ERIC
The ERISA Industry Committee
Driven By and For Large Employers
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March 1, 2019

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

RE: Massachusetts Paid Family and Medical Leave Preliminary Draft Regulations

Ladies and Gentlemen:

The ERISA Industry Committee ("ERIC") is writing in regard to the preliminary 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.

Of paramount concern is the current regulatory development timeline. Under the current timeline, final regulations are due to be promulgated on the same day that the collection of contributions is set to commence, creating an untenable compliance burden on employers. 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 Preliminary 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 preliminary 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 preliminary draft principles, 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. Currently, proposed regulations are not set to be formulated and published until March 29, 2019. Further time is then required to hold a formal hearing and invite public comment on these regulations before final regulations are promulgated on July 1, 2019 which is the same day that collection of employer contributions by the Department is set to commence.

It is unrealistic to expect employers to be able to comply with a regulation on the same day that it is promulgated. Moreover, 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. The Contribution Collection Process Needs Clarification

It is critical to provide employers with the specifics of when and how contribution collection will be conducted in order to ensure smooth implementation and operation of the program. The condensed nature of the current regulatory development timeline further highlights the importance of supplying employers with a finalized process for contribution collection. Currently, Section 30 of M.G.L. c.175M provides that the Department will commence collection of contributions on July 1, 2019. Section xx.04(5) of the preliminary draft regulations state that contributions owed must be remitted by an employer within 30 days after the end of the calendar quarter. Neither the original statute nor the preliminary draft regulations are clear as to whether the first contribution is to be made on the July 1 deadline for the proceeding calendar quarter, or 30 days after the end of that calendar quarter, which would be on October 30. For employers to properly comply, this provision must be clarified.

Additionally, Section xx.04(4) of the preliminary draft regulations requires employers to pay the difference between the total contribution owed and the portion of that contribution that the employer has lawfully deducted from an employee's wages. This requirement creates a dilemma for employers with employees who lack sufficient wages for a pay period. For example, an employee who receives the majority of his income through tips will generally not have sufficient wage income due to withholdings for taxes, health care premiums, and retirement benefits. In this situation, the employer would be responsible for paying the majority, if not all, of the contributions on behalf of the employee. We encourage the Department to clarify this section to provide that this rule does not apply if an employer is unable to deduct the maximum allowable employee share of the contributions for a pay period due to a lack of sufficient employee wages for that pay period.

III. Employer Reporting Timelines Need Extension and Clarification

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.03(2) of the preliminary draft regulations requires employers to submit a quarterly report through the MassTaxConnect system containing employer and employee information. The current draft language does not provide a specific date or deadline following the end of a calendar quarter by which these quarterly reports must be submitted. Adequate time following the end of a calendar quarter must be granted to employers to allow them to compile and submit these quarterly reports. We encourage the department to clarify the process and timeline for submission of these quarterly reports.

Additionally, Sections xx.07(6) and xx.09(2)(d) of the preliminary draft regulations provide that upon notice from the Department, employers will have five calendar days to provide the Department with specific information and records relating to their employees. This requirement is inconsistent with Section 7(f) of M.G.L. c.175M, which expressly requires employers to respond within ten calendar days of a Department request. Furthermore, this requirement creates an administrative hardship for employers that, depending on the date of receipt, will have only three to four business days to collect and submit the applicable records and information. We therefore encourage the Department to alter the preliminary regulations to provide employers with at least ten calendar days to respond to Department record requests.

Section xx.07(6)(d) of the preliminary draft regulations requires employers to report the weekly hours worked by employees but does not indicate the period of time for which this information is being requested. Similarly, Section xx.07(6)(e) requires employers to provide information about prior requests and approvals for leave made by employees but does not indicate the period of time to be reported on. We therefore encourage the Department to clarify these reporting requirements and provide a set period of time for which employers must submit reports to the Department. We recommend that this period be limited to the past twelve months.

IV. The Regulations Should Provide a Waiver for Employers That Are Already Providing Equivalent Paid Family and Medical Leave Benefits to Their Employees

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 contribution to the state program. Many large companies design their paid family and medical leave benefits to meet the overall compensation and employee benefits goals of the company, and are tailored to their industry, competitive environment, and the needs of their workers. As a result, ERIC member companies do not utilize a one-size-fits-all model for paid family leave programs. 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.

V. Definition of Family Member 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 unpaid leave for employees to care for an employee's child, spouse, or parent. The preliminary draft regulations use a definition of care recipient, or the family members whom employees may use leave benefits to care for, that extends well beyond the requirements of the federal FMLA and includes an employee's domestic partner,

parent of a spouse or domestic partner, grandchild, grandparent, sibling, or a person who stood in loco parentis to the covered individual when the covered individual was a minor child.

The definition used by the preliminary draft regulations threatens to create a patchwork of state-dependent standards as well as a compliance nightmare for employers. We therefore encourage the Department to amend its preliminary draft regulations to include a definition of family member that is consistent with the definition provided by the federal FMLA.

VI. Interaction with Section 45S of the Internal Revenue Code

Many employers currently enjoy a federal tax credit established under Section 45S of the Internal Revenue Code for wages paid to qualifying employees while they are on family or medical leave. Section 3(c) of M.G.L. c.175M states that if an employer provides payment to an employee while the employee is on family and medical leave, the employer will be reimbursed for this payment from any state benefits due to that employee under the state family and medical leave program. The preliminary draft regulations are currently silent as to employer reimbursement under these conditions. We therefore encourage the Department to clarify how the reimbursement will work and also to provide information about how this provision interacts with the family and medical leave credit under Section 45S of the Internal Revenue Code.

Conclusion

Ultimately, ERIC shares your goal of increasing access to paid family and medical leave benefits for Massachusetts employees. However, we believe that using a condensed regulatory development timeline, expanding administrative and reporting requirements, reducing employer flexibility to design and operate tailored paid leave benefits, and extending the definition of family member beyond that used by federal law, would serve to detract from the overall goal of increasing employee access to paid family and medical leave throughout the state. Therefore, further regulatory development by the Department for the implementation of a state paid family and medical leave program should take into serious consideration the array of challenges and burdens that employers are to face when attempting 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
Senior Vice President, Retirement and Compensation Policy