

## MEMORANDUM

TO: All Retirement Boards

FROM: John W. Parsons, Esq., Executive Director

RE: Implementation of Paid Family Medical Leave (“PFML”)

DATE: April 13, 2021

### Applicability to Retirement Boards

The enactment of Massachusetts General Laws Chapter 175M, “Family and Medical Leave”, established a right to Paid Family and Medical Leave (“PFML”) for qualifying employees. This law was enacted on June 28, 2018, and last updated on December 21, 2020. It was designed to give Massachusetts workers the resources to manage their own health and the health of their family. The leave provided for under G.L. c. 175M (“the Act”) became available to employees on January 1, 2021, for medical and family leave. Medical leave for individuals caring for a family member is not available until July 1, 2021.

For most retirement boards, PFML is not automatically applicable, as it requires municipalities, districts, political subdivisions, housing authorities, regional school districts, and regional planning commissions to adopt the provisions of the Act for it to apply. Specifically, G.L. c. 175M, § 10 provides:

A municipality, district, political subdivision or authority may adopt this chapter upon a majority vote of the local legislative body or the governing body. For the purposes of this section, a vote of the legislative body shall take place in a city by a vote of the city council subject to its charter, in a town by a vote at town meeting, for an authority by a vote of its governing body, in a district, by a vote of the district in a district meeting and by any other political subdivision or instrumentality, by a vote of its legislative body in accordance with its charter or enabling act. (Emphasis added.)

Therefore, a municipality, district, political subdivision, and authority can determine, through majority vote of the local legislative or governing body, whether or not they will accept PFML coverage for their members. Retirement boards will only be affected by the Act if their municipality, district, political subdivision, or authority has adopted the provisions of G.L. c. 175M.



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Of specific note, charter school employees are eligible for PFML, because service in charter schools is not considered municipal employment. Therefore, the Massachusetts Teachers Retirement System will always have members who are eligible and possibly participating in PFML coverage and should become familiar with the implementation of the Act with regards to creditable service and regular compensation, detailed below.

### **Coverage and Eligibility Limitations Under the Act**

Eligible employees may receive up to 12 weeks of job-protected paid family leave, up to 20 weeks of job-protected paid medical leave, or up to 26 weeks of job-protected combined family and medical leave in a benefit year. The PFML benefits are funded by payroll contributions by workers who are covered by the Act. The amount deducted is placed into a state trust fund called the Family and Employment Security Trust Fund.

There are specific eligibility limitations for PFML benefits for those receiving/using accrued paid leave, sick time, disability payments, and workers’ compensation. In general, while receiving PFML benefits, an employee cannot receive supplemental payments from his or her employer.

For more detailed information regarding coverage and eligibility limitations, please contact the Department of Family and Medical Leave.

### **Determining Creditable Service and Regular Compensation**

For Boards whose members are receiving PFML benefits, the PFML leave time should be treated the same as unpaid leave time under the federal Family and Medical Leave Act (“FMLA”) when determining creditable service and regular compensation.

458 CMR 2:01(3) provides that “[l]eave taken under M.G.L. c. 175M shall run concurrently with leave taken under other applicable state and federal leave laws, including...the federal Family and Medical Leave Act of 1993 (29 U.S.C. 2601 et seq.), when the leave is for a qualified reason under those acts.” It has been PERAC’s longstanding position that unpaid FMLA leave does not constitute creditable service. Therefore, PFML leave time is not creditable service, and payments made under the Act are not regular compensation.

Massachusetts General Laws, Chapter 32, Section 4(1)(c) provides as follows:

(c) Creditable service in the case of any member shall include any period of his continuous absence with full regular compensation, or in the event of his absence with partial regular compensation such period or portion thereof, if any, as the board shall determine. Creditable service in the case of any member may be allowed by the board for any period of his continuous absence without regular compensation

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which is not in excess of one month. Any portion of any leave or period of continuous absence of any member without regular compensation which is in excess of one month shall not be counted as creditable service except as specifically otherwise provided for in this section, but no duly authorized leave or period of absence shall be deemed to be a termination of membership or service. (Emphasis added.)

Since PFML payments will likely result in periods of continuous absence without regular compensation in excess of one month, they are not includable as creditable service. There are, however, very specific instances under the Act where an employee is permitted to take intermittent leave, so long as it was agreed upon with the employer in advance. If the PFML leave time is taken intermittently, and totals less than 30 days, it could be considered creditable service by the Board dependent upon the Board’s regulations. As these instances are highly fact specific and likely a rare occurrence, we suggest that the Board contact PERAC for assistance in determining whether or not the combined intermittent leave would constitute creditable service.

In examining the definition of regular compensation, PFML payments do not meet that definition. 840 CMR 15.03(3)(a) states:

(3) During any period of active service subsequent to July 1, 2009 the term “Regular Compensation”, as defined by M.G.L. c. 32, § 1, shall be determined subject to the following:

(a) to be considered regular compensation, any compensation to an employee must be compensation received exclusively as wages by an employee for services performed in the course of employment for his employer. (Emphasis added.)

With PFML payments, there is no service being performed for the employer and the employer is not paying the benefit. As such, these payments are more akin to Short-Term or Long-Term Disability benefits. When receiving disability insurance benefits from an insurance carrier, the payments received by the member are not paid by his or her employer and are not considered regular compensation.

Finally, the Act does not mention Chapter 32, or the terms “retirement” or “retirement allowances.” The term “pension” is used once, in defining “employment benefits” in Section 1:

"Employment benefits", all benefits provided or made available to employees by an employer, including, but not limited to, group life insurance, health insurance, disability insurance, sick leave, annual or vacation leave, educational benefits and pensions. (Emphasis added.)

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In Section 2, it is explained:

(f) The taking of family or medical leave shall not affect an employee's right to accrue vacation time, sick leave, bonuses, advancement, seniority, length-of-service credit or other employment benefits, plans or programs. During the duration of an employee's family or medical leave, the employer shall continue to provide for and contribute to the employee's employment-related health insurance benefits, if any, at the level and under the conditions coverage would have been provided if the employee had continued working continuously for the duration of such leave. (Emphasis added.)

Given the express direction regarding health insurance and the lack of direction regarding retirement allowances under Chapter 32, members taking leave under the Act would not be entitled to count PFML benefits as regular compensation.

We trust the foregoing will be of some assistance to you. If you have questions, please feel free to contact General Counsel Judith Corrigan at 617-666-446 ext. 904.