



January 2021 Compliance Report

January 26, 2021

Family and Medical Leave, Benefit and Contribution Rates, Sick Leave, From the Courts, and In the News

Family and Medical Leave

Federal

December 29, 2020:

The United States Department of Labor (DOL) Wage and Hour Division (WHD) issued two Field Assistance Bulletins (FAB) to provide guidelines on the use of electronic notices and telemedicine visits under the Family and Medical Leave Act (FMLA):

- FAB No. 2020-7: Generally, electronic notices supplement but do not replace the statutory and regulatory requirements that employers post a hard-copy notice. The WHD will only consider electronic posting an acceptable substitute for the continuous posting requirement where (1) all of the employer's employees exclusively work remotely, (2) all employees customarily receive information from the employer via electronic means, and (3) all employees have readily available access to the electronic posting at all times.
- FAB No. 2020-8: The WHD will consider telemedicine visits to be in-person visits as required by the FMLA if the telemedicine visit: (1) includes an examination, evaluation, or treatment by a health care provider; (2) is performed by video conference; and (3) is permitted and accepted by state licensing authorities. Communication methods that do not meet these criteria (e.g., a simple telephone call, letter, email, or text message) are insufficient, by themselves, to satisfy the regulatory requirement of an "in-person" visit. Ordinarily, the FMLA regulations define treatment by a health care provider as an in-person visit to a health care provider. However, the DOL issued this guidance considering that health care facilities and clinicians around the nation continue to use telemedicine to facilitate the availability of healthcare while increasing social distancing and reducing potential infectious disease exposures and community spread.

The full text of FAB No. 2020-7 and FAB No. 2020-8 can be found on the [DOL WHD website](#).

December 31, 2020:

The WHD updated its questions and answers document "[Families First Coronavirus Response Act: Questions and Answers](#)" to provide additional guidance on common employer questions on the expiration of the FFCRA. The two new Q&As on the expiration of the FFCRA are reproduced below:

Q: I was eligible for leave under the FFCRA in 2020 but I did not use any leave. Am I still entitled to take paid sick or expanded family and medical leave after December 31, 2020?

A: Your employer is not required to provide you with FFCRA leave after December 31, 2020, but your employer may voluntarily decide to provide you such leave. The obligation to provide FFCRA leave applies from the law's effective date of April 1, 2020, through December 31, 2020. Any change to extend the requirement to provide leave under the FFCRA would require an amendment to the statute by Congress. The Consolidated Appropriations Act, 2021, extended employer tax credits for paid sick leave and expanded family and medical leave voluntarily provided to employees until March 31, 2021. However, this Act did not extend an eligible employee's entitlement to FFCRA leave beyond December 31, 2020. Employers with questions about claiming the refundable tax credits for qualified leave wages should consult with the IRS. Information can be found on the [IRS website](#).

Q: I used 6 weeks of FFCRA leave between April 1, 2020, and December 31, 2020, because my childcare provider was unavailable due to COVID-19. My employer allowed me to take time off but did not pay me for my last two weeks of FFCRA leave. Is my employer required to pay me for my last two weeks if the FFCRA has expired?

A: Yes. WHD will enforce the FFCRA for leave taken or requested during the effective period of April 1, 2020, through December 31, 2020, for complaints made within the statute of limitations. The statute of limitations for both the paid sick leave and expanded family and medical leave provisions of the FFCRA is two years from the date of the alleged violation (or three years in cases involving alleged willful violations). Therefore, if your employer failed to pay you as required by the FFCRA for your leave that occurred before December 31, 2020, you may contact the WHD about filing a complaint as long as you do so within two years of the last action you believe to be in violation of the FFCRA. You may also have a private right of action for alleged violations.

