ERIC
The ERISA Industry Committee
Driven By and For Large Employers
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May 22, 2019

Massachusetts Department of Family and Medical Leave
One Ashburton Place, Suite 2112,
Boston, MA 02108

RE: Massachusetts Paid Family and Medical Leave Updated Draft Regulations

Ladies and Gentlemen:

The ERISA Industry Committee ("ERIC") is writing in regard to the updated draft regulations that were released by the Massachusetts Department of Paid Family and Medical Leave ("Department") in relation to the implementation of the Massachusetts Paid Family and Medical Leave Program as established by M.G.L. c.175M as codified in St. 2018, c.121.

The paramount concern remains the current regulatory development timeline. Under the current timeline, final regulations are due to be promulgated on an unspecified day following public hearings in May and an additional comment period, creating an untenable compliance burden on employers. This is particularly significant because the latest version of the regulations injects a new category of worker, a "covered contract worker," with respect to whom an employer's obligations are unclear and conflicting. As such, our first—and most urgent— recommendation is to delay the commencement date for contribution collection. Beyond this concern, we have several other recommendations to ensure that our members are able to continue to provide generous paid leave benefits to their employees.

ERIC's Interest in the Updated Draft Regulations

ERIC is the only national association that advocates exclusively for large employers on health, retirement, and compensation policies at the federal, state, and local levels. ERIC's members provide comprehensive paid leave programs that benefit millions of workers and their families. ERIC has a strong interest in proposals, such as these updated draft regulations, that would affect its members' ability to provide quality and uniform paid leave benefits to their employees.

ERIC shares the same goal of increasing employee access to paid family and medical leave programs; however, we strongly encourage the Department to adopt regulatory standards that minimize the administrative and compliance burdens on large employers who already provide paid leave benefits to their employees, or otherwise hinder large employers' ability to design their own leave benefits to best meet the needs of their business and workforce while satisfying the intent of Massachusetts law.

We appreciate the opportunity to provide comments on the updated draft regulations, as well as to discuss ways in which burdensome administrative impacts can be minimized for large employers who already offer generous paid family and medical leave programs.

Comments

I. The Commencement Date for Contributions Should Be Delayed Due to the Inadequate Regulatory Development Timeline

The regulatory development schedule currently provided by the Department does not leave adequate time for employers to receive, understand, and fully comply with final regulatory standards developed by the Department. For example, absent further clarification, the inclusion of "covered contract workers," leaves employers in the untenable position of either remitting contributions on behalf of self-employed individuals who may or may not have elected coverage or becoming subject to significant penalty provisions based on the failure to remit contributions for those non-employees. The current draft regulations are not set to be finalized until on or shortly before July 1, 2019, following public hearings and an additional comment period, at which time contributions are set to commence.

As recognized by other states, the timelines set for development of the necessary tools to receive and process the reports and contributions have been unrealistic. For example, Washington State recently extended its first reporting and collection period from April 2019 to July 2019.

It is similarly unrealistic to expect employers to be able to comply with a regulation on the same day that it is promulgated, or even shortly before. ERIC member companies employ thousands of individuals across multiple states, and, therefore, are hard pressed to adapt their core benefit plans to the specific standards of one state in such a short frame of time. Consequently, we strongly encourage the Department to delay the date on which contribution collection will commence to provide employers with enough time to complete all necessary actions associated with implementing the final regulations under the state paid family and medical leave program.

II. Employers' Obligations with Respect to Covered Contract Workers Must Be Clarified.

The Department has created conflicting obligations for reporting, collecting and remitting contributions for covered contract workers. Pursuant to the current draft regulations, a "covered contract worker," is, "a self-employed individual…." Section xx.06 permits self-employed individuals to elect coverage under M.G.L. c. 175M for an initial period of not less than three years. Self-employed individuals who elect coverage, "shall be responsible for the full contribution amount, based on that individual's income from self-employment." M.G.L. c. 175M Section xx.06(4). Self-employed individuals may also be, "required to be treated as a covered contract worker by a covered business entity to whom the self-employed individual provides services," and, "[a]n employer...shall [also] be required to calculate and remit contributions for all employees and covered contract workers…." Therefore, as written, contributions may be required from three separate sources for the same individual: an employer, a covered business entity and the self-employed individual, him or herself.

