



*To:* Secretary Rosalin Acosta  
Executive Office of Labor and Workforce Development

*From:* Michael Weekes, President/CEO  
Providers' Council

*Re:* Comments on draft regulations for the Department of Family and Medical Leave, dated January 23, 2019

*Date:* March 11, 2019

Secretary Acosta and staff of the Executive Office of Labor and Workforce Development, thank you for the opportunity to submit comments on the draft regulations for the Department of Family and Medical Leave.

We appreciate the Executive Office and the Department of Unemployment Assistance hosting nearly a dozen listening sessions across the state to solicit feedback and questions from employers about the newly developed regulations. Our staff attended the listening sessions, which were extremely helpful in understanding the regulations.

As you may know, the Council is the largest statewide association of community-based human services organizations that provide an array of services to one-in-ten Massachusetts residents on behalf of the Commonwealth. Since the mid-1970s, providers have built community supports that have been transformative in protecting the lives of many residents, advancing our state's system of care and ensuring hundreds of thousands of state residents receive critical supports.

While we are supportive of the concept of paid family and medical leave, we do have some questions and concerns about the draft regulations and how the new Department of Family and Medical Leave will administer the program. Through consultation with our members, we also have included the potential fiscal impact on community-based human services organizations that care for clients on behalf of the Commonwealth – and many of which receive a majority of their funding from the state.

### ***Concerns specific to human services organizations***

The Providers' Council surveyed our membership to collect information about how members were approaching the Family and Medical Leave contributions and the potential cost impact on their organizations.

For reference, Chapter 257 of the Acts of 2008 – the landmark rate-setting law that governs the state's purchase-of-service contracts with community-based human services organizations – mandates that the state reviews rates every two years to ensure rates are covering the full cost of providing services. New contracts being set

## Providers' Council

### Comments on draft regulations for the Department of Family and Medical Leave

March 11, 2019

for the state with an effective date on or after July 1, 2019 are expected to include a funding mechanism in their rates at 0.63 percent for the *Paid Family and Medical Leave Act Trust* contribution. Organizations, however, who received a contract with rates reviewed effective January 1, 2019 will not see funding for this mandated expense until their next review date – presumably *January 1, 2021*. This means organizations will be paying the 0.63 percent for the new assessment, but they may not be receiving any reimbursement from the state for doing so.

From our membership survey, community-based human services nonprofits that have already calculated the cost of implementing *Paid Family and Medical Leave* (PFML) estimate it to be between \$4,000 for smaller organizations and \$296,000 for larger organizations annually, with the average being nearly \$100,000 per year. About 40 percent of organizations responding noted they believe it will cost their organization more than \$100,000 per year.

While a number of organizations may receive reimbursement from the state through new purchase-of-service contracts, many won't receive it for 18 months and even then, it will not be retroactive – only after the rates are updated will the Executive Office of Health and Human Services begin building the Paid Family and Medical Leave Act Trust Contribution into the rates for January 1, 2021.

Accordingly, for organizations receiving a majority of their funding through purchase-of-service contracts with the Commonwealth, ***we ask that the Department of Family and Medical Leave develop a waiver that they can receive until the state can build reimbursement for this mandated expense into their rates.*** This would ensure that organizations funding to care for clients on behalf of the Commonwealth is not being redirected to pay for PFML or reducing paychecks for their dedicated workforce.

### ***Other Identified Issues***

Through our conversations with our members and attending listening sessions held throughout the Commonwealth, there are a number of other issues that have been raised regarding the draft regulations. We have listed the major issues below, and, if applicable, our recommendations.

- Overall, the July 1, 2019 date is extremely soon to begin collecting contributions from employers considering that the state has only released regulations under development for the purpose of early public input. Additionally, this would give the state a full two years of contributions from employers before beginning to pay out claims. ***With so much uncertainty and the regulations still under development, we ask the state to push back the initial contribution date to January 1, 2020 to give the state more time to assess the law and its impact.***