Massachusetts

December 21, 2020:

The Department of Family and Medical Leave (DFML) filed two sets of [emergency regulations](#) to address the following issues prior to the launch of the Paid Family and Medical Leave (PFML) benefits program:

- **Extension of the 12-month bonding leave deadline.** An employee of an acute care hospital who is eligible for family leave for bonding in connection with a birth, adoption, or foster care placement that occurred during calendar year 2020 may request, and the employer may grant, a period of family leave for bonding that extends beyond the 12 month period reckoned from the child's birth, adoption or foster care placement, provided that such leave shall not extend beyond December 31, 2021. Any extension of the period for family leave for bonding allowed to the emergency regulations shall not affect the total amount of leave available to the employee. The extension shall also have no effect on the availability of medical leave pursuant to under the MA PFML law or to other leave that may be available pursuant to MA Parental Leave Law, the federal Family and Medical Leave Act, or under any other State or Federal law.
- **Additional Covered Individuals and Employers.** Personal care attendants and family child care providers are now considered Covered Individuals. The Department of Early Education and Care shall be deemed the employer of family child care providers; the PCA Quality Home Care

Workforce Council shall be the employer of personal care attendants (although consumers are considered the employers for the purpose of notice requirements).

January 1, 2021:

The DFML has launched the Commonwealth's PFML benefits program, and issued the following additional guidance for employers and employees:

- **Reimbursements for qualifying paid leave plans.** A business or organization that has not received an exemption but offers a paid temporary disability, family, or medical leave policy which provides covered individuals with the type of benefits available under the PFML program may be eligible to be reimbursed for those paid benefits (fully insured temporary disability plans do not qualify). Payments for an employee's earned time (including PTO, sick, and vacation time) are not eligible for reimbursement. Additionally, benefits paid through a self-insured or fully-insured plan that has been approved for exemption by the DFML are not eligible for reimbursement. (Employers must be withholding and remitting contributions to the DFML under the Commonwealth's plan to be eligible for reimbursement.) Employers are not eligible for reimbursement where the DFML has issued payments directly to the employee for the same period of time covered under the reimbursement application. For more information, please see the [DFML website](#).
- **Intermittent leave and reduced leave schedule.** The DFML issued guidance, through direct e-mail to employers, to clarify the definitions of intermittent leave and reduced leave schedule. To take intermittent leave or a reduced leave schedule for medical leave, care of a covered servicemember, qualifying exigency leave or care of a seriously-ill family member (starting 7/1/2021), the minimum increment may not exceed one hour. For claims administered by the Department, increments must be measured in 15-minute multiples as smaller minimum increments cannot be administered. To take intermittent leave or a reduced leave schedule for bonding leave, the employer and covered individual must mutually agree on the schedule. Leave that does not meet the applicable minimum increment will be rounded down or, if the minimum increment is not satisfied, no benefits will be paid. For more information, please see the [DFML website](#).

Lincoln encourages employers with plan coverage through the Commonwealth to check the [DFML website](#) or contact the DFML for further information. Lincoln has provided its private plan employers with employer and employee resources and guides to understand MA PFML claim administration. We encourage you to talk to your Lincoln representative to learn more.

Connecticut

Effective January 1, 2021

All employers, regardless of size, and self-employed individuals who choose to participate in the PFML program are now responsible for withholding and submitting the payroll deductions for each employee for contributions to the PFML program. These payroll deductions are capped at 0.5%, up to the Social Security wage contribution rate. (In 2021, the cap is \$142,800.) There is no employer match. Contributions are taken after-tax and are based upon an employee's earnings as determined for FICA. Failure to make appropriate contributions may result in penalties in addition to the required withholdings. For an estimate of an employee's potential contribution amount, please see the CT PFML

website for a [Contribution Estimator Tool](#). If they have not already done so, all employers with employees in Connecticut need to register their business on the CT Paid Leave Authority portal. Business registration is necessary to remit employee payroll deductions to the CT Paid Leave Authority. For more information, please see the [CT PFML website](#).

Oregon

January 5, 2021

Oregon published new draft regulations, which are available for public comment until January 29, 2021. The regulations include: method to count employees and determine employer size, contribution rate period, maximum employee wages, serious health condition definition, verification of serious health condition, health care provider definition, verification of safe leave, employer equivalent plans application requirements and effective date, employer equivalent plans definitions and requirements, and employer equivalent plans use of the other paid leave benefits. The PFML rules are expected to be issued in several rounds and finalized not later than September 1, 2021. The full text of the available draft regulations can be found on the [PFMLIA website](#).