This framework also places employers and covered business entities at risk of over-deducting from payments to a covered contract worker based on a lack of insight into whether the self-employed individual has exceeded the income limit on qualifying earnings. However, failure on the part of any of employers or covered business entities to remit required contributions may subject the entity to penalties of up to 0.63% of the total annual payroll. Finally, the obligations imposed on employers in regards to covered contract workers would render the self-employed individual's opportunity to voluntarily elect to participate in the program and the definition of a covered business entity meaningless.

The regulations should be harmonized to relieve employers from all obligations to collect or remit contributions for self-employed individuals for whom income is reported on a 1099-MISC basis. Consistent with Section xx.06, those individuals should be permitted to elect coverage and be responsible for the full contribution amount.

III. Exemption from the Obligations Set Forth in M.G.L. c. 175M Should Be Granted for Subclasses of Covered Individuals.

Employers already offering paid family and medical leave benefits to employees that are equal to or more generous than those provided by the state program should be granted a waiver from required reporting and contribution to the state program. The inclusion of covered contract workers in Section xx.07 (Application for Exemption Due to Approved Private Plan), coupled with the guidance that approval for private plans will not be granted for a class or classes of employees, will virtually eliminate the ability of employers to gain approval from the state for private plans that provide coverage only to employees. This imposes a significant administrative burden on employers and undermines the ability of self-employed individuals to maintain exclusive control over the costs and profits associated with their businesses. Further, eliminating employer flexibility in employer-provided paid family and medical leave programs would ultimately reduce or eliminate the access that Massachusetts employees would have to employer-provided paid family and medical leave programs that are generally more generous than the standards of the state program.

We encourage the Department to grant approval to private plans that cover only a class or classes of employees, so as to focus the administrative efforts on a smaller subset of covered individuals.

IV. The Penalty Provision Should Be Limited to Covered Individuals.

Employers who fail to remit contributions following notice from the Department will be assessed 0.63 percent of its total annual payroll, without regard to what portion of the payroll is attributable to covered individuals. This places the Department in a position to collect well in excess of the amounts an employer may withhold pursuant to Section xx.05(5)(c) and, particularly for large, national employers imposes a penalty that is wholly disproportionate to any actual loss by the Department.

The penalty provision should be clarified to limit any assessment to that portion of payroll attributable to covered individuals.

V. Employer Reporting Obligations Should Be Clarified and Duplicative Items Eliminated

Employers are already under immense reporting and compliance burdens imposed by federal leave laws such as the Family and Medical Leave Act ("FMLA") as well as other state law requirements. Additional reporting requirements that would lead to continual request response and record submission would be extremely burdensome to large employers who would have to maintain and constantly prepare records on thousands of employees across multiple states.

The first paragraph of Section xx.04(2) of the updated draft regulations requires employers to submit a quarterly report through the MassTaxConnect system containing employer and employee information. Additionally, Sections xx.08(6) and xx.010(2)(d) of the updated draft regulations provide that, upon notice from the Department, employers will have five business days to provide the Department with specific information and records relating to their employees. The data requested includes, for example, wage or earnings information for the previous twelve months, prior requests/approvals for a qualifying reason and the amount of leave taken for a qualifying reason in the prior benefit year. The regulations do not specify whether the employer is required to create records where no written documents responsive to the request exist (e.g., a description of the employee's position).

These requirements create an unnecessary administrative hardship for employers both in terms of the extremely short response deadline and in requiring the submission of data that is either required to be provided to the Department in the quarterly submission or otherwise available to the Department as part of its own records. Specifically, wages earned will be reported each quarter. Similarly, the Department is in the best position to confirm the duration and reason(s) for any qualifying leaves taken in the prior calendar year, which

leave(s) may be taken during employment with multiple employers. The same information is also required to be provided by a claimant, who is required to attest to the truthfulness of the statements submitted. Therefore, any information required of the employer is redundant.

Employers may also be required to provide information regarding whether the covered individual has applied for concurrent FMLA or other leave and whether the employer has approved the application. The FMLA, however, sets forth different response deadlines, allowing for approval to be withheld or delayed until an employee provides sufficient information to certify the need for leave. Importantly, the approval or denial of state leave is not tied to approval of a separate, unpaid federal leave.

We therefore encourage the Department to alter the updated regulations to provide employers with a minimum of ten calendar days to respond to Department record requests and to eliminate the following categories of information from those required to be provided:

- Wage and/or earnings information for the past 12 months;
- Prior requests/approvals for a qualifying reason;
- Amount of paid leave already taken for a qualifying reason during the benefit year; and
- Whether the covered individual has applied for concurrent FMLA or other leave and whether the employer has approved the application.

