

**Labor & Employment Alert**  
**September 2019**

**DFML Issues Clarifications on 1099-MISC Workers**

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In **PFML News** (“Paid Family Medical Leave”) issued on Thursday, September 5, 2019, the Department of Family and Medical Leave (DFML) issued new guidance on two (2) topics:

1. When must an employer count 1099-MISC workers as part of its workforce?
2. Must an employer report 1099-MISC workers if 1099-MISC workers make up less than 50% of the employer’s workforce?

**1099-MISC workers only need to be reported if they make up more than 50% of your workforce.**

The DFML clarified that 1099-MISC workers only need to be reported to DFML *if they make up more than 50% of your workforce*. This clarification eliminates confusion around whether employers have to report their total workforce even if 1099-MISC workers do not make up more than 50% of your workforce: you do not – in such a case you would only need to report your W-2 employees. Additionally, the **PFML News** significantly narrowed the scope of which 1099-MISC workers count as members of your workforce for the purpose of determining whether they make up more than 50% of your workforce.

**1099-MISC workers are not counted as members of your workforce if they meet the independent contractor test set forth in M.G.L. c. 151A, §2.**

In a significant modification to its position, DFML clarified that 1099-MISC workers who satisfy the independent contractor test set forth in M.G.L. c. 151A, §2 are *not* considered part of your workforce count. A 1099-MISC worker meets the 3-part independent contractor test if:

1. The worker is free from control and direction in connection with the performance of services;
2. The services are performed either outside the usual course of business for which the service is performed or is performed outside of all the places of business of the enterprise for which the service is performed; and
3. The worker is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed.

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Accordingly, if your 1099-MISC workers meet the independent contractor test, they do not count as members of your workforce, they do not have to be reported to DFML and you do not have to remit contributions on their behalf whether or not they constitute more than 50% of your workforce.

Rather, if 1099-MISC contract workers do *not* meet the 3-part independent contractor test **and** perform services as an individual entity; live in Massachusetts; and perform services in Massachusetts, then they are considered part of your Massachusetts workforce count if they make up more than 50% of your workforce.

This latest DFML clarification warrants your attention relating to workers classified as independent contractors.

### **What steps should employers consider in light of the DFML's clarification regarding 1099-MISC workers?**

- *Is a workforce audit warranted?*

First, you should consider whether a workforce audit is appropriate. The DFML guidance underscores the importance of ensuring that your 1099-MISC workers meet the 3-part independent contractor test set forth above. If you have not done so already, it may be prudent to undertake an audit of such workers and the services they provide to ensure they are appropriately classified.

- *What if you have already notified 1099-MISC workers from whom you are not required to deduct contributions or report to DFML?*

As stated above, if your 1099-MISC workers meet the independent contractor test, they do not count as members of your workforce, they do not have to be reported to DFML and you do not have to remit contributions on their behalf whether or not they constitute more than 50% of your workforce. If, prior to the DFML policy clarification, you already notified such 1099-MISC workers of rights and obligations under the PFML and contribution amounts you intend to deduct from their wages, you should consider whether to rescind such notice and advise them of DFML's revised position. One approach, though not required, may be to also advise them of their opportunity to elect coverage on their own as a self-employed individual under the PFML.

We strongly urge you to consult with legal counsel before taking any of these steps or any other actions based on the **PFML News** described in this Alert.

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*This Alert was prepared by Nan O'Neill and Rachel Mills. If you have any questions about the PFML, please contact Nan O'Neill, Sarah Spatafore, Rachel Mills, or the attorney responsible for your account, or call (617) 479-5000.*

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