility requirement, an employee must have earned at least 30 times the weekly benefit amount the individual would be eligible to collect and at least \$4,700 during the employee’s prior year of employment.

A *former* employee is also a “covered individual” if his or her employment ended within 26 weeks of the start of the PFML, and the former employee also meets the financial eligibility requirement.

A self-employed individual who resides in Massachusetts may also qualify as a “covered individual” eligible for PFML. If the self-employed individual meets the same financial eligibility requirements, the individual may become eligible by either 1) electing coverage by submitting a Self-Employed Notice of Election to the Department, paying quarterly contributions for an initial minimum time period and remaining enrolled for a minimum of three years, or 2) working for a business whose workforce consists of more than 50 percent self-employed individuals, which qualifies the self-employed individual as a “covered contract worker.” In order to qualify as a covered contract worker, the individual is required to live and perform services in Massachusetts.

If an individual performs work for the employer, but *does not* receive W-2 or 1099-MISC forms (i.e., a principal or partner), the individual will be considered a “self-employed individual” and not an employee.

## **WHAT TYPES OF EMPLOYMENT ARE EXCLUDED FROM PFML?**

Certain categories of employment that are excluded from the Massachusetts unemployment law are also excluded from PFML, including:

- Work-study students, student nurses and interns of work trainee programs administered by nonprofit or public institutions;
- Real estate brokers/salespeople and insurance agents/solicitors in commission-only jobs;
- Employees of churches and certain religious organizations;
- Employees in the railroad industry; or

- Services performed by inmates of penal institutions;
- Services performed for a son, daughter or spouse;
- If under 18, services performed for one's father or mother; and
- Newspaper sales and delivery by persons under 18.

### **WHAT EMPLOYERS ARE SUBJECT TO THE PFML?**

All private Massachusetts employers, regardless of size, are required to comply with the PFML.

### **WHAT CONTRIBUTIONS MUST AN EMPLOYER MAKE TO THE FUND?**

An employer with less than 25 employees is required to contribute to the Fund on behalf of their employees, but does not need to make an employer contribution. The full deduction may be made from the employee's pay.

An employer with 25 or more employees must contribute to the Fund on behalf of their employees and must also make an employer contribution.

To determine if an employer meets the 25 or more employee threshold, the employer must calculate the average number of individuals on its payroll per quarter, including all full-time, part-time, seasonal and temporary employees, and any independent contractors it paid for services.

### **WHAT PAYROLL TAX CONTRIBUTIONS MUST AN EMPLOYER MAKE FOR EMPLOYEES AND COVERED CONTRACT WORKERS?**

Starting October 1, 2019, all employers are required to contribute to the Fund through a payroll tax.

For employers with 25 or more employees, the payroll tax is 0.75 percent of the employee's wages paid after October 1, 2019 (regardless of when the wages were earned). The Department has determined that 0.62 percent will be allocated to the medical leave portion of the Fund and 0.13 percent will be allocated to the family leave portion of the Fund. The law permits employers with 25 or more employees to require the employee to pay up to 40 percent of the medical leave allocation and to require the employee to pay up to 100 percent of the family leave allocation. An employer may deduct different percentages from the wages of

different groups of covered individuals, so long as it does not require any individual to pay more than 40 percent of the medical leave allocation or 100 percent of the family leave allocation.

For employers with less than 25 employees, the payroll tax is 0.378 percent of the employee's wages paid after October 1, 2019 (regardless of when the wages were earned). The Department has determined that 0.248 percent will be allocated to the medical leave portion of the Fund and 0.13 percent will be allocated to the family leave portion of the Fund. The contribution rate for smaller employers is less than the contribution rate for larger employers because the Department does not require employers with less than 25 employees to pay the employer share of the medical leave contribution, reducing the overall contribution amount. Accordingly, employees are responsible for 100 percent of the medical leave and family leave allocations, unless the employer elects to cover a portion of the employees' contribution.

The payroll tax is effective up to the contribution and benefit base limit established by the U.S. Social Security Administration for purposes of the Federal Old-Age, Survivors and Disability Insurance program (currently \$132,900).

To help employers estimate the amount of their required contributions, which may aid in determining whether a private plan exemption is more cost-effective, the Department released a Paid Family and Medical Leave Contribution Calculator.<sup>3</sup>

## **WHAT PAYROLL TAX CONTRIBUTIONS MUST AN EMPLOYER MAKE ON BEHALF OF SELF-EMPLOYED INDIVIDUALS?**

A self-employed individual who elects coverage by submitting a Self-Employed Notice of Election to the Department and following the statutory requirements is responsible for *all* contributions (the full 0.378 percent contribution).