California

December 30, 2020

The Employment Development Department (EDD) sent out the General Release Letter, which included the following legislative updates:

- Non-English Claims Forms (CA AB 406): This legislation requires that the EDD distribute the application for DI/PFL in other languages that are spoken by a substantial number (5% or more of people service by the state agency) of non-English speaking applicants. This becomes effective on January 1, 2025.
- Certifying Providers - Nurse Practitioners (CA AB 890): This legislation allows for nurse practitioners that meet certain education, experience, and certification requirements to certify a disability claim without physician or surgeon supervision or collaboration. This becomes effective on January 1, 2023.
- Certifying Providers - Physician Assistants (CA SB 697): This legislation, as part of a delegation of services agreement, allows for physician assistants to certify a disability claim without physician or surgeon supervision. This became effective on January 1, 2020.
- Certifying Providers - Certified Nurse Midwives (CA SB 1237): This legislation removes the condition that certified nurse midwives practice under physician or surgeon supervision. This became effective on January 1, 2021

Effective January 1, 2021

Amendments to the California Family Rights Act (CFRA) and Paid Family Leave (PFL) take effect beginning January 1, 2021. CFRA amendments include changes to the employer size requirement, expanded definitions of child and covered family members, the addition of qualifying exigency as a covered leave reason, removing the combined entitlement for married employees, removing the key employee exception, and repealing provisions of the New Parent Leave Act (NPLA). PFL amendments

include changes to the definitions for family care leave, care recipient, care provider, and the addition of the definition for military member, to better align with the addition of qualifying exigency as a covered leave reason.

January 2021

The Department of Fair Employment and Housing (DFEH) published [a 2021 Family and Medical Leave for Employees Toolkit](#) which includes the following updated forms and documents relevant to CFRA, PFL, and Pregnancy Disability Leave:

- Certification of Health Care Provider form (DFEH-E11P-ENG)
- Family Care & Medical Leave & Pregnancy Disability Leave poster (DFEH-100-21ENG)
- Family Care and Medical Leave fact sheet (DFEH-E03P-ENG)
- Pregnancy Disability Leave fact sheet (DFEH-E02P-ENG)

In addition, the EDD has also updated the [California Paid Family Leave brochure \(DE 2511\)](#).

Benefit and Contribution Rates

San Francisco, California

Effective January 1, 2021

San Francisco announced that the 2020 Paid Parental Leave Ordinance (PPLO) Cap is \$2,262 per week. The San Francisco PPLO requires employers to pay “supplemental compensation” for the full period that a covered employee receives California Paid Family Leave to bond with a child. Employers are required to provide supplemental compensation in an amount such that the California Paid Family Leave wage replacement plus the supplemental compensation equals 100% of the employee’s gross weekly wage, subject to a cap.

California

December 30, 2020

Amendments to expand leave rights for victims of crime or abuse take effect beginning January 1, 2021. The amendments expand the qualifying reasons to take this type of leave, add definitions for immediate family member and crime, and provides for additional certification methods for this leave.

2021 California State Disability Insurance (SDI) Plan Updates

- The employee contribution rate for 2021 is 1.2% of annual gross taxable wages up to \$128,298.
- The maximum annual contribution amount per employee for 2021 is \$1,539.58.
- Effective Date: January 1, 2021

2021 California Voluntary Plan Assessment Rate

- Voluntary Plan Disability Insurance (VPDI) assessment rate is 14% of SDI contribution rate (1.2%). Therefore, the voluntary plan employer assessment rate is 0.00168 of VP taxable wages.
- Effective Date: January 1, 2021

Voluntary Plan Text Changes

- California’s EDD Voluntary Plan Group (VPG) will require that employers and TPAs use a VP Text Provision DE form (to be announced).
- Effective Date: January 1, 2022

Rhode Island

Effective January 1, 2021

Rhode Island announced that the current withholding rate for Temporary Disability Insurance (TDI) / Temporary Caregiver Insurance (TCI) as of January 1, 2021 is 1.3% of an employee’s first \$74,000 in earnings. An employee’s weekly benefit rate will be equal to 4.62% of the wages paid in the highest quarter of their base period. The weekly benefit rate remains the same throughout an employee’s benefit year. For claims with a benefit year begin date effective 7/1/20 or later, \$887.00 is the maximum benefit rate and the minimum benefit rate is \$107.

