On June 28, 2018, Massachusetts Governor Charlie Baker signed House Bill 4640, “An Act Relative to Minimum Wage, Paid Family Medical Leave, and the Sales Tax Holiday” (“Act”). Rather than leave the issues to voters this November, Massachusetts legislators forged a “grand bargain” that gradually raises the minimum wage, provides for paid family and medical leave, makes permanent the Commonwealth’s annual tax holiday, and phases out Sunday and holiday premium pay requirements.

Of the “grand bargain’s” several prongs, this Advisory will focus on the Act’s minimum wage increases and new paid leave requirements.1

A Steady Increase in the Minimum Wage

The Commonwealth’s minimum wage will gradually increase over five years from $11.00 to $15.00 per hour, and the tipped wage base will rise from $3.75 to $6.75 according to the following schedule:

<table>
<thead>
<tr>
<th>Effective Date</th>
<th>Hourly Minimum Wage</th>
<th>Tipped Minimum Wage</th>
</tr>
</thead>
<tbody>
<tr>
<td>January 1, 2019</td>
<td>$12.00</td>
<td>$4.35</td>
</tr>
<tr>
<td>January 1, 2020</td>
<td>$12.75</td>
<td>$4.95</td>
</tr>
<tr>
<td>January 1, 2021</td>
<td>$13.50</td>
<td>$5.55</td>
</tr>
<tr>
<td>January 1, 2022</td>
<td>$14.25</td>
<td>$6.15</td>
</tr>
<tr>
<td>January 1, 2023</td>
<td>$15.00</td>
<td>$6.75</td>
</tr>
</tbody>
</table>

1 For a discussion of the changes in the Act to Massachusetts’ “Blue Laws,” please see our blog post titled “Massachusetts ‘Grand Bargain’ Makes Changes to Blue Laws for Retailers.”
Employers that fail to comply with the Commonwealth’s minimum wage mandates may be held strictly liable and required to pay three times the total amount of any wages owed to employees, plus court costs and attorneys’ fees.

Paid Family and Medical Leave Benefits

The Act creates an expansive new paid family and medical leave program. Beginning on January 1, 2021, all employers of one or more employees working in Massachusetts will be required to provide the following paid leave benefits in a given benefit year:\(^2\)

<table>
<thead>
<tr>
<th>Type of Paid Leave</th>
<th>Maximum Leave</th>
</tr>
</thead>
<tbody>
<tr>
<td>Family Leave</td>
<td>12 weeks</td>
</tr>
<tr>
<td>Family Leave to Care for a Covered Servicemember</td>
<td>26 weeks</td>
</tr>
<tr>
<td>Medical Leave</td>
<td>20 weeks</td>
</tr>
<tr>
<td>Paid Family and Medical Leave (Aggregate)</td>
<td>26 weeks</td>
</tr>
</tbody>
</table>

Eligibility for Leave

All Massachusetts employees will be immediately eligible for paid family or medical leave at the outset of the program. Self-employed individuals will be able to opt into the program, and former employees will remain eligible for paid leave within 26 weeks of their separation from employment.

There will be a seven-day waiting period before employees on leave will be paid, except if the employee seeks to take medical leave during pregnancy or recovery from childbirth. During the seven-day waiting period, employees may use accrued sick, vacation, or other paid leave.

The Act requires employees to give 30 days' notice of intent to take leave, or if that is not practicable, as soon as possible.

Paid Family Leave

As set forth in the table above, Massachusetts employees will be provided up to 12 weeks of paid family leave in any given benefit year. Such leave benefits may be taken:

- to bond with the employee’s child during the first 12 months after the child’s birth or during the first 12 months after a child is adopted or placed in foster care,

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\(^2\) A “benefit year” is the period of 52 consecutive weeks beginning on the Sunday immediately preceding the first day that paid leave begins for the covered employee.
• to care for a family member\(^3\) with a serious health condition,\(^4\)

• for 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

• to care for a family member who is a covered servicemember with a serious
injury or illness incurred or aggravated by service in the line of duty in the Armed
Forces (employees may take up to 26 weeks of paid leave for this particular
reason).

Employees may take paid family leave on an intermittent or reduced schedule basis
when “medically necessary”\(^5\) for the care of a family member or due to an exigency or
injury involving a covered servicemember. However, paid family leave \textbf{may not} be
taken intermittently or on a reduced schedule for bonding with an employee’s newborn
child.

\textit{Paid Medical Leave}

A covered employee may take up to 20 weeks of paid medical leave for his or her own
serious health condition. Paid medical leave may be taken on an intermittent or reduced
schedule basis when “medically necessary.”

In a given benefit year, an employee is eligible for a combined total of 26 weeks of paid
family leave benefits and paid medical leave benefits.

\textit{Interaction with Other Laws and Benefits}

Paid family and medical leave benefits may overlap with existing employee benefits. To
assist employers and employees, the Act offers the following clarifications:

• With respect to parental leave, eligible employees who are giving birth may be
entitled to both medical leave during pregnancy and/or after childbirth, and to
family leave for the care of the newborn child.

• Paid family and medical leave will run concurrently with any leave the employee
may be entitled to under the federal Family and Medical Leave Act or
Massachusetts Parental Leave Act.

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\(^3\) The Act broadly defines “family member” to include an employee’s domestic partner, grandchildren,
grandparents, and siblings, as well as the parents of a spouse or domestic partner.

\(^4\) A “serious health condition” is defined as an illness, injury, impairment, or physical or mental condition
that involves inpatient care in a hospital, hospice, or residential medical facility, or continuing treatment by
a health care provider.

