



PLADS

LEGISLATIVE ADVISORY

REGULATORY UPDATES FROM
AFLAC'S PREMIER LIFE, ABSENCE AND
DISABILITY SOLUTIONS DIVISION



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We are pleased to share the February 2022 **PLADS Legislative Advisory**, information related to paid and unpaid leave legislation as well as other regulatory updates.

Keeping up to date with the ever-changing unpaid and paid statutory leave laws can be difficult. This edition highlights Massachusetts PFML guidance, information about leave laws and COVID-19 impacts, and state-specific paid leave and long-term care updates.

TOP NEWS INSIDE

- [New Massachusetts PFML guidance.](#)
- [Leave laws and COVID-19.](#)
- State/other paid leave legislation: [Connecticut](#), [Colorado](#) and [Oregon](#).
- State long-term care legislation: [Washington](#).

NEW MASSACHUSETTS PFML GUIDANCE

The Department of Family and Medical Leave (DFML) has published guidance in four areas:

1. The application of 2022 benefit rates.
2. The extensions of leave.
3. Leave entitlement.
4. Ownership of claims.

Application of 2022 benefit rates

For leaves that start on or after Jan. 1, 2022, the max benefit will be \$1,084.31 per week and providers must use the 2022 state average weekly wage (SAWW) to calculate the benefit rate. However, the individual average weekly wage (IAWW) is calculated at the start of the benefit year and remains the same for all claims submitted during that year.

The four completed quarters before the start of the benefit year determine an employee's IAWW. The IAWW is calculated based on the top two quarters of earnings divided by 26 weeks (or top one quarter of earnings divided by 13 weeks if two or fewer quarters have earnings reported). Accordingly, if an employee starts a new claim in January 2022, but had previously initiated a claim in July 2021, the second claim would occur within the same benefit year as the first claim. The benefit rate for the January 2022 claim must be calculated using the IAWW that was established at the beginning of the benefit year. Leaves starting before Jan. 1, 2022, must use the 2021 max benefit and 2021 SAWW.

For example, Employee A applies for an eight-week family leave beginning on July 1, 2021. This family leave triggers Employee A's benefit year, which is June 27, 2021, through June 25, 2022. Employee A files for a medical leave starting Feb. 1, 2022. The medical leave starting in February must use the same IAWW based on earnings from the family leave claim (Q2 2020 through Q1 2021) but will also be subject to the 2022 max benefit cap and the 2022 SAWW.

Extension of leave

An extension will be subject to the SAWW and the maximum benefit cap of the year in which the extension starts.

For example, Employee A applies for a 10-week medical claim beginning Dec. 1, 2021. This is Employee A's first leave, and the benefit year will run from Nov. 28, 2021, through Nov. 26, 2022. Employee A's IAWW will be based on earnings during Q4 2020 through Q3 2021 and will be subject to the 2021 max benefit amount of \$850 per week.

Near the end of Employee A's medical leave, Employee A files for a five-week extension, which would start Jan. 10, 2022. This extension is subject to the 2022 benefit cap and SAWW, but still uses the same IAWW that was established at the beginning of the benefit year.

Leave entitlement

To be compliant, both private and self-funded plans must calculate new benefit rates and new allotments at the start of a new benefit year if a leave extends beyond the current benefit year.

For example, Employee A takes two weeks of leave beginning Jan. 15, 2021, and his benefit year is Jan. 10, 2021, through Jan. 8, 2022. Employee A then requests eight weeks of leave starting on Dec. 1, 2021. Employee A would be approved from Dec. 1, 2021, through Jan. 8, 2022. Employee A would then need to submit a new claim starting on Jan. 9, 2022, which will start a new benefit year with new entitlement.

NEW MASSACHUSETTS PFML GUIDANCE

Ownership of claims

Ownership of claims when an employee either transitions between the state program and a private plan (or vice versa) has been clarified by the Department of Family and Medical Leave in several ways.

