

Management Alert



Massachusetts Legislature Passes Bill Providing \$15 Minimum Wage And Paid Family And Medical Leave: What Employers Need To Know

By Daniel Klein

Seyfarth Synopsis: On June 20, 2018, the Massachusetts Legislature overwhelmingly passed a bill providing a number of important provisions impacting employers in the Commonwealth. The so-called “grand bargain” bill resulted from a compromise among legislators, the business community, labor unions and community groups designed to eliminate three potential November ballot questions on proposals concerning paid leave, the minimum wage, and a reduction in the state sales tax. The bill will now advance to Governor Baker’s desk for his consideration by June 30.

The “grand bargain” bill would gradually raise the state minimum wage from the current \$11 per hour to \$15 per hour by 2023. It would also phase out over five years the time-and-a-half premium pay requirement for retail workers working on Sundays and holidays.

The bill also provides for paid family and medical leave. While the statutory language raises a number of questions that will need to be addressed through the regulatory process, the principal terms are mostly clear. Over a 3-year phase-in period, the Family And Medical Leave Law would provide Massachusetts workers up to 12 weeks of paid family leave, and up to 20 weeks of paid medical leave for the employee’s own serious health condition. After a 7-day waiting period, workers on paid leave would earn 80% of their wages up to 50% of the state average weekly wage, and then 50% of their wages above that amount, up to an \$850/week cap (which may be adjusted annually). The benefit will be paid by a state trust fund which will be funded by a payroll tax on employers at an initial contribution rate of 0.63% of the employee’s wages. The cost may be shared between employer and employee at varying percentages, based on the type of leave and the size of the company. Unlike the federal FMLA, the state law will apply to all employers of one or more employees working in Massachusetts. Job-protected, paid leave will seemingly be available to eligible new employees without any hours worked or service time requirements. That law also will apply to certain former employees after separation and self-employed workers. The key provisions are unpacked below, subject to regulatory clarification.

Minimum Wage And Premium Pay

If signed, the bill will gradually raise the state minimum wage over 5 years from the current \$11 per hour to \$15 per hour by 2023, including annual increases to \$12, \$12.75, \$13.50, \$14.25, and \$15. The bill also will gradually increase the alternative minimum “service rate” for eligible customarily tipped employees from \$3.75 per hour to \$6.75 per hour by 2023.

The bill will phase out over five years the time-and-a-half premium pay requirement for retail workers working on Sundays and holidays, decreasing annually from 1.5 times to 1.4 to 1.3 to 1.2 to 1.1 and ultimately to straight time. However,

retail work on Sundays and certain holidays will still need to be voluntary, and refusal to work shall not be grounds for discrimination, dismissal, discharge, reduction in hours, or any other penalty.

Family And Medical Leave

The Family And Medical Leave Law, Massachusetts General Laws Chapter 175M, would establish a Department of Family and Medical Leave within the Executive Office of Labor and Workforce Development. This new department will be responsible for administering the paid leave program. The law would phase in mandated paid family and medical leave over three years with the following key provisions:

- Effective July 1, 2019, employers will be required to post a notice of benefits available under this law in a conspicuous place on each of their premises. The notice must be prepared or approved by the Department. The notice must be in English and any other language which is the primary language of 5 or more employees or self-employed individuals of that workplace (if such notice is available from the Department).
- Also effective July 1, 2019, employers must issue to each employee within 30 days after the employee's start date, written information provided or approved by the Department in the employee's primary language explaining the available benefits, the employee's contribution amount and obligations, the employer's contribution amount and obligations, instructions on how to file a claim for family and medical leave benefits, and related information.
- Failure to comply with the above notice requirements will result in a civil penalty for a first violation of \$50 per employee, and \$300 per employee for each subsequent violation.
- Beginning July 1, 2019, all Massachusetts employers will contribute to the Family and Employment Security Trust Fund at an initial contribution rate of 0.63% of each employee's wages. For employers with 25 or more employees in Massachusetts, while the employer must remit the full contribution to the Trust Fund, for medical leave, the employer may deduct up to 40% of the contribution from the employee's wages; and for family leave, the employer may deduct up to 100% of the contribution from the employee's wages. (The regulations will need to address how this varied deduction will work.) Smaller employers with less than 25 employees in Massachusetts are not required to pay any portion of the contribution for family and medical leave. The Director of the Department may adjust the contribution rate annually by October 1 for the coming calendar year.
- Beginning July 1, 2021 (although the statutory language concerning this date is currently inconsistent and needs to be clarified), workers will be able to take family or medical leave and file claims with the Department for medical or family leave benefits. After an initial 7-calendar day waiting period, employees will be entitled to up to 12 weeks of paid family leave per benefit year, and up to 20 weeks of paid medical leave per benefit year for the employee's own serious health condition. The law sets a maximum aggregate of 26 weeks of paid leave per benefit year.
- After the 7-day waiting period (during which employees may use accrued paid sick leave), workers on paid leave may receive wage replacement from the state Trust Fund equal to 80% of their wages up to 50% of the state average weekly wage, and then 50% of their wages above that amount, up to an \$850/week cap. The Director may adjust this maximum weekly benefit amount annually by October 1, to be 64% of the state average weekly wage, which shall take effect on January 1 of the year following.
- Paid "medical leave" will be available to any covered individual with a serious health condition.
- Paid "family leave" will be available for the following reasons: (i) to care for a family member with a serious health condition; (ii) to bond with the worker's child during the first 12 months after birth or the first 12 months after the placement of the child for adoption or foster care with the worker; (iii) because of any qualifying exigency arising out of the fact that a family member is on active duty or has been notified of an impending call or order to active duty in the Armed Forces; or (iv) in order to care for a family member who is a covered servicemember with a serious injury or illness incurred or aggravated in the line of duty (for this particular reason, up to 26 weeks of leave may be taken in a benefit year).

