



FMLA Guidance Issued

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On March 14, 2019, the Department of Labor's Wage and Hour Division (WHD) issued an opinion letter (**FMLA 2019-1-A**) providing some guidance relating to the Family and Medical Leave Act (FMLA). This Opinion Letter affirms that it is the employer's obligation to commence FMLA and neither the employer nor the employee can delay the commencement of FMLA nor can they expand the duration of FMLA.

As background, the FMLA provides up to 12 weeks of job protected, unpaid leave (26 weeks for military caregiver leave) to eligible employees for the employee's own serious health condition, to care for a family member with a serious health condition or for baby bonding.

Sometimes employees would like to delay the commencement of FMLA leave by using available paid time off. According to this Opinion, while paid time off can be substituted for all or a portion of FMLA, it cannot be used to delay the commencement of FMLA. In other words, the paid time off and FMLA run concurrently.

Further, this letter provides that the maximum amount of FMLA cannot be expanded. An employer, of course, can provide more generous leave than the FMLA requires and this is affirmed in the letter. However, the richer benefit would not in and of itself constitute FMLA. It is important to note, if the employer provides a richer benefit and if it intends that benefit be available during such extended leave, it is important to ensure that all relevant benefit plans and insurance contracts reflect this intent.



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Increased Penalty for Failure to Post EEOC Notice

The Equal Employment Opportunity Commission (EEOC) **announced** an increase in the penalty for failure to post the EEOC notice from \$545 to \$559 per violation, effective April 22, 2019.

As background, employers subject to various laws enforced by the EEOC should ensure that they have the appropriate EEOC notice posted in their workplaces. The EEOC enforces laws that prohibit workplace discrimination under such laws as:

- ◆ Title VII of the Civil Rights Act (relating to discrimination on the basis of race, color, religion, national origin, or sex);
- ◆ Americans with Disabilities Act (ADA) and ADA Amendments Act (ADAA);
- ◆ Age Discrimination in Employment Act (ADEA);
- ◆ Genetic Information Nondiscrimination Act of 2008 (GINA); and
- ◆ Pregnancy Discrimination Act (PDA)

The EEOC poster, “*Equal Employment Opportunity is the Law*” is available in four languages (English, Spanish, Arabic and Chinese), and, can be obtained by downloading and printing it via [EEOC website](#).

San Francisco HCSO Report due April 30th

Employers subject to the San Francisco’s Health Care Security Ordinance (HCSO) are required to annually report their health care expenditures to the Office of Labor Standards Enforcement (OLSE). The **2018 Employer Annual Reporting Form**, together with **Instructions**, is now available on [OLSE’s website](#).

As background, a business is subject to the HCSO if it engages in business within the City of San Francisco and employs 20 or more employees per week. Nonprofit employers with fewer than 50 employees, and small employers with fewer than 20 employees, are exempt from the HCSO. For 2019, the applicable health care expenditure rate for large businesses employing 100-plus employees is \$2.93 per hour; the rate for businesses with 20-99 employees and nonprofits employing 50-99 employees is \$1.95 per hour.

The form is due by April 30, 2019. Employers who fail to timely submit the annual report could be subject to penalties of \$500 for each quarter the violation occurs.

Updates: Massachusetts Paid Family and Medical Leave, Take Two

Massachusetts passed a Paid Family and Medical Leave law which requires Massachusetts employers to provide paid family and medical leave to their employees. Starting July 1, 2019, employers may begin payroll deductions to fund the paid family and medical leave (PFML) program. Employees are eligible for PFML benefits for baby bonding, military exigency, and for an employee’s own serious health condition beginning January 2021. PFML benefits for a family member’s serious health condition begins July 1, 2021.

On March 29, 2019, the Massachusetts Department of Family and Medical Leave (DFML) issued updated draft regulations for public comment. The Department plans to issue final regulations prior to the July 1, 2019 implementation date.

The Department has also posted on its website an employer guide, a toolkit for employers, and the mandatory workplace poster. This new information can be found on [DMFL’s website](#).

