

Massachusetts Paid Family and Medical Leave on Tap

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Background

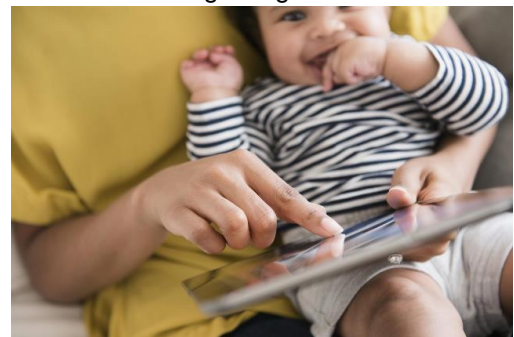
Four states — California, New Jersey, New York, and Rhode Island — currently require employers to provide paid family leave benefits through state-administered programs. Last year, Washington became the fifth state to mandate paid family leave, creating a family and medical leave program that will go into effect in 2020. (See our [July 18, 2017 For Your Information.](#)) The District of Columbia also adopted a paid family leave law, slated to take effect in 2020. (See our [February 21, 2017 For Your Information.](#))

Massachusetts Paid Leave Program

On June 28, Massachusetts Governor Charlie Baker signed into [law](#) a bill providing the nation's most generous paid family and medical leave program to date. The program will be established and administered by a new Department of Family and Medical Leave within the Executive Office of Labor and Workforce Development. The law requires the department to propose implementing regulations by March 31, 2019, and finalize them by July 1, 2019. Family and medical leave benefits will be available to covered individuals beginning in 2021.

Covered Employers and Covered Individuals

Unlike the federal Family and Medical Leave Act ([FMLA](#)), which applies to employers with 50 or more employees, Massachusetts' paid family and medical leave law will apply to employers with at least one employee working in the state. Massachusetts municipalities, districts, political subdivisions or their instrumentalities will not be covered by the new mandate unless they elect to be. Employers may apply for



approval to opt out of the state program if they provide benefits that either match or exceed those provided under the new law.

Because the Massachusetts program does not impose a minimum hours of service requirement, job-protected family and medical leave will be available to employees of covered entities and other individuals who would not qualify for FMLA leave. Current employees, former employees separated from employment for no more than 26 weeks at the start of leave, and certain self-employed workers who opt into the new program will be eligible for paid family and medical leave benefits, provided they meet the financial eligibility requirements for receiving unemployment compensation under Massachusetts law (i.e., earned at least \$4,700 during the last four completed calendar quarters, and 30 times the weekly unemployment benefit amount they would be eligible to collect).

Paid Leave Benefits

Under the Massachusetts program, paid **medical** leave benefits will be available for the employee's own *serious health condition*.

Paid **family** leave benefits will be available for:

- Bonding with a child during the first 12 months after birth or placement for adoption or foster care
- A qualifying exigency arising out of a *family member's* active duty or impending call or order to active duty in the Armed Forces
- Care of a family member who is a *covered servicemember* with a serious injury or illness incurred or aggravated in the line of duty
- Care of a family member who has a serious health condition

For these purposes, *family member* is more broadly defined than under the FMLA to include an employee's child, grandchild, grandparent, parent, sibling, spouse, domestic partner, and a parent of the employee's spouse or domestic partner. The term *child* includes a biological, adoptive, or foster child, stepchild, legal ward, or a child to whom the employee stands or stood *in loco parentis* when the child was a minor.

A serious health condition is defined as an illness, injury, impairment, or physical or mental condition that involves: (1) inpatient care in a hospital, hospice, or residential medical facility; or (2) continuing treatment by a healthcare provider. Massachusetts' definition of *covered servicemember* is substantially similar to the FMLA's and, like the federal law, provides an extended period for military caregiver leave.

Maximum Duration

Beginning in 2021, Massachusetts workers will be entitled to up to 12 weeks of paid family leave and up to 20 weeks of paid medical leave for their own serious medical condition in a benefit year, with a combined maximum of 26 weeks in any year. Up to 26 weeks of paid family leave in a benefit year may be taken to care for a covered servicemember. Under some circumstances, leave may be taken on an intermittent or reduced schedule basis. For these purposes, *benefit year* is defined as the 52-consecutive week period beginning on the Sunday immediately preceding the first day of a covered individual's protected leave.

Federal Family and Medical Leave Act

The federal Family and Medical Leave Act (FMLA) requires employers with at least 50 employees within 75 miles to provide eligible employees with up to 12 weeks of unpaid, job-protected leave in a 12-month period for qualifying family or medical reasons. Employees must have worked for a covered employer for at least 1,250 hours in the 12-month period preceding leave to meet eligibility requirements.

Comment. While the statute indicates that family and personal medical leave will be available to covered individuals effective January 1, 2021, an effective date of July 1, 2021 is indicated for family leave to care for a family member with a serious health condition. Whether this seeming inconsistency was intentional needs to be clarified.