- 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 leave, the employer shall continue to provide for and contribute to the employee's employer-provided 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.
- Intermittent leave or reduced schedule leave, paid on a prorated basis, may be taken "when medically necessary" for a medical leave for the worker's own serious health condition, for a family leave to care for a family member with a serious health condition, or for injured servicemember family leave. Qualifying exigency family leave may also be taken intermittently or on a reduced schedule. However, bonding leave for a new baby may not be taken intermittently or on a reduced schedule unless the employee and the employer agree otherwise.
- An employer must restore an employee who has taken family or medical leave to the employee's previous position or to "an equivalent position" with the same status, pay, employment benefits, length of service credit, and seniority as of the date of leave (except in the event that other employees of equal length of service credit and status in the same or equivalent positions have been laid off due to economic conditions or other changes in operating conditions).
- The weekly benefit amount shall be reduced by the amount of wages or wage replacement a worker receives for that period under: any government program or law, including workers' compensation (other than for permanent partial disability incurred prior to the leave claim); other state or federal temporary or permanent disability benefits law; or an employer's permanent disability policy or program. The weekly benefit amount shall not be reduced by the amount of wage replacement received while on leave under an employer's temporary disability policy or program, or an employer's paid family or medical leave policy, unless the aggregate amount an employee would receive would exceed the employee's average weekly wage.
- The state law adopts many of the same definitions as the federal FMLA, but provides broader coverage in various respects:
 - According to the current language of the bill, unlike the federal FMLA, all employees will be eligible for paid family or medical leave under the state law, regardless of length of service with the employer or hours worked.
 - Under the Massachusetts law, in addition to the family members included under the federal FMLA, "family member" also includes a worker's domestic partner, grandchildren, grandparents, and siblings, as well as the parents of a spouse or domestic partner.
 - "Serious health condition" is defined more broadly under Massachusetts law as an illness, injury, impairment, or physical or mental condition that involves (i) inpatient care in a hospital, hospice, or residential medical facility; or (ii) continuing treatment by a health care provider.
- The law will not obviate an employer's obligation to comply with any company policy, law, or collective bargaining agreement that provides for greater or additional leave rights.
- Leave under this law will run concurrently with leave taken under the Massachusetts Parental Leave Law or the federal Family and Medical Leave Act.
- Employees must provide employers at least 30 days' notice of the anticipated starting date of the leave, the anticipated length of the leave and the expected date of return, or shall provide notice as soon as practicable if the delay is for reasons beyond the employer's control.
- Workers must submit a benefits claim to the Department within 90 calendar days after the start of leave, or benefits may be reduced. The Department shall notify applicants of their eligibility or ineligibility for benefits within 14 days of receiving a claim and shall pay benefits not less than 14 days after the eligibility determination. The Department shall notify the employer within 5 business days after a claim has been filed.

- All claims must include a certification supporting the leave request, which differs based on the reason for leave. Of note, the certification to care for a family member with a serious health condition must include a statement by the health care provider that the covered worker is needed to care for the family member and an estimate of the amount of time that the covered worker is needed to care for the family member.
- Employers may apply to the Department for approval to opt out of the state program if they have a program that offers benefits greater than or equal to what an employee would receive in the state program.
- The law prohibits retaliation against employees for exercising their rights under this law, and any negative change in status or adverse employment action during a leave or within six months of the leave will create a rebuttable presumption of retaliation, which the employer can rebut with clear and convincing evidence that such action was not retaliation and was based on an independent justification.
- The law provides employees a private right of action with a 3-year statute of limitations for violation of the job restoration, benefits accrual and continuation, and anti-retaliation provisions. A court may award a prevailing employee job reinstatement, benefits reinstatement, injunctive relief, compensation for 3 times any lost wages, benefits and other remuneration and the interest thereon, and reasonable costs and attorneys' fees.
- Former employees, if they otherwise meet the financial eligibility requirements, could receive paid leave benefits for family or medical leave that starts within 26 weeks after their separation from employment.
- Self-employed individuals may elect coverage under certain conditions.
- By March 31, 2019, the Department will publish for public comment and hearing proposed regulations and procedures, and such regulations will be promulgated by July 1, 2019.

Questions surrounding many of the Family and Medical Leave Law's terms and implementation issues will likely be the subject of much discussion and debate between now and the March 2019 issuance of proposed regulations. If the bill is signed by the Governor, Massachusetts would have one of the most generous paid family leave programs in the country. Currently, California, New Jersey, New York, and Rhode Island mandate paid family leave. California is the only other state currently with plans for a minimum wage as high as \$15, which is to be implemented by 2022.

We will keep you informed of upcoming clarifications and developments, including Governor Baker's consideration and the future regulations.

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