Sick Leave

Colorado

Effective January 1, 2021

Paid leave coverage under Colorado’s “Healthy Families and Workplaces Act” (HFWA) broadens as of January 1, 2021. Employees accrue one hour of paid leave for every 30 hours worked, up to 48 hours of paid leave per year. This applies to private sector employers with 16 or more employees; employers with 15 or fewer employees are exempt in 2021 from HFWA. Guidance on the HFWA can be found on the CDLE website ([INFO #6B](#)). The CDLE also uploaded a model notice and poster that can be used for compliance with the law’s notice and posting requirements in 2021. The paid leave poster can be found on the [CDLE website](#).

New York

Effective January 1, 2021

Employees will be able to take paid sick leave beginning January 1, 2021. Employers with 4 or fewer employees must provide up to 40 hours of unpaid safe and sick leave if the employer’s net income is less than \$1 million in the previous tax year and must provide up to 40 hours of paid safe and sick leave if the employer’s net income is \$1 million or more in the previous tax year. Employers with 5 or more employees, regardless of net income, must provide up to 40 hours of paid safe and sick leave if the employer employs up to 99 employees and must provide up to 56 hours of paid safe and sick leave if the employer employs 100 or more employees. Guidance and proposed regulations on the NY PSL program can be found on the [NY PSL website](#).

California

Effective January 1, 2021

An employee has the discretion to designate their sick leave as personal or kin care. This will not require employers to provide any additional paid time off, but simply clarifies who designates which type of sick leave is used when an employee uses a sick day.

New York City, New York

Effective January 1, 2021

Amendments to expand safe and sick leave and to bring the law in line with New York State paid sick leave requirements take effect beginning January 1, 2021. Guidance and proposed regulations on the NY PSL program can be found on the [NYC PSL website](#).

City of Oakland, California

Effective immediately

On January 19, 2021, the city council enacted an ordinance extending their emergency paid sick leave (EPSL) ordinance until the end of the city's COVID-19 Emergency Declaration. Covered employers must provide 80 hours of EPSL to each current employee who worked at least 40 hours per week within the City of Oakland between 2/3/2020 and 3/4/2020 or at any point thereafter or is classified as full-time; and to each current employee who worked fewer than 40 hours per week between 2/3/2020 and 3/4/2020 and continues to do so after 3/4/2020, EPSL equal to the average number of hours the employee worked within the City of Oakland over the fourteen (14) days with the highest number of hours worked, from 2/3/2020 through 3/4/2020. Guidance on the Oakland EPSL program can be found on the [Oakland EPSL website](#).

Other Leave

Maine

Effective January 1, 2021

Employees will be able to take earned paid leave beginning January 1, 2021. Employees accrue one hour of paid leave for every 40 hours worked, up to 40 hours of paid leave per year. This applies to private sector employers with at least 10 employees in Maine. Employees can use their accrued earned paid leave for any reason such as an emergency, illness, sudden necessity, planned vacation, etc.

California

Effective January 1, 2021

Amendments to expand leave rights for victims of crime or abuse take effect beginning January 1, 2021. The amendments expand the qualifying reasons to take this type of leave, add definitions for immediate family member and crime, and provides for additional certification methods for this leave.

Accommodation

Federal

December 16, 2020

The U.S. Equal Employment Opportunity Commission (EEOC) updated their technical assistance questions and answers document "[What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws](#)" to provide additional guidance on common employer questions on how EEO laws, including the ADA and Rehabilitation Act, apply to workplace situations during the COVID-19 pandemic. A new Q&A on COVID-19 vaccinations as related to disability accommodation is reproduced below:

Q: What happens if an employer cannot exempt or provide a reasonable accommodation to an employee who cannot comply with a mandatory vaccine policy because of a disability or sincerely held religious practice or belief?

A: If an employee cannot get vaccinated for COVID-19 because of a disability or sincerely held religious belief, practice, or observance, and there is no reasonable accommodation possible, then it would be lawful for the employer to exclude the employee from the workplace. This does not mean the employer may automatically terminate the worker. Employers will need to determine if any other rights apply under the EEO laws or other federal, state, and local authorities.

