

INSIGHTS + NEWS

Client Alert: Paid Family and Medical Leave Comes to Massachusetts

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Adding the Commonwealth to the small-but-expanding list of states providing employees with paid leave benefits, Massachusetts enacted legislation this past summer (Acts 2018, ch. 121, the “Act”) to create a new state-administered [Paid Family and Medical Leave program](#) (the “Program”) that will affect Massachusetts employers of all sizes, with very few apparent exceptions. This marks a substantial change in the law; currently, the federal Family and Medical Leave Act applies only to employers of 50 or more employees and provides for periods of unpaid leave under certain circumstances. Beginning in January 2021, however, the Program will provide eligible employees with benefits during defined periods of either “medical” or “family” leave.

The relevant sections of the Act (which will appear as chapter 175M of the Massachusetts General Laws) establish only the basic framework of the Program. A new state agency, the Department of Family and Medical Leave (the “Department”), to be located within the Executive Office of Labor and Workforce Development, will develop the details of implementation through regulations, which are to be published and circulated for public comment and hearing no later than March 31, 2019.

In the meantime, employers should familiarize themselves with the major features of the Program described in M.G.L. c.175M, which are summarized below.

FAMILY AND MEDICAL LEAVE FOR COVERED INDIVIDUALS

The Program provides employees with job-protected, paid leave for up to 12 weeks per year to care for a family member with a serious health condition or bond with a new child (family leave), up to 20 weeks a year to deal with the individual’s own serious health condition (medical leave), and up to 26 weeks to deal with an emergency related to deployment of a family member for military service (family leave). The maximum amount of combined family and medical leave that any covered individual may take under the Program per benefit year is 26 weeks, and the Act permits the leave to be taken on an intermittent or reduced schedule basis, unless it is a family leave taken for the purpose of bonding with a child. Any leave taken under the Act runs concurrently with any leave available under the federal Family and Medical Leave Act of 1993 or previously enacted Massachusetts law.

NEW PAYROLL TAX

The Act creates a new state trust fund, the Family and Employment Security Trust Fund (the “Trust”) to finance the paid leave benefits available to employees. Funded through a payroll tax, the Act establishes an initial contribution rate of 0.63% of each employee’s wages (amount to be adjusted annually), up to the maximum wage base tied to the federal Social Security Administration’s annually-calculated contribution and benefit base (for 2018, the SSA wage base is

\$128,400, meaning that the per-employee contribution cap under the Program would be \$808.92). Employers must remit the entire amount of the contribution to the Trust in the first instance, though employers with less than 25 employees are required only to remit the deductions from employees' wages and will not be required to pay an employer-share contribution. Collection of contributions will begin on July 1, 2019, in accordance with the Department's final regulations.

THE PROGRAM IS A STATE-ADMINISTERED WAGE REPLACEMENT SCHEME

Similar to the system governing unemployment benefits in Massachusetts, the Program's primary function will be realized through interactions between the Department and the individual employee seeking benefits, but employers have a critical role to play by making contributions to fund the Trust and by providing information requested by the Department (and in some cases, raising challenges) during the claims process. Weekly benefit amounts for an employee on leave will be calculated as a percentage of the employee's average weekly wage—using the same formula applied in the unemployment benefit context—with a maximum weekly benefit of \$850 (to be adjusted in October of each year to reflect an amount that is 64 percent of the state average weekly wage). Benefits will not be provided during the first seven days of leave, during which time the employee may, but cannot be compelled to, use accrued sick or vacation time. No benefits may be distributed under the Act until January of 2021.

NOTICE REQUIREMENTS

Employers will be required to display notice of rights under the Act in the workplace and also to provide written notice to each employee (or independent contractor) within 30 days of hire or engagement, the delivery of which is to be confirmed by written acknowledgment. Unless the employer fails to observe these requirements, employees and other covered individuals must provide at least 30 days' notice of the anticipated start date, length, and end date of the leave, or, if for reasons beyond the employee's control, 30 days' notice cannot be provided, the employee must provide notice as soon as practicable.

ANTI-RETALIATION AND OTHER LEAVE PROTECTIONS

Upon return from leave, an employee has the right to be restored to his or her previous position, with the same status, pay, employment benefits, length-of-service credit and seniority as of the date of leave. During leave, the employer must continue to provide for and contribute to the employee's health insurance and other employment-related benefits, if any, at the level and on the same conditions as if the employee were working continuously throughout the leave period. The Act also provides robust anti-retaliation protection for covered individuals by imposing a presumption of retaliation upon the occurrence of "any negative change in the seniority, status, employment benefits, pay or other terms or conditions of employment of an employee" during or within six months after return from leave. This presumption may only be rebutted upon a showing of clear and convincing evidence that the conduct was not retaliatory, and a finding of retaliation entitles the employee to triple damages and attorney fees under the Act.

PRIVATE PLAN OPTION

There is also an option for employers to "opt out" of the Program and instead meet their obligations under the Act by implementing a private plan conferring all of the same rights, protections and benefits to employees as the state-administered Program. Any such plan is subject to Department approval.