Employees who apply in advance of their leave will need to apply with the carrier providing coverage as of the date the leave starts, and not the carrier providing coverage as of the date of the application.

Example: On May 15, Employee A applies to the state program. Employee A's leave begins July 5. The employer has applied for and been approved for an exemption starting July 1. Employee A's application will be rejected by the state. They will be covered by the new insurer and will need to reapply with that insurer.

Medical pregnancy and new child bonding leaves are two separate claims and coverage must be analyzed separately, even if the bonding leave immediately follows the medical leave.

Example: Employee B's employer provides MA PFML through a private plan with Insurer C. But as of July 1, 2022, the employer will be moving to Insurer D. Employee B files for medical leave benefits and for bonding leave benefits immediately following the medical leave with Insurer C. Employee B has the baby, and her medical leave ends on July 15, 2022. Insurer C will grant the medical leave but deny the bonding leave. Assuming Employee B's bonding leave immediately follows her medical leave, she will not incur a waiting period and her bonding leave will be covered by Insurer D.

Timely filed extensions are counted as part of the same claim for purposes of determining coverage and are made within 14 days of the end of the leave. The extension must continue immediately from the end of the initial leave.

Example: Employee C's employer has a private plan with Insurer D in effect through June 30. Effective July 1, the employer transitions coverage to the state. Employee C files a claim for eight weeks of medical leave benefits beginning June 1, with Insurer D. Three weeks after the end of the leave, Employee C files a claim with Insurer D to extend the medical leave by another six weeks. The extension started in late July immediately after the end of the original leave. Insurer D rejects Employee C's application because it is late. Employee C will need to file a new claim, subject to a waiting week, with the state.

Intermittent leave claims will be covered based on the approved period of intermittent leave and must be covered until the end of the approved period or the end of the benefit year, whichever is first.

For additional information, please see: <https://www.mass.gov/info-details/important-guidance-on-2022-benefit-calculations-and-transferring-back-to-pfml>.



LEAVE LAWS AND COVID-19

This information aims to help employers better understand job-protected leave surrounding the vaccination process with the changing vaccination laws.

Standalone paid vaccination leave laws

To date, it appears New York has the only law in the country requiring employers to provide their employees with up to four hours of paid leave to receive a COVID-19 vaccine injection in addition to other paid leave benefits they must provide for including paid sick time, quarantine and company paid leave. In addition, New York City passed legislation permitting employees who are parents to take paid time off to accompany their children when the child receives a COVID-19 vaccination. Again, employers will need to give employees up to four hours of paid time off per injection per child.

Emergency (COVID) paid sick leave laws

Many states enacted pandemic-specific laws that allow employees to use paid, job-protected leave for various reasons associated with COVID-19. Some states have specifically included language that employees may use this paid sick leave to receive and recover from a COVID-19 vaccination. The American Rescue Plan Act of 2021 offers a federal tax credit to eligible private employers with 499 or fewer employees that provided pay for sick and family leave from April 1, 2021, through Sept. 30, 2021.

<https://www.irs.gov/newsroom/employer-tax-credits-for-employee-paid-leave-due-to-covid-19#:~:text=The%20American%20Rescue%20Plan%20Act%20of%202021%20%28ARP%29,employees%20to%20receive%20or%20recover%20from%20COVID-19%20vaccinations.>

Established paid leave laws

There are many jurisdictions across the country that have enacted laws, prior to the COVID-19 pandemic, requiring employers to provide job-protected paid time off for sick or safe leave. These same laws are interpreted to include preventative care, which would include receiving and recovering from a COVID-19 vaccination.

Wage and hour laws

In several states, if an employer is requiring an employee to get vaccinated as a part of their employment, the time an employee spends obtaining the vaccine, and potentially recovering from any side effects, could be considered compensable hours worked, even if the vaccination occurs outside of the employee's normal work schedule or off company property. Traveling to and from a vaccination appointment may also be included in an employee's hours worked.