Weekly Benefit

While on covered leave, Massachusetts employees will receive a weekly benefit of up to \$850, determined as a percentage of their average weekly wage. Subject to the annually adjusted maximum, employees will be eligible to receive 80% of their average weekly wage (or salary) capped at 50% of the state average weekly wage plus 50% of that portion of their average weekly wage that exceeds 50% of the state average weekly wage. Benefits will be prorated for intermittent or reduced schedule leaves.

The weekly benefit amount will be reduced by the amount of wages or wage replacement a worker receives for that period under: a government program (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 the employer's permanent disability policy or program (LTD). The benefit would not be reduced by wage replacement received under the employer's temporary disability policy or program (STD) or the employer's paid family or medical leave policy unless the total amount would exceed the employee's average weekly wage.

Waiting Period

Paid leave benefits under the new program generally will be subject to an initial 7-day waiting period following a qualifying event. However, there will be no waiting period for family leave if it immediately follows medical leave for pregnancy or recovery from childbirth. Employees may use accrued sick or vacation pay or other paid leave provided under an employer policy to cover some or all of the waiting period.

Requesting Leave

Employees will be required to provide at least 30 days' notice of the expected leave, its length and return date, or notice as soon as practicable in appropriate circumstances. Workers must submit their claim for benefits to the department within 90 days after the start of leave, or benefits may be reduced. Claims must include appropriate certifications, which will vary depending on the type of leave. Notably, the certification for leave to care for a family member with a serious health condition must include a healthcare provider's statement that the worker is needed to care for the family member and the estimated amount of time needed for that purpose. The department will notify the employer within five business days that a claim has been filed.

The department will notify those applying for benefits of the eligibility determination within 14 days of receiving a claim, with payment to be made not less than 14 days after the determination. In addition to establishing procedures and forms for filing claims and providing other guidance, it will also establish an administrative appeals process for adjudicating claims.

Funding

The new family and medical leave benefits will be funded by a payroll tax of 0.63%, starting on July 1, 2019. The rate will be adjusted annually. Employers with more than 25 employees will have to make the full contribution but will be able to deduct a portion from the employee's wages — up to 40% of the contribution for their personal medical leave and up to 100% of the contribution for family leave. Employers with fewer than 25 employees are exempt from paying the employer portion but will still have to collect the employee portion of the payroll tax.

Employers must remit contributions for each employee to the Family and Employment Security Trust Fund established exclusively for purposes of the new law. Qualifying family and medical leave benefits will be paid by the trust fund.

Other Leaves and Benefits

Paid family and medical leave will run concurrently with leave taken under the FMLA, as well as leave taken under the Massachusetts Parental Leave Act. Employees may be required to take paid family and medical leave concurrently with disability or family care provisions of a collective bargaining agreement or employer policy, as long as the employee receives the greater benefit. Employees who take leave under the new state program while FMLA-ineligible may take FMLA leave in the same benefit year only to the extent they remain eligible for concurrent leaves under the Massachusetts law.

The new law provides that taking 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.” Further, during any such leave, employers must continue to provide for and contribute to the employee’s health insurance benefits at the level and under the same conditions as if the employee had worked continuously.

Because qualifying leave is job-protected, workers must be restored to their original or to an equivalent position on returning to work unless they would have been laid off if they had not taken leave. Notably, workers who would not qualify for job-protected leave under the FMLA will qualify for job-protected leave under the Massachusetts program.

Employer Notice Requirements

Employers will be required to post multi-lingual workplace notices describing the new benefit and will have to provide to each employee within 30 days of hire a similar written notice of their rights that includes their and their employer’s contribution and instructions on how to file a claim for benefits under the new law. Form notices are to be prepared by the department.

Non-Retaliation

Like the FMLA, Massachusetts law includes various provisions intended to protect employees against discrimination or retaliation for exercising or seeking to exercise their paid leave rights or otherwise interfering with the exercise of those rights. Notably, it presumes that a negative change in seniority, status, employment benefits, pay, or other terms and conditions of employment is retaliatory if it occurs during the employee’s leave or within six months following leave, job restoration, or the termination of proceedings or inquiries concerning this law in which the employee has participated. To rebut the presumption, employers will have to show clear and convincing evidence of an independent justification for such actions.

The law provides a private right of action that allows employees and former employees to seek reinstatement with full fringe benefits and seniority rights, treble damages for lost wages, and other relief. Civil actions must be filed within three years after the alleged violation occurs.

Next Steps for Employers

While the new family and medical leave benefit will not be available to employees until 2021, employers will be required to take action earlier. Effective July 1, 2019, employers will have to post workplace notices describing the new benefit and will have to provide each employee with a written notice of their rights under the new law within 30 days of hire. Beginning July 1, 2019, employers will have to begin contributing to the state trust fund.

In Closing

Employers should begin developing strategies to harmonize the state's new paid family and medical leave program with existing leave programs. Employers will want to consider how best to integrate the new entitlement into their leave programs and payroll practices as further details emerge.

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