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Employment Law Update

Human Resources Association
of Southern Maine

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Introduction

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Perkins Thompson is a client-centric, Maine-based law firm that works with businesses, institutions, and individuals to realize their goals.

We take a highly collaborative approach to ensure that time is used efficiently, and our firm's shared expertise can be applied to shape the best possible outcomes for our clients, no matter their size.



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Maine Paid Family & Medical Leave

Overview

Maine Paid Family and Medical Leave

- Background
- Employee eligibility
- Leave benefit
- Premiums
- Substitution with private plans
- Application and review process

Paid Family & Medical Leave

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Why Paid Family & Medical Leave?

- The federal Family and Medical Leave Act (FMLA) provides for *unpaid* leave.
- Maine law also currently provides for *unpaid* family and medical leave.
- For economic reasons, employees may take less leave than they are allowed, frustrating the intended purpose of family and medical leave.
- Many states have therefore started implementing *paid* family and medical leave.
- In July 2023, Maine became the 13th jurisdiction to do so.

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Overview of Maine Paid FML:

- The Maine Paid Family & Medical Leave statute sets up a program from which eligible employees can be paid during their qualifying family or medical leave.
- The program is administered by the Maine Department of Labor (MDOL) and is to be funded by payroll deductions.
- The payroll contribution is currently set at 1% of an employee's wages.

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Implementation Dates:

- **January 25, 2024** – Governor Mills announced nominations to the Paid Family and Medical Leave Benefits Authority
- **May 20, 2024** – MDOL publishes proposed rules for public comment
- **July 9, 2024** – public comment closes with nearly 300 comments on MDOL proposed rules
- **August 28, 2024** – MDOL publishes revised-proposed rules for public comment
- **October 3, 2024** – public comment closes with nearly 280 comments on MDOL proposed rules
- **December 4, 2024** – MDOL publishes final rules

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Implementation Dates:

- **January 1, 2025** – Employer contributions begin
- **January 6, 2025** – MDOL online portal is open for contributions
- **April 2025** – All employers must register for MDOL online portal
- **May 1, 2026** – Employees may start applying for and receiving benefits under the program

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How does an employee qualify for Maine Paid FML?

1. Be a “covered employee”
2. Earn sufficient wages
3. Have a qualifying reason for leave
4. Provide employer with notice
5. Submit application to MDOL
6. Be employed at date of application or date that leave begins
7. Not otherwise ineligible under statute or regulations

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Who are covered employees?

MDOL Regulations define “covered employees” as either:

- A. Employees who earn wages* paid in Maine; **or**
- B. An individual who has elected coverage under Maine Paid FML

* “earned wages” is broadly defined, and includes remuneration for personal services (tips or gratuities), severance and terminal pay, commissions, and bonuses

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Wage Requirements

- Under the statute, an employee must have earned at least **six-times** the state average weekly wage in wages (\$1,144.67 (July 2024)) that are **subject to the premium**.
- The MDOL regulations have translated this into a slightly different requirement: An employee must have earned six-times the average weekly wage during the **first four of the last five completed calendar quarters** preceding the first day of an individual's benefit year.

Note: Maine Paid FML is not based on working for the same employer. In theory, a new employee could be eligible for Maine Paid FML on 1st day if they have met the wages at a former employer

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Maine Paid FML Qualifying Reasons:

- Employee's serious health condition;
- Employee's or employee's domestic partner's childbirth, adoption, or foster care placement;
- Employee's care for a qualifying family member with a serious health condition;
- Employee's attendance of their qualifying family member's U.S. Armed Forces foreign deployment;
- Employee's care for a qualifying family member who is a service member in the U.S. Armed Forces and, as a result of their service, is temporary disabled or undergoing medical treatment, recuperation, therapy, or outpatient treatment;
- Safe leave: Employee or their qualifying family member is a victim of violence, assault, sexual assault, stalking, or any other act that would require an order for protection; or
- Any other qualifying reason allowed under the Maine Family and Medical Leave law (e.g., organ transplant, death or serious health condition of qualifying family member while servicing for U.S. Armed Forces, etc.)