## **ARE PAYROLL DEDUCTIONS MADE ON A PRE-TAX OR POST-TAX BASIS?**

The tax treatment for both employer and employee PFML contributions is governed by federal tax law. The Department has requested guidance from the Internal Revenue Service ("IRS") regarding the tax implications of PFML payroll deductions, but in the meantime, the Department recommends that employers consult with their tax advisors until the IRS provides guidance. The Department has stated that based on its review of federal rules and following consultation with the Massachusetts Department of Revenue, it anticipates that the IRS will conclude that employee contributions should be withheld from after-tax wages.

## **WHEN WILL PAID LEAVE BE AVAILABLE?**

The dates are staggered based on the *reason* for the leave. On January 1, 2021, paid leave is available for an individual's own serious health condition, bonding with a new child and service member-related events. On July 1, 2021, paid leave is available for a family member's serious health condition.

## **HOW MUCH WEEKLY PAY MAY AN INDIVIDUAL RECEIVE?**

The weekly benefit amount is calculated based on a percentage of the individual's earnings and is capped at \$850 per week. The amount is calculated at 80 percent of the individual's weekly earnings if the individual's average weekly wage is equal to or less than 50 percent of the state average weekly wage, and 50 percent of the individual's weekly earnings if the individual's average weekly wage is more than 50 percent of the state average weekly wage. The Department will reevaluate the maximum weekly benefit annually.

There is a seven-day waiting period before an individual may receive pay from the Fund. During the waiting period, an employee may *elect* to use accrued paid time off ("PTO"). An employer cannot *require* an employee to use PTO during the waiting period.

## **MAY A COVERED INDIVIDUAL TAKE INTERMITTENT OR REDUCED SCHEDULE LEAVE?**

Yes, in certain circumstances. A covered individual may take intermittent or reduced schedule leave for the individual's own serious health condition, or to care for a family member's serious health condition or due to a qualifying exigency arising out of a family member's active military duty or impending call to active military duty. However, an individual may *not* take intermittent or reduced schedule leave for child bonding, unless the employer and covered individual specifically agree. An employer may require an employee to take intermittent leave in increments that are not shorter than a time period designated by the employer and not greater than four consecutive hours. A covered individual who takes intermittent or reduced schedule leave will receive a pro-rated weekly benefit.

## **DOES PFML RUN CONCURRENTLY WITH OTHER LEAVE?**

Yes, in some circumstances. PFML will run concurrently with any other leave taken under the Family and Medical Leave Act, Massachusetts

Parental Leave Act, and the Massachusetts Earned Sick Time Law, provided the leave is for a qualified reason under those laws.

**MAY AN EMPLOYER REQUIRE THAT PAYMENTS UNDER PFML BE COORDINATED WITH OTHER PAYMENTS OFFERED UNDER AN EXISTING EMPLOYER PLAN?**

Yes, in certain circumstances. An employer may require that any PFML payment be made concurrently or otherwise coordinated with payment made or leave allowed under a collective bargaining agreement or employer policy, so that the employee receives the *greater* of the benefits available for the covered reason. Any such paid leave by the employer will count against the allotment of PFML leave. The employer must give an employee notice of this requirement.

**MUST A COVERED INDIVIDUAL PROVIDE NOTICE TO THE EMPLOYER OF PFML LEAVE?**

Yes. An employer may require an employee to provide notice of the anticipated start date of the leave, the anticipated length of the leave, the type of leave and the expected return date at least 30 days in advance (or as soon as practicable). The employer must first notify employees of this requirement, such as through a written PFML workplace policy.

**HOW DOES AN INDIVIDUAL FILE A CLAIM FOR BENEFITS AT THE DEPARTMENT?**

To request benefits, the individual will file a claim for benefits directly with the Department, including a certification evidencing that the leave serves a covered purpose. The certification must include information about dates of the proposed leave and appropriate medical facts or other facts relevant to the purpose of the leave.

The Department will notify the employer of the individual's claim for benefits within five business days and verify the individual's name, type of leave at issue, expected duration of the leave, whether the request is for continuous or intermittent leave and any other information relevant to the claim.

The Department will notify the applicant of his or her eligibility (or ineligibility) within 14 days of receiving the claim. The Department will begin payment within 14 days of the eligibility determination. The Department will provide the individual and the employer with contemporaneous notice.

An individual may appeal a denial of PFML benefits to the Department by filing a request for appeal within 10 days of the party's receipt of notice of the determination.