We also encourage the Department to clarify whether employers are required to create written records in response to requests where such records do not otherwise exist.

VI. Intermittent Leave Regulations Must Be Harmonized to Clarify Employers' Obligations.

The updated draft regulations contain inconsistent rules regarding use of intermittent leave. Section xx.08(5)(a)(v) states that a covered individual will be required to certify that the individual and employer "mutually agree" to leave on an intermittent or reduced leave schedule due to the employee's own medical condition. In contrast, Section xx.13(1)(d) states that the employee or covered individual "shall attempt to work out a schedule for such leave that meets the individual's needs without unduly disrupting the employer's operations, subject to the approval of the health care provider."

We suggest the Department clarify when, and under what circumstances, covered individuals are required to obtain employer approval before taking leave on an intermittent basis.

VII. Impact of Employer-Provided Benefits on Paid Leave Under M.G.L. c. 175M is Uncertain.

The current draft regulations are unclear about the process by which employers may obtain reimbursement for paid benefits provided to employees in excess of the statutory minimum. The regulations also permit the employee to choose whether or not to elect paid benefits from the employer, but does not clarify whether the employer may reduce Company-paid benefits if the employee elects to receive state benefits. Finally, the regulations are both silent on whether "accrued paid leave," referenced Sec. xx.12(8) ("Substitution of Employer-Provided Paid Leave") applies to an employer's paid time off policies and are inconsistent on the issue of whether employees are ineligible for benefits under M.G.L. c. 175M during any period for which they are receiving Company-paid leave benefits, or whether the employee may receive the state benefit with reimbursement being provided to the employer at some later date.

These issues may discourage employers from offering or providing benefits for family and/or medical leave to employees within the state to prevent either double payment by the employer or double recovery by the employee. This approach is also inconsistent with administration of the Massachusetts Earned Sick Time Act, under which employers are permitted to rely on paid time off policies to satisfy compliance.

The Department is encouraged to credit employers for Company-paid leave benefits that meet or exceed the state benefit towards the total leave entitlement under M.G.L. c. 175M and to clarify that all Company-paid leave taken for reasons permitted under the statute, or which may be taken for any reason at the election of an employee (e.g., a general paid time off benefit), may be credited toward an employee's total annual leave entitlement. In the alternative, the Department should create a clear, easily navigable process for reimbursement of amounts paid in excess of the state minimum to employees. In addition, the current draft regulations should be updated to reflect the fact that employers may reduce the total amount of Company-paid family or medical leave by the duration of any state-provided leave.

VIII. Definition of Covered Servicemember Should Match the Federal FMLA Definition

The federal FMLA has been in effect for decades and has been widely used as a standard by companies to design leave benefits for their employees. Under the FMLA, employers are required to provide an extended period of leave to care for a covered servicemember with a serious injury or illness. While many of the definitions included in M.G.L. 175M Section xx.02 mirror the language from the federal statute, notably the definition of a covered servicemember excludes reference to a veteran's discharge status and the length of time that has passed since the covered veteran was discharged or released. This omission could greatly increase the number of individuals who are eligible for the enlarged period of 26 weeks of paid leave under the state statute, where such leave is not similarly available under the FMLA.

We therefore encourage the Department to amend its updated draft regulations to include a definition of covered servicemember that is consistent with the definition provided by the federal FMLA.

Conclusion

Ultimately, ERIC shares your goal of increasing access to paid family and medical leave benefits for Massachusetts employees. However, we believe that without further clarification and development, the current draft regulations fail to provide a clear, thorough and consistent guideline for compliance. By enlarging the time for submission of reports and contributions, clarifying employers' obligations towards non-employee contract workers, eliminating duplicative administrative and reporting requirements, and harmonizing provisions within the regulations and with those used under federal law, employers will be able to make knowledgeable decisions regarding applications for private plans and administration of current benefits. Therefore, we again ask that the Department take into serious consideration the array of challenges and burdens employers face when attempting in good faith to comply with the requirements of the program.

ERIC appreciates your consideration of our concerns. If you have any questions concerning our comments, or if we can be of further assistance, please contact us at (202) 789-1400 or arobinson@eric.org.

Sincerely,

Aliya Robinson
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