**Providers' Council**

**Comments on draft regulations for the Department of Family and Medical Leave**

**March 11, 2019**

- Some employers have noted that they may need to drop short- and long-term disability coverage as soon as they need to begin paying for Family and Medical Leave due to the increased costs and not being able to afford both programs. We understand the need to ensure the program is funded before employees begin drawing on the benefit, but a two-year lead period means some organizations may drop their short- and long-term disability coverage sooner rather than later.
- Section xx.07, *Claim for Benefits*, there is an extremely quick turnaround for employers to provide a lot of information. Subsection 6 only provides an employer “five calendar days” in which to furnish a large amount of information (subsections (a) through (h)) to the state. Should the request be received late on a Friday before a three-day weekend, the employer would only have two business days in which to gather it all. Should the request be received late Tuesday before the Thanksgiving holiday, it would be all but impossible to comply. ***We suggest this be changed from “five calendar days” to “ten business days” to ensure organizations are reasonably able to comply with this section.***
- In Section xx.15, *Job Protection, Prohibition on Retaliation*, there are several issues that have been identified.
  - One issue with the law includes the accrual of vacation, sick leave, etc. while an employee is using leave. The current regulations read: “Taking family or medical leave under M.G.L. c. 175M shall not affect an employee’s right to accrue vacation time, sick leave, bonuses, advancement, seniority, length-of-service credit or other employment benefits, plans or programs.” ***We believe this section should be clarified to state that while employees should receive these benefits after leave, they do not actively accrue vacation time while using family or medical leave.*** It would be unprecedented to have employees accrue vacation time or other benefits while using family and/or medical leave.
    - With covered individuals eligible for up to 26 weeks, in the aggregate, of family and medical leave under the statute, they could accrue vacation, sick or other benefit time while on leave and use it immediately upon return. We believe that would create a hardship for many human services organizations.
  - Currently, employees will pay employers for health insurance premiums while they are on leave if they’re not collecting a salary. This section states that “*During the duration of an employee’s family or medical leave, the employer shall continue to provide for and contribute to the employee’s employment-related health insurance benefits, if any, at the level and*

## Providers' Council

### Comments on draft regulations for the Department of Family and Medical Leave

March 11, 2019

*under the conditions coverage would have been provided if the employee had continued working continuously for the duration of such leave.”*

- Employees who are currently out on paid time will pay employers on a monthly basis for their portion of the health insurance premiums. If they don't pay it within 30 days of it being due, they will be removed from the plan. The draft regulations seem to note that employers would be forbidden from removing employees from the plan for non-payment. ***We ask that the department ensures that employees who do not submit payment for health insurance in a reasonably timely manner are still able to be removed from the plan so to not put an undue burden on employers.***
- Organizations have asked if the state would automatically be able to take the premium out of the benefit it would send the employees and pay the employer for health insurance out of that benefit. Most employees already have their employee share contribution deducted from their paycheck now. ***We recommend a system like this be instituted if necessary to ensure the timely payment of health insurance premiums for employees taking leave.***

### **Other Questions**

There are some other general questions that have been raised to which we are seeking answers. Thank you for any guidance you can provide on the below questions that the Providers' Council has heard a number of times.

- Should employee deductions for paid leave be considered pre-tax or post-tax? It is unclear from the regulation, and we have received this question from employers multiple times.
- We are unclear if the paid leave income would count toward the calculation for unemployment insurance.
- The federal FMLA program requires employees to exhaust all benefit time they have accrued, including any vacation time expected to be earned during the current fiscal year. Will PFML add a provision for this?
- Are there any special considerations given for two parents who work with the same company who both want to take family or medical leave simultaneously to care for each other or a dependent?
- These regulations do not appear to address an employer's current desire and practice to return employees to work on modified or light duty. Engaging in an interactive dialogue with employees on medical leave is pertinent under the

## Providers' Council

### Comments on draft regulations for the Department of Family and Medical Leave

March 11, 2019

ADA, and it would be important to ensure that these discussions about modified duty, part-time work and other accommodations can continue between the employer and employee when a medical leave is administered through the DFML.