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Qualifying Family Member:

- Paid FML is allowed to care for a qualifying family member with a serious health condition.
- Must have a qualifying familial relationship to the employee, employee's spouse, or employee's domestic partner.
- **Spouse or domestic partner** (as defined by statute)
- **Children**
 - Age does not matter
 - Includes biological, adopted, foster, and step-children
 - Includes spouse's or domestic partner's children that are under the guardianship of the spouse or domestic partner
 - Includes any individual to whom the covered individual or spouse or domestic partner stood in any of these relationships when the individual was a minor child

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Qualifying Family Members:

- **Parents**
 - Includes legal parent, biological parent, adoptive parent, foster parent, stepparent, de facto parent or legal guardian or a person who stood in as a parent when the covered individual or spouse or domestic partner of the covered individual was a minor child
- **Grandparents**
 - Includes a legal grandparent, biological grandparent, adoptive grandparent, foster grandparent, step-grandparent or de facto grandparent
- **Grandchildren**
 - Includes legal grandchild, biological grandchild, adoptive grandchild, foster grandchild, step-grandchild or de facto grandchild
- **Siblings**
 - Includes legal sibling, biological sibling, adoptive sibling, foster sibling, stepsibling or de facto sibling
- **Significant bonds**
 - An individual with whom the covered individual has a significant personal bond that is or is like a family relationship, regardless of biological or legal relationship

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Eligible Employees Compared:

| Maine Paid FML | Maine (unpaid) FML | Federal (unpaid) FMLA |
|--|---|---|
| <ol style="list-style-type: none"> Earned at least six-times the state average weekly wage in wages that are subject to the premium*; and Qualifying reason for leave. <p>* under MDOL regs., last the first four of the last five completed calendar quarters preceding the first day of an individual's benefit year</p> | <ol style="list-style-type: none"> Employed by the same employer for 12 <i>consecutive</i> months; Work at a permanent work site with 15 or more employees; and Qualifying reason for leave. | <ol style="list-style-type: none"> Employed by the same employer for 12 months (does not need to be consecutive); Worked at least 1,250 hours over the past 12 months; Work at a location where the company employs 50 or more employees within 75 miles; and Qualifying reasons for leave. |

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Notice to Employer:

- Employee must give written and “reasonable notice” to employer of intent to use Paid FML.
- The notice must:
 - Be in writing (standard forms, letter, email, text message, etc.) Provide the reason for the leave being requested (e.g., family, medical, safe leave, etc.)
 - Provide the type of leave needed (continuous, reduced schedule, intermittent leave)
 - Provide the actual or anticipated timing and duration of leave
 - Provide any other relevant information regarding the employee’s need to take leave

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Notice to Employer:

- Employers cannot require a certain form and must accept the written notice if it contains the sufficient information.
- 30 days notice is presumed to be “reasonable notice”
- If there is an unforeseen necessity of leave, the employee must notify their employer as soon as is feasible under the circumstances

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Employee Application to MDOL

- Employee submits an online application to the MDOL
 - As early as 60 days before leave starts
 - Deadline is 90 days after leave starts (unless the employee proves that there was an “undue hardship” regarding filing a timely application)
- MDOL will review the application within 10 business days
 - During this review period, MDOL will require employer to submit requested information
- If leave is denied, the MDOL will notify the employee and the employer
- If leave is approved, the MDOL will notify the employer of the approved timeframe of leave

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Duration of Paid Leave:

- A covered employee is eligible for 12 weeks of paid family and medical leave in a benefit year on a continuous, intermittent, or reduced schedule.
- Intermittent and reduced schedule leave may be taken by the covered individual in increments of not less than a scheduled workday, unless the employer and the employee agree otherwise (but still cannot be less than one hour).

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Intermittent Leave:

- An employee takes varying periods of leave and returns to work throughout a period of approved covered leave time.
- Intermittent leave may be planned (e.g., for routine appointments) or unplanned (e.g., for a flare-up of a serious health condition).

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Reduced-Schedule Leave:

- A leave schedule that reduces the typical number of days per workweek, or hours per workday, of an employee on a planned and consistent basis.
- Intermittent and reduced schedule leave may be taken by the covered individual in increments of not less than a scheduled workday, unless the employer and the employee agree otherwise (but still cannot be less than one hour).

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Maine Paid FML runs concurrently with other leave.

- Leave taken under the Maine Paid FML law runs concurrently with Maine (unpaid) FML.
- Leave taken under the Maine Paid FML law will also run concurrently with federal (unpaid) FMLA leave, *but* only if the employee is eligible for both type of leave. Examples:
 - Remember different employment eligibility requirements (see slide 12)
 - Federal FMLA does not cover domestic partners, but Maine Paid FML does
 - Federal FMLA does not cover “safe leave,” but and Maine Paid FML does

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Payment of Benefit:

- The amount of the employee benefit will be based on the employee's average weekly wage and how their wages compare to Maine's average weekly wage:
 - The portion of the employee's average weekly wage that is \leq 50% of the state average weekly wage is replaced at 90%.
 - The portion of the employee's average weekly wage that is $>$ 50% of the state average weekly wage is replaced at 66% up to the weekly maximum benefit.
 - The "weekly maximum benefit" is the state average weekly wage.

