

All Employees Now Permitted to “Top Off” Benefits Under MA Paid Family and Medical Leave Law; New Contribution Rates and Weekly Benefit Amounts Set to Take Effect January 1, 2024

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Last month, the Massachusetts Legislature voted to amend the Massachusetts Paid Family and Medical Leave Law (“PFML”) to permit employees receiving PFML benefits either through the Commonwealth’s trust fund (i.e., the state funded PFML plan) or through a self-insured or third-party private PFML plan to supplement or “top off” their PFML benefits with any available accrued paid leave (i.e., sick time, vacation time, personal time, or other paid time off (“PTO”)).

The amendment took effect on November 1, 2023, and applies to applications for PFML benefits filed on or after that date. Retroactive applications filed on or after November 1, 2023 for a leave that began before that date are also eligible for the new top off. PFML claims that were filed with the Massachusetts Department of Family Medical Leave (the “Department”) before November 1, 2023 are not eligible to be topped off.

Prior to the amendment, employers who provided PFML benefits through either a self-insured or third-party private plan had the choice to permit employees to supplement their PFML benefits with employer-provided accrued paid leave. Now, all employers – regardless of whether they pay into the state-funded plan or a private plan – are required to permit employees to top off.

The decision whether or not to top off PFML benefits rests solely with the employee, meaning that employers may not require employees to use their accrued, unused paid leave to supplement their PFML benefits. For those employers who are also subject to the federal Family and Medical Leave Act of 1993 (“FMLA”), please keep in mind that you will not be able to require employees who are concurrently taking PFML leave and FMLA leave to use their accrued, unused paid leave, even though the FMLA



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permits such employers to require their employees to use their accrued paid leave while on FMLA leave.

Employees who choose to supplement their state-funded PFML benefits with available accrued paid leave may not receive more than their Individual Average Weekly Wage (“IAWW”) when their PFML benefits are combined with the supplemental employer-provided paid leave benefits. The IAWW is calculated using the amount the employee earned in the last four completed calendar quarters preceding the start of the employee’s benefit year; it is the average amount the employee earned per week in the two quarters when the employee earned the most money (or the one quarter when the employee earned the most money if the employee worked in two or fewer calendar quarters).

Employees’ use of employer-provided accrued paid leave to top off their PFML benefits will not impact their weekly PFML benefit and need not be reported to the Department. Thus, employers are now responsible for overseeing employees’ supplementation of their PFML benefits and managing employees’ use of accrued paid leave while they are on PFML leave to ensure that the combined sum does not exceed the employee’s IAWW. If an employee receives more than the IAWW because the employee used too much accrued paid leave to supplement PFML benefits, the employer will be responsible for managing and recouping the overpayment. The Department will not participate in the repayment process for top off overages.

To calculate the proper amount that may be topped off, employers should subtract the amount of PFML benefits the employee is receiving from the IAWW. The difference is the maximum amount of accrued paid leave that the employee can use to supplement their PFML benefits. Employers who have a registered leave administrator can determine their employees’ weekly PFML benefit rate and their respective IAWW by accessing each employee’s PFML Approval Notice. Employers who do not have a registered leave administrator are unable to access this information.

To further complicate matters, employees may still file an application for retroactive PFML benefits even if they have already used accrued paid time off as full salary replacement prior to filing their application. In such a case, if the employee receives combined employer provided benefits and PFML benefits that exceed the employee’s IAWW, the employer will be responsible for managing any payments made to the employee that exceed the employee’s IAWW. Employees will be responsible for working

Brian M. Casaceli
Anthony P. DaSilva, Jr.
Ashlyn E. Dowd
Corey F. Higgins
Robert L. Kilroy
Kimberly A. Rozak
Massiel L. Sanchez
Sharon P. Siegel
Jonathan R. Sigel
Richard C. Van Nostrand
Reid M. Wakefield
Cheryl A. Spakauskas

with their employer to ensure that the combined weekly sum of PFML benefits and any accrued paid leave does not exceed their IAWW.

In light of these changes, employers should notify their employees that under the PFML Law, they now have the option to use their available accrued paid leave to supplement their PFML benefits while on leave, up to the employees' IAWW. Employers should also notify their employees about what employer-provided paid leave benefits they are eligible to use and when they are eligible to use such benefits, so that the employees know not to report them on their PFML application.

Finally, please note that the Department recently set the new contribution rates for the upcoming 2024 benefit year. Effective January 1, 2024, the total contribution rate for employers with 25 or more covered individuals will increase from 0.63% to 0.88% of employees' eligible wages, while the contribution rate for employers with 24 or fewer covered individuals will increase from 0.318% to 0.46% of employees' eligible wages. Likewise, in 2024, the maximum weekly PFML benefit amount will increase from \$1,129.82 per week to \$1,149.90.

In short, employers should be sure to notify their employees of the recent change in the law concerning PFML top off. In addition, by law, employers are required to notify new and current employees of the upcoming increases in the contribution rates and the maximum weekly benefit amounts by **December 2, 2023**.

Please feel free to contact us if you have questions about these or other labor and employment matters.

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