### **DOES AN EMPLOYEE ACCRUE AND RECEIVE BENEFITS DURING PFML?**

Yes. The employee must continue to receive health insurance benefits and accrue other employment benefits typically provided by the employer, including vacation time, sick leave, seniority and length of service.

### **DOES AN EMPLOYEE HAVE A RIGHT TO JOB RESTORATION?**

Yes. An employee returning from PFML is entitled to their same position or an equivalent position with the same pay, employment benefits, seniority and length of service.

An employer is *not* required to restore the employee to his or her position "if other employees of equal length of service credit and status in the same or equivalent positions have been laid off due to economic conditions or other changes in operating conditions affecting employment during the period of leave," provided that the employee who took leave "shall retain any preferential consideration for another position to which the employee was entitled as of the date of leave." An employer is also not "required to restore an employee who was hired for a specific term or only to perform work on a discrete project, if the employment term or project is over and the employer would not otherwise have continued to employ the employee."

A covered contract worker, or self-employed individual, is not entitled to job restoration upon returning from PFML.

### **MAY AN EMPLOYER REQUIRE AN INDIVIDUAL RETURNING FROM PFML TO COMPLETE A FITNESS-FOR-DUTY CERTIFICATION?**

Yes, in certain circumstances. If the employer has a uniformly applied policy or practice that requires all similarly situated employees or covered individuals (e.g., employees in certain positions or employees with certain serious health conditions) to obtain and present a certification from their healthcare provider that the individual is able to resume work, then the employer may do so for an individual who takes leave for his or her own serious health condition. The employer must provide employees and covered individuals with notice of the fitness-for-duty requirement.



## **DOES THE ACT INCLUDE ANTI-RETALIATION PROVISIONS?**

Yes. An employer is prohibited from interfering with an employee's rights under the law or retaliating against an employee for exercising the employee's rights.

This law creates a presumption of retaliation if there is any negative change to an employee's status or adverse action against the employee during the leave or within six months of the leave. The employer must rebut the presumption with "clear and convincing evidence" that the action was not retaliation and that the employer had "sufficient independent justification" for taking that action and "would have taken such action in the same manner and at the same time the action was taken."

## **DOES THE LAW PROVIDE A PRIVATE CAUSE OF ACTION FOR AN ALLEGED VIOLATION?**

Yes. An individual may bring a civil action in Superior Court for an alleged violation of the anti-retaliation, job restoration and continuation of benefits (e.g., the right to accrue vacation and other benefits, and the continuation of healthcare benefits) provisions. The action must be brought within three years of the alleged violation. Unlike claims under Chapter 151B or the Massachusetts Wage Act, there is no administrative filing requirement. The plaintiff has a right to a jury trial.

A prevailing plaintiff may be awarded various remedies, including all common law remedies, three times the employee's lost wages and benefits, and reasonable attorney's fees and costs. In addition, the court may issue a temporary restraining order or injunction and order reinstatement.

## **MAY AN EMPLOYER ADOPT A PRIVATE PAID LEAVE PLAN INSTEAD OF CONTRIBUTING TO THE FUND?**

Yes, with approval by the Department.

An employer may elect to adopt a private plan in lieu of contributing to the Fund, provided the private plan confers all of the same benefits as PFML, does not cost employees more than they would be charged under the state plan, includes equivalent or better job and benefit protections, and is approved by the Department.

An employer seeking to use a private plan must apply for approval annually. If the Department approves the plan, the employer must provide the Department with 30 days' notice before making any changes to the terms or conditions of the plan.

## **CAN AN EMPLOYER APPLY FOR A PRIVATE PLAN EXEMPTION?**

Yes. An employer may apply for a private plan exemption from the PFML's Family Leave program and Medical Leave program or both. The Department considers an employer's application for a private plan exemption based on the employer's federal employer identification number. An employer may apply for a private plan exemption no more than once per quarter. Accordingly, if the Department denies the employer's application, the employer must remit PFML contributions to the Department and wait until the following quarter to reapply.

## **WHEN MUST AN EMPLOYER APPLY FOR A PRIVATE PLAN EXEMPTION?**

The Department will review and accept applications for private plan exemptions on a rolling basis, but an employer's application must be approved in the quarter prior to the quarter the plan goes into effect. Accordingly, if an employer was interested in seeking an exemption from first-quarter contributions, it had to file for an exemption by December 20, 2019.