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Premiums:

- **Employers with 15 or more employees** must contribute 1% of employee wages to the program.
 - Employers may deduct up to 0.5% from employee payroll
 - Employers must contribute the other 0.5% of the premium
- **Employers with less than 15 employees** must contribute 0.5% of employee wages to the program.
 - Employers may deduct the full 0.5% of from employee payroll
 - Employers are otherwise exempt from the other 0.5% of the premium

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Can employers require an employee use PTO?

- An employer may *voluntarily* pay the difference between the employee's Maine Paid FML weekly benefit and the employee's typical weekly wage.
- If an employer chooses to do so, the employer may charge that time against the employee's leave balances (e.g., PTO, sick leave, etc.)
- Employer cannot compel an employee to exhaust their rights to any sick, vacation, or personal time prior to or while taking paid family or medical leave.

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Other Considerations:

- Employee's rights to accrue vacation time, sick time, bonuses, advancement, seniority, length of service credit, or other employment benefits, plans, or program cannot be affected.
- The Maine Paid Family and Medical Leave program does not change an employer's obligations under an employer's already established policies or collective bargaining agreement or employment agreement.

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Substitution of Private Plans:

- Employers may apply for approval of a private plan in lieu of participating in the Maine Paid Family and Medical Leave program.
- Private plans must provide substantially equivalent rights, protections, and benefits as the Maine Paid Family and Medical Leave law, and they must meet additional statutory requirements.
- Two types of plans available:
 1. Fully-Insured Private Plans
 2. Self-Insured Private Plans

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Fully-Insured Private Plans:

- Must be “substantially equivalent” to Maine Paid FML’s rights, protections and benefits.
- Must also comply with all of the requirements of Maine Insurance Code
- **Best practice:** ensure that your fully-insured private plan has been approved by the MDOL and Maine Bureau of Insurance
 - Insurers may request certification of a proposed plan as substantially equivalent through the MDOL, which will coordinate with the Maine Bureau of Insurance

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What is a “substantially equivalent” private plan?

- Provide same types of leave as the state law
- Allow for at least 10 weeks of aggregate leave per benefit year
- Allow a covered individual to take intermittent or reduced leave
- Cost to employees is not be greater than 0.5% of earnings
- Provide an internal reconsideration process for denial of benefits

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Fully-Insured Private Plans:

- Employers must submit an application to substitute for a fully-insured private plan to the MDOL
- Applications may be made after April 1, 2025, via an online form on MDOL portal.
 - Review administrative fee is \$250
 - If approved, there is an additional \$250 reimbursement fee
 - The MDOL may increase these fees after January 1, 2026

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Fully-Insured Private Plans:

- Approved submissions are valid for a period of 3 years
- Exemption from premiums begins on the first day of the quarter in which the submission is approved (unless the application is submitted less than 30 days prior to end of quarter, exemption begins first day of following quarter.)
- If employee withholdings were made prior to approval, the employer must refund the employees within **30 days**, and the employer is responsible for the premiums from before the exemption begins.
- **Coverage must commence on May 1, 2026** (or following the month following approval if applied after May 1, 2026).

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Self-Insured Private Plans:

- Employers must submit a request for certification with the MDOL
- Employers must submit an application to substitute for a fully-insured private plan to the MDOL.
 - Review administrative fee is \$250
 - If approved, there is an additional \$250 reimbursement fee
 - The MDOL may increase these fees after January 1, 2026
- Employer's may submit a certification request and application together
- Employers must issue the MDOL a bond (at an amount set by the MDOL) with a surety that the employer is authorized to transact business in Maine

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What does an employer need to do?

1. Sign-up for MDOL online portal at pfml.maine.gov/contributions
2. Pay premiums in accordance with number of employees
3. Post state-approved Maine Paid FML poster (English and primary language of 3 or more employees)
4. Issue state-approved notice to all employees within 30 days of starting employment in the employee's primary language

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What does an employer need to do?

5. After April 1, 2025, submit an application for fully-insured or self-insured private plan
6. After May 1, 2026, receive employee's written notice of intent to use leave
7. Respond to MDOL's request for information after employees apply for benefits

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What does an employer need to do?

8. If you wish to allow an employee to take intermittent or reduced leave in an increment less than 1 day, work with the employee to come to an arrangement

9. Determine whether you will voluntarily pay the difference in wages and use PTO or other accrued leave to do so

Q & A

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