\(^5\) “Medically necessary” is not defined in the statute; however, \textit{federal Family and Medical Leave Act regulations}
define “medical necessity” as follows: “[T]here must be a medical need for leave and it must be
that such medical need can be best accommodated through an intermittent or reduced leave
schedule.”
• Employees may not be compelled to use any accrued sick leave, vacation time, or other paid time off but may choose to use such time to supplement benefits provided under the Act.

• Taking paid family or medical leave may not affect an employee’s right to accrue vacation time, sick leave, bonuses, or other employment benefits, plans, or programs.

• Any leave provided under a collective bargaining agreement or policy that is used for a covered reason and paid at the same or higher rate than leave available under the Act will count against the allotment of leave available under the Act.

• Throughout an employee’s paid leave, the employer must continue to provide for and contribute to an employee’s employer-provided health insurance benefits, if any exist, at the level and under the same conditions that coverage would have been provided if the employee had not taken the leave.

Payroll Tax and Employer Contributions

The Massachusetts family and medical leave program will be funded by a payroll tax and administered by a newly created Department of Family and Medical Leave (“Department”). Effective July 1, 2019, all Massachusetts employers that do not have approval for their own private plan (see discussion below) will be required to contribute to a trust fund managed by the Department at an initial contribution rate of 0.63 percent of each employee’s wages. The Department’s Director may adjust the contribution rate annually each October 1.

Under the Act, employers with fewer than 25 employees in Massachusetts will not be required to pay any portion of the contribution for family and medical leave. Employers with 25 or more employees in Massachusetts will be obligated to remit the full contribution to the trust fund, but, with respect to medical leave, they may deduct up to 40 percent of the contribution from an employee’s wages. With regard to family leave, such employers may deduct up to 100 percent of the contribution from an employee’s wages.

Weekly Benefits to Employees

After the initial seven-calendar-day waiting period, an employee on paid family or medical leave will receive a weekly wage replacement benefit equal to:

- the portion of the employee’s average weekly wage that is equal to or less than 50 percent of the state average weekly wage ($1,338.05 as of 2018) replaced at a rate of 80 percent; plus

- the portion of the employee’s average weekly wage that is more than 50 percent of the state average weekly wage replaced at 50 percent.

The maximum weekly benefit amount initially will be capped at $850 per week, with the limit subject to annual adjustment so that the benefit remains at 64 percent of the state average weekly wage.
**Reinstatement and Anti-Retaliation Provisions**

An employee who takes medical or family leave must be reinstated to his or her previous position or an equivalent one, unless the employee's status would have changed had he or she not taken the leave. Under the Act, employers may not retaliate against employees who take paid family or medical leave. Any adverse employment action taken against an employee during or within six months of the protected leave will create a rebuttable presumption of retaliation.

Employers will be able to rebut this presumption only if they can show with clear and convincing evidence that their action was not retaliatory but, rather, was taken for a legitimate business reason. If an employer fails to rebut the presumption, a court may reinstate the employee; reinstate the employee’s benefits; provide injunctive relief; and award treble damages for lost wages and benefits, along with court costs and attorneys' fees.

**Notice and Posting Requirements**

Effective July 1, 2019, employers will have to post a notice about the paid family and medical leave benefits in a conspicuous location at each of their premises. Employers must use a notice prepared or approved by the Department, and it must be in English and any other language that is the primary language of five or more employees or contractors in that workplace.

Additionally, an employer must provide written notice to each employee in his or her primary language explaining the available benefits, the employee’s and the employer's respective contribution amounts and obligations, instructions on how to file a claim for family and medical leave benefits, and other related information. Employers that do not comply with any of these notice requirements may incur a penalty of $50 per employee for a first violation, and $300 per employee for each subsequent violation.

**The “Private Plan” Option**

Under the Act, employers are provided a path, albeit a complicated one, to (in effect) opt out of the state’s paid leave program. An employer may apply to the Department for approval to meet its paid leave obligations under the Act through a private program, such as a self-insured plan. In order to be approved, such a plan must, among other requirements, confer all of the same rights, protections, and benefits provided to employees under the Act, and the cost to employees covered by the private plan must not be greater than the cost charged to employees under the state program. Employers may seek approval to opt out of either the medical or family leave portion of the state program, or both.

**Future Regulations**

The Act leaves several questions unanswered related to the implementation of the paid family and medical leave program. For example, it is unclear from the statutory language how employers will implement the various deductions for contributions to the trust fund. The statute also contains inconsistent dates that may affect when employees
will be able to take family or medical leave and file claims with the Department for those paid benefits.

The Department presumably will address these matters in its proposed regulations, which will be released by May 19, 2019, and finalized by July 1, 2019.

**What Massachusetts Employers Should Do Now**

- Employers with existing paid medical and/or family leave plans should evaluate how their programs measure up against the state program. If an employer’s plan meets the Act’s myriad criteria, the employer may have the option, with the Department’s approval, to continue using its private plan.

- If opting out of the state program is not a viable or desirable alternative, employers should begin to assess how they will handle various aspects of this new, mandated benefit, such as payroll deductions for the trust fund. Employers also may wish to consider how and when they will communicate details about the program to their employees. The obligation to make payroll deductions takes effect in less than a year, so employees will need to understand at least the basics of the program before then.

- The minimum wage will increase in fewer than six months. Although the increase is relatively small, it will still affect some employers. These employers should evaluate the likely impact of the increase on their operations and how to respond.

- Unionized employers should review their collective bargaining agreements to assess what impact, if any, the changes to the minimum wage and the paid family and medical leave mandates may have on their contractual obligations.

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