From the Courts

December 30, 2020

A long-term leave of absence is not a reasonable accommodation under the ADA. The Seventh Circuit ruled that the employer was not required to grant an employee a four-month leave of absence in addition to leave that the employer already granted her. The court held that affording the employee such prolonged leave effectively excuses her inability to work, which the ADA does not require of employers. The court also held that a doctor's view that an employee cannot return to work in any position means an employee cannot establish that she is a "qualified individual with a disability" under the ADA, and the employer was entitled to rely on the doctors' recommendations that the employee was not able to safely perform an essential function of her job. The employer was also not required to offer her any light-duty roles because the doctors ordered her not to return to work in any position due to the severity of her injuries. The district court held in favor of the employer, and the Seventh Circuit affirmed. (*McAllister v. Innovation Ventures, LLC*, 983 F.3d 963 (7th Cir. 2020))

In the News

December 18, 2020

The EEOC announced that Interconnect Cable Technologies Corporation (ICTC) has agreed to pay a \$35,000 settlement in an employment discrimination lawsuit alleging that an employee was demoted and fired due to mental illness. An employee was hospitalized for and diagnosed with major depressive disorder, the next week the employee returned to work, but her job duties were promptly removed,

then she was demoted with a pay cut, and four months later terminated. In addition to monetary relief, the company must get an ADA coordinator, create and disseminate a policy against disability discrimination, conduct anti-discrimination training for all employees, post notice about the lawsuit at the worksite, and report back to the EEOC every year.

December 18, 2020

The EEOC announced that American Medical Response Ambulance Service, Inc. (AMR) has agreed to pay a \$162,500 settlement in an employment discrimination lawsuit alleging that a pregnant employee was refused a reasonable accommodation. The employee, who was a paramedic, provided a doctor's note and requested light duty for the end of her pregnancy. The company denied the light duty accommodation, despite providing light duty to employees injured at work. The company instead advised the employee to take unpaid leave or work without restrictions. In addition to monetary relief, the company must update their policies and procedures for Title VII, provide anti-discrimination training regarding Title VII and the PDA to supervisors and safety human resources staff in Washington, as well as all employees at the Spokane locations. The company is also required to post notice about Title VII, PDA, and the company's obligations under this consent decree.

In the Spotlight: COVID-19

Lincoln Financial is here to help you remain confident and prepared during this evolving situation. We're continuously monitoring the latest news, information from the Centers for Disease Control and Prevention and other regulatory and medical experts to offer targeted guidance and support. In this effort, we've created a dedicated [COVID-19 Guidance page](#). We recommend bookmarking this page for important messages from our leaders, timely updates on legislative changes specific to our offerings, employer best practices, and resources to support you as we navigate this unprecedented situation together.

District of Columbia

January 1, 2021

Pursuant to the DC Mayor's Order No. 2020-127, the Declaration of Public Health Emergency was extended to March 31, 2021. COVID-19 leave under the DC FMLA leave program is available while the declaration of public health emergency is in effect. During the declaration of a public health emergency, an employee who has worked for 30 days for an employer of any size may use up to 16 weeks of COVID-19 leave for the following qualifying reasons: care for self, family or household member or childcare closure. For more information on COVID-19 leave under DC FMLA, please see the [DC OHR website](#).

Colorado

Effective January 1, 2021

The Colorado Department of Labor and Employment (CDLE) updated its website with a new Interpretive Notices & Formal Opinion (INFO) on the HFWA. INFO No. 6C provides that the employer requirement to provide 80 hours of COVID leave to their employees continues into 2021. The CDLE interpreted the HFWA to mean that 2021 COVID Leave is a new supplement of up to 80 hours based on an emergency declaration, not a continuation of the 2020 COVID leave that was based on federal leave law. During the

period of a public health emergency declaration, an employer must provide up to two weeks of paid leave (up to 80 paid hours) for the three categories of COVID-related needs in the HFWA. INFO 6C can be found on the [CDLE website](#).

Please note: This alert is provided for informational purposes only and should not be considered legal advice. This information is being provided to Lincoln Financial Group clients so they may conduct any necessary internal evaluation of their policies and procedures. This alert is designed to provide informative and current information as of the date of the alert. Please contact your legal advisor with any questions regarding the laws discussed in this communication. Lincoln continually monitors activity related to family and medical leave laws and as laws pass, we will determine any impacts to our suite of products. Lincoln does not currently administer or track paid sick leave. The information contained herein includes information on major cities and counties and is not all inclusive of all city and county laws.

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