



Benefits Compliance Update

July 3, 2018

Massachusetts Establishes Paid Family and Medical Leave Act

On June 28, 2018, Massachusetts Governor Charlie Baker signed into law a bill that provides for Paid Family and Medical Leave¹. The bill includes paid family and medical leave, a multi-year phase-in to \$15 per hour minimum wage, and an annual sales tax holiday. The Paid Family and Medical Leave Act has rolling effective dates for various provisions of the Act, the first becoming effective as of July 1, 2019.

EMPLOYER COVERAGE

The Act requires **ALL** private employers, who employ one or more employees in Massachusetts, to provide paid family and medical leave.² A “covered individual” is defined as (1) a current employee of a Massachusetts employer, (2) a self-employed individual who elects coverage under the Act, and (3) a former employee, who has been separated from employment for not more than 26 weeks at the start of the former employee’s family or medical leave. The definitions of employee and employer in this context is generally the same as that under Massachusetts unemployment law.³

TYPES OF LEAVE

There are two types of leave outlined in the Act, paid family leave and paid medical leave.

¹ See H.4640, <https://malegislature.gov/Bills/190/H4640>.

² A municipality, district, political subdivision or its instrumentalities, as well as any other employer not subject to this Act, may choose to become covered under the Act by notifying the Department of Medical and Family Leave.

³ The Act provides additional definitions of employee and employer in special circumstances. Employers should consult with their employment counsel regarding appropriate classification.

A covered individual is entitled to 12 weeks of **paid family leave** per benefit year⁴. Paid family leave is available:

- to bond with the covered individual's child during the first 12 months after the child's birth or the first 12 months after the placement of the child for adoption or foster care with the covered individual;
- 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
- in order to care for a family member who is a covered servicemember.

A covered individual is entitled to 20 weeks of **paid medical leave** in a benefit year. Paid medical leave is available to any covered individual with a serious health condition.⁵

A covered individual may not take more than 26 weeks, in the aggregate, of paid family and medical leave per benefit year. A 7-day waiting period must be satisfied before a covered individual can use paid family and medical leave. The waiting period is not required in a situation where a covered individual takes a medical leave during pregnancy or recovery from childbirth if supported by documentation by a health care provider that is immediately followed by paid family leave. An employee may use vacation leave, sick leave, or any other paid leave during the waiting period.

The Act allows for intermittent leave or a reduced leave schedule for all reasons covered under the Act except for bonding with a child which requires the employee and employer mutually agree to the leave.

EMPLOYEE RESTORATION AFTER LEAVE

An employee who has taken family or medical leave is restored 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. An employer is not required to restore an employee who has taken family or medical leave to the previous or to an equivalent position if 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 affecting employment during the period of leave; provided, however, that the employee who has taken leave retains any preferential consideration for another position to which the employee was entitled as of the date of leave.

The taking of family or medical leave does 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 must 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.

⁴ "Benefit year" is the period of 52 consecutive weeks beginning on the Sunday immediately preceding the first day that job-protected leave under the Act commences for the covered individual.

⁵ "Serious health condition" is 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.

FUNDING THE BENEFIT

The Act creates a new agency, The Department of Family and Medical Leave (the “Department”). The Department will create the Family and Employment Security Trust Fund (the “Fund”) which will receive all contributions under the Act. Contributions are funded through a mandatory payroll tax, starting at .63% of wages, but the Director of the Department can adjust the contribution rate annually by October 1 for the next calendar year. The payroll tax is split approximately evenly between employees and employers. However, employers with fewer than 25 employees are not required to contribute to the fund, but their employees will still be required to contribute.

AMOUNT OF BENEFIT

The weekly benefit amount for employees and self-employed individuals on family or medical leave is determined as follows:

- the portion of an employee’s or self-employed individual’s average weekly wage that is equal to or less than 50 percent of the state average weekly wage is replaced at a rate of 80 percent; and
- the portion of an employee’s or self-employed individual’s average weekly wage that is more than 50 percent of the state average weekly wage is replaced at a rate of 50 percent.