Specific occupation laws

While predominantly at a local level, there are laws focusing on grocery and retail employers to provide up to four hours of paid leave to employees so that they can attend COVID-19 vaccination appointments. Employers should consult with their human resources departments and corporate counsel to determine what local, state and federal laws may apply to their employees.

For more information, please check your state or government website.

LEAVE LAWS AND COVID-19

Accommodating work from home COVID-19 requests

While the Omicron COVID-19 variant has become problematic for employers when it comes to return-to-work plans, employers are beginning to expect employees to return to the office with various work conditions such as hybrid schedules, masking and requiring proof of vaccination. Those employees returning to work may not want to return to the office for various reasons such as an inability to be vaccinated or they have become accustomed to working from home. As a result, employers are seeing an increase in requests from employees to remain at home as an accommodation. Employees have a variety of reasons not to return to the workplace such as concerns about contracting the disease and passing it on to family members with serious health conditions, apprehension about using mass transit and religious objections to the vaccine.

Employers will need to thoughtfully consider work from home accommodations in order to avoid any discrimination or “failure to accommodate” claims under the Americans with Disabilities Act. Under the ADA, an employer can approve an:

“...adjustment or modification provided by an employer to enable people with disabilities to enjoy equal employment opportunities. If a reasonable accommodation is needed and requested by an individual with a disability to apply for a job, perform a job or enjoy benefits and privileges of employment, the employer must provide it unless it would pose an undue hardship, meaning significant difficulty or expense. An employer has the discretion to choose among effective accommodations. Where a requested accommodation would result in undue hardship, the employer must offer an alternative accommodation if one is available absent undue hardship.” <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>.

The crux of what may be at issue comes in two parts. First, is there a disability? Second, can the employer reasonably accommodate a request from the employee to remain working from home? The answer to both questions can become complex. Pregnant women, older adults and employees who have serious health conditions such as diabetes, heart or lung disease, or those who have compromised immunity clearly fit the definition of “disability.” These employees likely have a record of disability as defined by the ADA. However, the definition of disability becomes less clear for employees who are caregivers of family members with serious health conditions or for employees who are diagnosed with a non-disability illness under normal circumstances, such as asthma, but when coupled with COVID-19, may place an employee at greater risk for illness or death. There is also guidance on a disability that has arisen from COVID-19, “long-haul COVID,” which can last weeks or months with an employee continuing to experience coronavirus symptoms after recovery from the initial infection.

Employers will need to evaluate each work from home request on an individual basis to determine whether the request can be reasonably accommodated, but they will also need to remember to treat similar requests equally. Employers should not only assess the disability factor, but also:

- the job position.
- the duration of the request.
- whether the requested accommodation would sufficiently mitigate a direct threat to the workplace.
- whether the requested accommodation would create an undue burden on the business.

If an employer believes they cannot approve an employee’s work from home accommodation, then the employer must communicate with the employee indicating the hardship the employer would be under should the request be

approved or denied. These conversations or communications should be documented especially when the employer ultimately finds the accommodation is unreasonable and denies it.

This article predominantly focuses on work from home accommodation requests under the ADA. However, other bodies of law such as the EEOC, OSHA, emergency and well-established state laws and regulations, as well as federal mandates, can also impact the decision-making process when it comes to assessing a work from home accommodation request due to COVID-19. Also, there is no blanket method to evaluate appropriate accommodations. Employers should consult with their human resources departments and corporate counsels to determine best practices.

For more information, please visit: <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>.

STATE/OTHER PAID LEAVE LEGISLATION

CONNECTICUT

Connecticut Paid Leave: Additional two weeks for pregnancy

The Connecticut Paid Leave Authority and the Connecticut Department of Labor have clarified the additional two weeks of leave that is available under CT Paid Leave and CT Family Leave Act. When an employee is incapacitated during pregnancy, an additional two weeks may be used. The incapacity does not need to have been caused by the pregnancy or even related to the pregnancy. Keep in mind, however, compensation under the additional two weeks is available only during the pregnancy and will not be available after the birth of the child. As additional clarifications are published, we will keep you updated.