- Section xx.04, *Contributions*, discusses that the initial contribution rate begins on July 1, 2019. But when is the first payment date? July 1, 2019? July 31, 2019? September 30, 2019? Another date? This is not clear in the draft regulations, and multiple employers have inquired about this.
- In Section xx.04, *Contributions*, there is some information in subsection 2 regarding the treatment of employees covered under IRS Form 1099-MISC. How would this be handled if the 1099 is to a company -- for example, a staffing agency -- and not individual employees? Do both the staffing agency and employer count the employee?
- In the same subsection, it discusses employee and workforce count, but some guidance is needed for community-based human services organizations that have vocational programs for clients and consumers who are issued a W2 or 1099 form. Are they considered eligible employees or is it dependent on unemployment insurance standards?
- At one of the listening sessions, it was noted that the 0.63 contribution would only be up to the Social Security base amount of \$128,400, though Section xx.04, *Contributions*, subsection 6 states if employers assessed a penalty will pay the penalty on their entire payroll – including salaries that exceed the Social Security base amount. Our members would like clarification on this point from the Department.
- As to Section xx.06, *Application for Exemption*, a number of employers have inquired as to what, exactly, their plan would need to have to be exempt from the regulation. For example – if employers offer short/long-term disability, plus a package of accrued vacation, sick and personal days – how would they know if they would be likely to receive an exemption?
- It is unclear in Section xx.07, *Claim for Benefits*, but we believe applicants would be applying to the Department of Family and Medical Leave and not their employer. Yet subsection (2)(a) notes “an individual filing a claim for benefits must provide the individual’s employer with: (i) at least 30 days’ notice of the anticipated start date of the leave,” etc. Is the employee notifying the DFML with 30 days’ notice and DFML notifies the employer? How does this work?
- In Section xx.13, *Attestations and False Statements*, if an employment is found to have made false statements during their application for – or use of – PFML, can the employer exact discipline according to the organization’s attendance policy?

## **Providers' Council**

### **Comments on draft regulations for the Department of Family and Medical Leave**

**March 11, 2019**

- With regard to Section xx.14, *Claim Denials and Appeals*, if an employee goes out suddenly, applies for Paid Family and Medical Leave using whatever mechanism is decided and has that claim denied, would they be protected under retaliation protections or would they be eligible for discipline according to the organization's attendance policy?
- In that same section, it says if the individual cannot provide 30 days' notice, they shall provide notice "as soon as is practicable." What are some scenarios in which DFML would envision allowing leave for less than a 30-day notice?
- How will the Department of Family and Medical Leave confirm relationships between the employee and the family member for which leave is being requested? For example, with the expanded list of family members, how will employees show proof that someone is their relative?
- Our understanding is employees would not be eligible for workers compensation benefits by participating in PFML, but we would like this clarified, as workers compensation is an exclusive/sole remedy in Massachusetts.
- How are maternity-related absences classified? Typically, a new mother is considered medically disabled for six to eight weeks following birth. The regulations state the benefit period to care for a child after birth is 12 weeks, but it is unclear whether all of that time is considered "family" leave or if the first six to eight weeks are "medical" leave with the remainder family leave.
- Finally, how do the state and federal leave laws interact? The regulations state that, when applicable, state PFML and federal FMLA will run concurrently, but there are two conditions needed for this to happen: the employee must be eligible under both laws and the reason for leave has to qualify under both laws. If either of those conditions are not met, then only one law would apply at a time – probably the state law since its eligibility requirements are more generous than the federal law.

These are just some of the most frequent questions we've received from organizations regarding the draft regulations. We strongly recommend the Department publish a Frequently Asked Questions (FAQ) sheet with answers to these questions and those it has often received at listening sessions.

### ***In closing***

Again, thank you for the opportunity to provide comments on an early draft of the Department of Family and Medical Leave regulations.

The Providers' Council and its members are proud to work in a state that provides critical medical and family leave benefits to its workforce. We are in support of a well thought out and constructed medical and family leave policy and our comments are to

**Providers' Council**

**Comments on draft regulations for the Department of Family and Medical Leave**

**March 11, 2019**

improve on this policy and procedures. Our workforce is an essential element of an effective human services system and thereby, a strong and caring Massachusetts for all..

We appreciate the Executive Office of Labor and Workforce Development holding nearly a dozen listening sessions and giving organizations numerous opportunities to provide comment – both in person and in writing. We appreciate the open dialogue and communication from your office and staff at the Department of Unemployment Assistance.

The Providers' Council and the community-based human service providers we represent throughout Massachusetts look forward to continuing to work with you on these regulations. We thank you for your time, and we'd be happy to convene a meeting of human services providers to meet with you to discuss these issues or our special circumstances – and our request for a very limited waiver – at your convenience.