The maximum benefit amount is capped at \$850.00 per week. The Director of the Department can adjust the weekly benefit amount annually by October 1, to be 64% percent of the state average weekly wage, for the next calendar year.

The weekly benefit amount is reduced by the amount of wages or wage replacement that a covered individual receives for that period under any of the following while on family or medical leave:

- any government program or law, including but not limited to workers’ compensation, other than for permanent partial disability incurred prior to the family or medical leave claim, or under other state or federal temporary or permanent disability benefits law, or
- a permanent disability policy or program of an employer.

The weekly benefit amount is not reduced by the amount of wage replacement that an employee receives while on family or medical leave under any of the following conditions, unless the aggregate amount an employee would receive would exceed the employee’s average weekly wage:

- a temporary disability policy or program of an employer; or
- a paid family, or medical leave policy of an employer.

If an employer makes payments to an employee during any period of family or medical leave that are equal to or more than the amount required, the employer will be reimbursed out of any benefits due or to become due from the Fund for that employee covering the same period of time as the payments made by the employer.

EMPLOYERS ALREADY PROVIDING REQUIRED AMOUNT OF LEAVE

Employers may apply to the Department for approval to meet their obligations under the Act through a private plan. A private plan must confer all the same rights, protections and benefits provided to employees under the Act.

EMPLOYER NOTIFICATION

Employers are required to post a workplace notice prepared or approved by the Department providing notice of paid family and medical leave in a conspicuous place on each of the employer's premises. The required workplace notice must be in English and each other language other than English 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.

Employers are required to issue to each employee not more than 30 days from the beginning date of the employee's employment, the following written information provided or approved by the Department in the employee's primary language:

- an explanation of the availability of family and medical leave benefits, including rights to reinstatement and continuation of health insurance;
- the employee's contribution amount and obligations;
- the employer's contribution amount and obligations;
- the name and mailing address of the employer;
- the identification number assigned to the employer by the Department;
- instructions on how to file a claim for family and medical leave benefits;
- the mailing address, email address and telephone number of the Department; and
- any other information deemed necessary by the Department.

An employer that fails to comply with the above notification will pay a \$50 civil penalty per employee for the first violation and \$300 per employee for each subsequent violation. The employer has the burden of demonstrating compliance with employer notification requirements.

EMPLOYEE NOTICE TO EMPLOYER

The employee must provide at least 30 days' notice to the employer of the anticipated starting date of the leave, the anticipated length of the leave and the expected date of return or must provide notice as soon as practicable if the delay is for reasons beyond the employee's control.

INTERACTION WITH OTHER POLICIES AND LEAVE LAWS

The Act will not obviate an employer's obligations to comply with any company policy, law or collective bargaining agreement that provides for greater or additional leave rights. Leave taken under the Act runs concurrently with leave taken under the Massachusetts Parental Leave Law or Family and Medical Leave Act ("FMLA").

ENFORCEMENT

The Act specifies it is unlawful for any employer to retaliate against an employee for exercising their rights under the Act. Any negative change in status or an adverse employment action during the 6-month period following an employee's leave or restoration to a position, or of an employee who has participated in proceedings or inquiries within 6 months of the termination of proceedings related to the Act is presumed to be retaliation. Per the Act, the employer can only rebut this presumption by clear and convincing evidence that the employer's action was not retaliation, but was based on some other reason unrelated to the Act.

ADDITIONAL GUIDANCE

The Act requires the Department to propose regulations necessary to implement and enforce the law.

APPLICABILITY DATES

March 31, 2019: The Department is required to publish proposed regulations for public comment.

July 1, 2019: The Department must promulgate all regulations; commence collection of contributions; employer notification posting; and employer notification to employees.

January 1, 2021: All leave is available except family leave to care for a family member with a serious health condition.

July 1, 2021: Family leave is available to care for a family member with a serious health condition.

EMPLOYER NEXT STEPS

Employers should work with labor counsel and payroll processors to review their leave policies and procedures to make sure they are compliant with the Act by July 1, 2019. In addition, employers should monitor the Commonwealth's web site for additional guidance and regulations.⁶

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⁶ <https://www.mass.gov/>