## **WHAT MUST A PRIVATE PLAN INCLUDE FOR AN EMPLOYER TO OBTAIN AN EXEMPTION?**

To receive a private plan exemption, the benefits offered by an employer's private plan must be *greater than or equal to the benefits provided by PFML*. This means an employer's private plan must provide workers with the same or greater paid leave benefits as provided under the law, as well as job protection while the worker is on leave, continued employer contributions to employment-related health insurance benefits, and the ability to take leave intermittently or on a reduced leave schedule for a prorated benefit amount. Further, according to the Department's guidance, the employer's private plan must *specifically state* that "all presumptions shall be made in favor of the availability of leave and the payment of leave benefits." An employer considering private plan exemptions should review the list of questions employers will be asked during the application process.<sup>4</sup>

In addition to these benefit requirements, an employer's private plan must be covered by a bond, valued based on the average size of the employer's workforce, statewide average weekly wage and 2019 PFML contribution rate, which is set annually on October 1.

An employer that was approved for an exemption on or before December 20, 2019, will have an exemption and bond effective date of October 1, 2019. The bond period will end on September 30, 2020. The

Department will require a Contributions Bond from the employer with an October 1, 2019, effective date so that the state may recover PFML contributions if the employer fails to maintain its self-insured PFML private plan prior to January 1, 2021.

Before the bond period expires on September 30, 2020, the employer must renew its self-insured private plan exemption approval. At that time, the Department will require a new bond to cover the employer's obligation to cover the repayment of PFML contributions if an employer fails to maintain its PFML private plan as well as the obligation to provide paid family and/or medical leave benefits to its covered workforce on or after January 1, 2021. Because of these additional obligations, the renewal bond value will be greater than the Contributions Bond required in 2019. The Department will continue to update its bond guidance once the new bond values are available for exemptions with effective dates after October 1, 2019.

The Department will continue to accept applications for private plan exemptions on a rolling basis, but applications must be approved in the quarter prior to the quarter in which the exemptions go into effect. Once an application is submitted, the Department anticipates issuing a determination within one to two business days.

### **IS THERE A PENALTY IF AN EMPLOYER FAILS TO MAINTAIN OR RENEW A PRIVATE PLAN?**

An employer who fails to maintain an approved private plan or has approval withdrawn by the Department may be assessed a penalty equal to the employer's annual payroll (or covered workforce it failed to maintain a plan for) multiplied by the annual contribution rate. Additionally, an employer that fails to renew or maintain a private plan approved for the future payment of PFML scheduled to begin January 1, 2021, may be responsible for retroactive contributions to the Department.

If an employer elects not to renew its approved private plan, it must provide notice to individuals covered by the plan at least 30 calendar days prior to the termination date. An employer must continue to provide paid leave benefits under the private plan's terms and conditions for the entire duration of an employee's leave, provided such leave began prior to the private plan's termination date.

### **WHAT IS MASSTAXCONNECT AND HOW DOES IT RELATE TO PFML?**

All Massachusetts employers and self-employed individuals who elect coverage under PFML are required to file earnings reports and remit contributions electronically through the Massachusetts Department of Revenue's MassTaxConnect system. Registration can easily be completed

online if the business or self-employed individual does not have a pre-existing account. Employers may access further information on how to electronically register<sup>5</sup> with MassTaxConnect.

### **MUST AN EMPLOYER PROVIDE INFORMATION TO THE EMPLOYEE UPON HIRE?**

Yes. The employer must provide written information to an employee within 30 days of the employee's start date. The written information must be in the employee's primary language and it must explain the employee's rights under the PFML. This notice may be distributed by email. The employer must obtain from each employee a written acknowledgment of receipt of the information, or the employer must maintain a statement indicating the employee's refusal to sign.

Additionally, the employer must provide notice to a self-employed individual or covered contract worker about PFML at the time that the employer enters into the contract with the individual. The individual must provide written acknowledgment of receipt of the information or the employer must maintain a statement indicating the individual's refusal to sign an acknowledgment.

### **WHEN MUST AN EMPLOYER PROVIDE ITS WORKFORCE WITH WRITTEN NOTICE OF PFML?**

An employer had to provide its workforce with written notice of PFML, and obtain from each worker a signed acknowledgement page, by September 30, 2019.

To comply with this requirement, an employer must provide all employees and covered contract workers with a written notice of their rights under the PFML. An employer may distribute this notice electronically. The Department has stated that a "read receipt" is not sufficient to constitute a written acknowledgment of receipt by the worker. An employer must obtain a written acknowledgment of receipt from each worker or a written statement indicating that the worker declines to acknowledge receipt of the information. The Department has indicated that it will consider an employer to have fulfilled its notice obligation if the employer can establish that it provided each member of its workforce with notice and the opportunity to acknowledge or decline to acknowledge receipt.

