The Department of Family & Medical Leave

December 31, 2022

Pursuant to Section 24 of Chapter 9 of the Acts of 2021, the Department of Family and Medical Leave (the "Department") provides this report analyzing the potential merits and disadvantages of expanding the family and medical leave program established by chapter 175M of the General Laws to provide coverage for future communicable illnesses related to a public health emergency to the House and Senate Clerks, and to the Chairs of the Joint Committee on Labor and Workforce Development. For the reasons that follow, and based on the Commonwealth's and the Department's experience during the COVID-19 pandemic, we conclude that such expansion is not advisable.

CHAPTER 175M BACKGROUND

The Commonwealth's paid family and medical leave program ("PFML"), including the Department of Family and Medical Leave, was created pursuant to Chapter 121 of the Acts of 2018. The PFML program provides temporary income replacement to eligible workers who are welcoming a new child into their family, are struck by a serious illness or injury, need to take care of an ill or ailing relative, and for certain military considerations. PFML benefits are paid from a designated Trust Fund, which is funded by Commonwealth employers and employees; there is no federal support for this program. To be eligible for PFML, an individual must be employed by a covered Massachusetts entity and must meet the PFML's statutory earnings threshold.

Most Massachusetts employees are eligible for up to 20 weeks of medical leave, 12 weeks of family leave, and no more than 26 total weeks of combined family and medical leave per benefit year. Individuals can take leave for a qualifying reason that renders them unable to work and eligible for Paid Family and Medical Leave benefits. Per the Department's enabling legislation, G.L. c. 175M, qualifying reasons include:

- Caring for your own serious health condition as certified by a recognized health care provider, including illness, injury, or pregnancy/childbirth;
- Caring for a family member with a serious health condition as certified by a recognized health care provider, including illness, injury, or pregnancy/childbirth, including a family member who was injured serving in the armed forces;
- Bonding with a child during the first 12 months after birth, adoption, or placement;

- Managing affairs while a family member is on active duty.

A serious health condition is a physical or mental condition that prevents an individual from working for more than 3 consecutive days. A health care provider's certification of a serious health condition requires at least one of the following:

- Overnight stay in a medical facility;
- 2 or more treatments by a health care provider within 30 days of whatever prevented the individual from doing their job; or
- At least 1 treatment by a health care provider within 30 days of whatever prevented the individual from working, with plans for continued treatment, including prescriptions.

In addition, an eligible individual with a qualifying serious health condition is subject to a one-week (7 day) waiting period before benefits are paid pursuant to Section 3(a) of Chapter 175M. This so-called waiting week is statutorily mandated and applies to every individual claimant seeking paid family and medical leave program benefits.

The Department began approving applications for leave and issuing benefits payments to qualified individuals on January 1, 2021. Through the end of calendar year 2022, the Department has issued approximately $1,180,000,000 in total payments to qualified individuals throughout the Commonwealth. Pursuant to Section 7(e) of Chapter 175M, in addition to administering the PFML program, the Department must also publish an annual report tracking, among other things, the number of eligible claims; the percentage of such claims attributable to medical, family, bonding, or military leave; certain demographic information; and claim processing information (including processing times and total volume) for the previous fiscal year. The Department is not required to—nor does it—distinguish medical leave claims based

on the underlying medical condition (*i.e.*, whether a claim is for a broken back or an autoimmune disease). The Department simply confirms that the claimant has a serious health condition that has been properly certified by a recognized healthcare provider. As such, the Department does not track medical leave claims by type of medical condition and could not conduct or provide an analysis of which approved leaves are attributable to communicable illnesses related to a public health emergency.

COVID-19 PANDEMIC BACKGROUND

The COVID-19 pandemic placed unprecedented burdens on the Commonwealth, and its citizen workers received support from a variety of sources. Based on the sheer volume of benefits paid, it is clear that the state's unemployment insurance program provided the bulk of that support. While unemployment claims reached historic levels, the federal government (through the U.S. Department of Labor) initiated a myriad of grant and other pandemic-related programs to help states pay record numbers of claimants, and also provided loans to states, including Massachusetts, for replenishing depleted unemployment insurance trust funds. This federal backstop was critical in enabling the Massachusetts Department of Unemployment Assistance ("DUA") to pay claimants during the pandemic.

A. Public Health Statistics

From February of 2020 to December of 2022, the Executive Office of Health and Human Services ("EOHHS") tracked reported cases of COVID-19 for residents in the Commonwealth. To date, EOHHS has tracked 1,959,910 total positive cases. According to the data, the reported number of COVID-19 cases hit its peak on January 3, 2021, with over 36,000 cases reported on that single day.

B. DUA Statistics

Unemployment claims reached unprecedented highs during the COVID-19 pandemic. Federal pandemic unemployment assistance programs and related support administered in large part by the U.S. Department of Labor were essential to the DUA's operations during the pandemic. During the pandemic, the DUA prioritized the speedy distribution of benefits to meet the needs of workers across the Commonwealth. Over the course of 2020 and 2021 (through December 31, 2021), the DUA paid over $33.5 billion in total state and federal benefits. In calendar year 2020, DUA paid $21.3 billion in benefits, and in calendar year 2021, DUA paid $12.2 billion in benefits. In comparison, in 2019, DUA paid out $1.4 billion in benefits to approximately 400,000 claimants.