For more information, visit: https://ctpaidleave.org/s/article/How-often-can-someone-take-leave-Is-there-a-limit?language=en_US.

COLORADO

Colorado has begun rulemaking on paid family medical leave

On Nov. 3, 2020, Colorado passed the Paid Family and Medical Leave Insurance Act (CO PFML). Starting Jan. 1, 2023, employers must begin to remit a payroll tax to the fund to provide for the benefits. Benefits will become available to employees beginning Jan. 1, 2024. The Colorado Division of Family and Medical Leave Insurance has begun the rulemaking process with its first public hearing held on Jan. 6, 2022.

During the hearing, public comments were taken on premium rules including definitions, assessing and collecting definitions, determining wages and notifying employers and employees of their expected premiums due and due dates (7 CCR 1107-1). Additionally, comment was taken on local government rules (7 CCR 1107-2) that focuses on processes for local government participation with the CO PFML program.

For more information, please see: <https://famli.colorado.gov/proposed/adopted-rules>.

STATE/OTHER PAID LEAVE LEGISLATION

OREGON

Oregon has begun rulemaking on paid family and medical leave insurance

As was widely publicized in 2020, the Oregon Legislature passed, and Governor Kate Brown signed, a bill officially changing the implementation timeline of Oregon's PFML program. With the new law, Oregon PFML contributions will begin Jan. 1, 2023, and employees will be able to use the program beginning Sept. 3, 2023. According to the Oregon Employment Department, the change allows PFML to do several things, including develop rules, policies and policies with adequate time for stakeholder feedback; hire necessary staff and set up facilities; plan outreach events and raise awareness about the program; and contribute to a technology system that will fully support the PFML program.

On that note, the OR PFML policy team will produce administrative rules in five different batches. Two of the five batches have already been drafted and are out for review. The rulemaking process allows the public the opportunity to provide feedback, offer suggestions and comment on Oregon PFML administrative rules.

Included in Batch 1 are rules relating to:

- assistance grants for small employers.
- how contributions are calculated.
- how people who are self-employed may participate in PFML.
- outreach.
- employer size as it relates to paying the employer contribution.
- wage definitions.

Public comment was received on the Batch 1 rules and will become final in January 2022.

Included in Batch 2 are rules relating to:

- how an employer can offer paid family and medical leave benefits through an equivalent plan.
- definitions that are used for wages.
- what constitutes agricultural labor.
- what does domestic service include and not include.
- what is considered holiday or paid time off.

Two public hearings are scheduled from 3 to 5 p.m. PT on Feb. 23, 2022, and 9 to 11 a.m. PT on Feb. 28, 2022.

For more information on the advisory committee and meetings, visit: State of Oregon: [Paid Family and Medical Leave Insurance - Advisory Committee and Workgroups](#).

STATE LONG-TERM CARE LEGISLATION

WASHINGTON

Delay in the WA Cares Fund premium assessment

In 2019, Washington state Governor Jay Inslee signed the Long-Term Services and Support (LTSS) Trust Act into law (RCW 50B.04). Known as the WA Cares Fund, it created a long-term care insurance benefit for all eligible individuals in Washington.

The trust is the first to be rolled out in the United States and is fully funded by individual contributions that were set to begin in January 2022. However, the governor of Washington state along with the state's senate majority leader and house speaker agreed to delay collecting premiums until July 1, 2023. The governor announced that "legislators have identified some areas that need adjustments," and the delay will allow "legislators to make refinements to the bill."

The Long-Term Care Commission will be studying and making recommendations to the legislature about residents who move out of Washington to retire and ensure those who have opted out of the program maintain their private insurance policies.

Under the governor's authority, he has notified the Employment Security Department not to collect the premiums from this program before they come due in April. For more information, please see: <https://wacaresfund.wa.gov/>.



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