An employer is *required* to provide written notice to all covered contract workers only if those workers make up more than 50 percent of the employer's workforce. If the number of covered contract workers does not meet this threshold, the Department encourages (but does not require), employers to provide 1099-MISC contractors with written notice of PFML so that those contractors can decide whether they want to opt into the program, regardless of whether the employer meets the threshold.

An employer may elect to distribute the template notice to employees<sup>6</sup> and a template notice to 1099-MISC contractors<sup>7</sup> published by the Department. If an employer creates its own notice, that notice must include the following information:

- An explanation of the availability of family and medical leave benefits;
- The employee's contribution amount and obligations;
- The employer's contribution amount and obligations;
- The employer's name and mailing address;
- The employer's identification number assigned by the Department;
- Instructions on how to file a claim for family and medical leave benefits; and
- The mailing address, email address, and telephone number of the Department.

### **WHEN MUST AN EMPLOYER DISPLAY THE WORKPLACE POSTER?**

Employers must display the poster now, in an area where other workplace posters are displayed, in English and each language that is the primary language of five or more members of the workforce.

Employers may access the workplace poster published by the Department, "Notice of Benefits Available Under M.G.L. Chapter 175M Paid Family and Medical Leave," in English<sup>8</sup> and translated in other languages.<sup>9</sup>

### **WHERE DO I GO FOR MORE INFORMATION?**

Employers may access information through these sources:

- The Department's website;<sup>10</sup>
- The PFML Statute;<sup>11</sup> and
- The PFML Regulations.<sup>12</sup>

## **WHAT ARE THE DEADLINES AND NEXT STEPS FOR EMPLOYERS?**

Below are key compliance dates and recommended next steps.

- Now: Display the new “Notice of Benefits Available Under M.G.L. Chapter 175M Paid Family and Medical Leave”<sup>13</sup> poster, which has been updated by the Department to reflect the new October 1, 2019, implementation date, in a conspicuous location where other workplace posters are located.
- September 30, 2019: Written notices had to be distributed to employees and covered individuals who are 1099-MISC contractors, and written acknowledgments obtained from those workers recognizing their receipt (or a statement indicating the individual’s refusal to sign such acknowledgment). If an employer provided written notices to its workforce before the PFML delay announcement on June 14, 2019, it had to provide its workforce with updated rate sheets explaining the new dates and contribution rates.
- October 1, 2019: Employers began PFML payroll deductions.
- December 20, 2019: This was the first-quarter deadline for employers to apply for private plan exemptions for the Family Leave program and the Medical Leave program, or both.
- January 31, 2020: Employers had to remit employee and (if applicable) employer contributions for the October 1 to December 31 quarter through MassTaxConnect.
- Prior to January 1, 2021: Employers should consider how PFML will relate to existing leave policies and revise handbooks and policies accordingly.
- January 1, 2021: Paid family leave benefits available for bonding with a new child, service member-related leave, and for serious personal health conditions.
- July 1, 2021: Paid family leave benefits available for a family member’s serious health condition.

## NOTES

1. <https://www.mass.gov/orgs/department-of-family-and-medical-leave>.
2. <https://www.mass.gov/doc/458-cmr-200-department-of-family-and-medical-leave/download>.
3. <https://calculator.digital.mass.gov/pfml/contribution/>.
4. <https://www.mass.gov/doc/review-the-questions-you-will-be-asked-during-your-exemption-application/download>.
5. <https://www.mass.gov/how-to/register-your-business-with-masstaxconnect>.
6. <https://www.mass.gov/info-details/informing-your-workforce-about-paid-family-and-medical-leave#notifying-massachusetts-w-2-employees->.
7. <https://www.mass.gov/info-details/informing-your-workforce-about-paid-family-and-medical-leave#notifying-massachusetts-1099-misc-contractors->.
8. <https://www.mass.gov/doc/paid-family-and-medical-leave-mandatory-workplace-poster/download>.
9. <https://www.mass.gov/lists/paid-family-and-medical-leave-downloads-for-massachusetts-employers>.
10. <https://www.mass.gov/orgs/department-of-family-and-medical-leave>.
11. <https://malegislature.gov/Laws/SessionLaws/Acts/2018/Chapter121>.
12. <https://www.mass.gov/doc/458-cmr-200-department-of-family-and-medical-leave/download>.
13. <https://www.mass.gov/doc/paid-family-and-medical-leave-mandatory-workplace-poster/download>.

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