C. COVID-19 Emergency Paid Sick Leave Statistics

Under the terms of Chapter 16 of the Acts of 2021 (An Act Providing for Massachusetts COVID-19 Emergency Paid Sick Leave), employers were required to make paid leave time available to employees for COVID-related illnesses, quarantine, and vaccinations, and could then apply for reimbursement from the state. Applications for reimbursement were accepted from May 28, 2021, through April 1, 2022. Over that time, nearly 17,000 employers requested reimbursement for their employees who used sick leave for COVID-related reasons, and the state paid out nearly $160 million to those employers.

D. Workers' Compensation Statistics

Under the Massachusetts Workers' Compensation law, G.L. c. 152, an employer must file with the Department of Industrial Accidents a First Report of Injury once an employee is out of work for 5 or more days due to a work-related injury or illness. Between the onset of the pandemic in early 2020 and November 30, 2022, DIA received 16,354 First Reports of Injury

related to COVID-19. The great majority of those reports (12,037, or 74%) were for workers in the healthcare professions.

ANALYSIS

As currently statutorily constructed, the Commonwealth's paid family and medical leave program likely will not provide primary support for future communicable illnesses related to a public health emergency. Moreover, amending the PFML statute to permit the Department to better provide such support would frustrate the purpose of the statute and potentially put the PFML trust fund at risk.

i. The PFML Trust Fund is paid for by the Commonwealth Workforce and lacks federal safeguards available to other benefit programs.

PFML is funded by the Family and Employment Security Trust Fund (hereinafter the "PFML" trust fund). G.L. c. 175M § 7. Contributions to the PFML trust fund are remitted by employers or covered business entities throughout the Commonwealth. G.L. c. 175M § 6. The PFML trust fund is entirely funded by the Commonwealth's workforce and has no federal analog or support. The Family and Medical Leave Act (FMLA) is a federal law that provides some job protections to employees who need to take leave for qualified family and/or medical reasons, but it does not provide income replacement or other financial support. The Department is entirely self-sustaining and lacks the federal safety net available to the DUA through the U.S. Department of Labor. As such, potentially expanding Chapter 175M to cover future public health crises would require the Department to directly charge the Commonwealth's workforce (employers and employees) for the increased costs associated with such a change.

ii. PFML's eligibility requirements make the program largely unsuitable to support a public health crisis like COVID-19

To be eligible for PFML benefits, individuals with a qualifying condition/event must work for a covered Massachusetts entity and must meet the Department's statutory earnings threshold. Individuals who work for municipalities and other local governmental instrumentalities, or religious institutions are not covered unless their employer has voluntarily opted-in. Those who have been unemployed or retired for more than 26 weeks are not covered. Self-employed individuals are not covered unless they have chosen to opt into the program and have paid contributions for at least two calendar quarters. Additionally, an individual must not have used up their annual statutory leave allowances for other qualifying reasons, even if they did not apply to the department or receive benefits for those prior leaves.

Provided a covered individual meets the Department's statutory earnings requirement and has not otherwise exhausted available leave allotments, the individual must have a serious health condition that is certified by a recognized medical provider in order to be eligible for PFML benefits. For the Department to recognize a serious health condition, an individual must be unable to do their job for more than 3 consecutive days AND must meet the treatment threshold (overnight stay in a medical facility, two or more treatments within a 30-day period, or at least one treatment with a documented plan for continued care). While we do not know the symptoms or duration that will be associated with the communicable disease that causes the Commonwealth's next public health crisis, many individuals who suffered from COVID-19 did not meet the statutory definition of a serious health condition, under Chapter 175M.

In addition, Section 3(a) of Chapter 175M requires a 7-day waiting period for eligible individuals with a certified serious health condition. This mandatory waiting week must be served before any benefits are paid to an eligible individual from the PFML trust fund. Even if individuals with COVID-19 met the duration and treatment thresholds, statistics show that most

patients with COVID-19 would have recovered and been able to return to work within the seven-day waiting period, and therefore would have been ineligible to receive any financial support in the form of benefit payments from the Department. Massachusetts' unemployment statute, G.L. c. 151A, also mandates a one-week waiting period, but during the COVID-19 pandemic the federal government both provided inducements to states to drop the waiting week and paid that first week of benefits on state UI claims.

As stated above, the Department does not track qualifying reasons by the specific type of medical condition, including those which would fall within communicable illnesses related to a public health emergency. Based on pre-COVID-19 pandemic forecasting demands, however, the Department believes that the COVID-19 pandemic did not impact the volume of requests for leave submitted.

RECOMMENDATIONS

The Department makes the following recommendations with regard to the potential expansion of Chapter 175M in the event of a future public health emergency:

1. The Legislature should not amend Chapter 175M to make it better able to support future public health crises, largely because such changes would burden the PFML Trust Fund, which is funded solely by contributions from employers and employees.
2. The Legislature should continue to explore and consider alternatives for future public health crises similar to those implemented during the COVID-19 pandemic, including appropriate emergency provisions with targeted funding mechanisms that do not unduly burden the Commonwealth's employers and workers.