Contributions

Starting July 1, 2019, employers must begin making contributions to the Trust Fund at an initial contribution rate of 0.63% on the first \$132,900 (indexed for 2019) of an individual’s annual earnings. The 0.63% contribution rate is split between a 0.52% medical leave contribution and a 0.11% family leave contribution.

Employers with 25 or more employees must remit the entire 0.63% contribution to the Trust Fund. Such employers may deduct 100% of the family leave contribution and 40% of the medical leave contribution from employees. The employer must pay the remaining 60% of the medical leave contribution.

Employers with 24 or fewer employees are not obligated to pay the 60% employer share of the medical leave contribution. Such employers need only remit to the Trust Fund the remaining 40% employee share of the medical leave contribution and 100% of the employee’s family leave contribution, all of which may be deducted from the wages of employees.

The Department offers employers two interactive tools. One tool is for **calculating contributions** and the other tool is for **determining if the employer is responsible for the share of medical leave**.



Workplace Poster

The law requires employers to notify employees of the law and its requirements. Employers must display the poster in a conspicuous place at its business by July 1, 2019. The poster must be displayed in English and each language which is the primary language of 5 or more individuals in the workforce. The Department has created a **workplace poster** in English, Spanish and ten other languages for an employers' use.

Beginning July 1, 2019, employers will also be required to notify their workforce about the State's PFML program. Employers must provide W2 employees and 1099-MISC contractors written notice of contributions, benefits, and workforce protections. This notice must be issued to each new employee within 30 days of his/her first day of employment and in the employee's primary language. Employers must obtain from each employee a written statement acknowledging receipt of the notice or a statement indicating the employee's refusal to acknowledge the notice.

The notice must contain:

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

Private plan exemption

Beginning April 29, 2019, an employer that provides a paid leave benefit through a private plan may apply to the Department for an exemption from the above referenced tax. The employer may apply for an exemption from medical leave, family leave, or both. Applications for exemptions will be accepted and reviewed by the Department on a rolling basis and will be effective for one year. The exemption may be renewed annually.

To be approved for an exemption, an employer's private plan must confer all the same or better benefits as those required by law and may not cost employees more than they would be charged under the state plan administered by the Department.

Additionally, the employer's policies must provide equivalent or better rights and protections as those required by the law, including the job- and benefit-protection provision and the non-retaliation provision.

What Should An Employer Do?

While these regulations are not final, yet.

- ◆ Employers should begin taking steps to prepare for the payroll changes that will take effect July 1, 2019;
- ◆ Employers should begin preparing to deliver the required notices and posting; and
- ◆ Employers intending to get their private plans certified should be prepared to submit documentation beginning April 29, 2019.

New Jersey Pre-Tax Transit Benefit Coming Soon

On March 1, 2019, Governor Murphy signed a transit benefits law requiring employers to offer pre-tax transit benefits. This law becomes applicable on the earlier of March 1, 2020 or the date the New Jersey Department of Labor and Workforce Development adopts regulations.

Employers subject to law

Both for-profit and not-for-profit employers that are subject to New Jersey's unemployment compensation law and employ 20 or more employees shall offer a pre-tax transportation fringe benefit to its employees. Employer includes state and local governments. Employers with 19 or fewer employees and the federal government are excluded from the requirements.

Eligible employee

Any employee who works for remuneration for an employer is eligible for the transit benefit.

Transit benefits

Employers must offer an IRC Section 132 qualified transportation pre-tax program. As a reminder, these types of programs are similar to, but cannot be a part of an IRC Section 125 cafeteria plan.

A qualified transportation program provides:

- ◆ Commuter Highway Vehicle (van pooling) and Any Transit Pass (up to \$265 per month, indexed for 2019)
- ◆ Qualified Parking (up to \$265 per month, indexed for 2019)



Enforcement

Any employer that fails to offer transit benefits to employees will be subject to a penalty of not less than \$100 and not more than \$250 for a first violation. The employer will have 90 days to offer the employees transit benefits before the penalty is imposed. If the employer fails to offer such benefits after 90 days, each additional 30 days in which the employer fails to make such offer will be considered a subsequent violation, subject to a penalty of \$250.

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