Massachusetts Paid Family and Medical Leave – Next Steps for Employers

By David Robinson on September 18, 2018



Recently, Massachusetts passed as part of the "grand bargain," a law creating paid family and medical leave for all eligible employees in the state. Following New York and California's lead, the paid family and medical leave law in Massachusetts will be available for employees in 2021.

The new law provides for the following types of job-protected paid leave:

• 20 weeks to care for a covered employee's own serious health condition;

• 12 weeks to care for a family member with a serious health condition;

• 12 weeks to bond with the employee's child during the first 12 months after the child's birth or placement of the child for adoption or foster care;

• 12 weeks for any qualifying exigency arising out of an employee's family being on active duty or notification of an impending call or order to be in the Armed forces; and

• 26 weeks to care for an injured or sick service member as a result of their military service.

An employee may not take more than 26 weeks of the paid leave in the aggregate in a benefit year.
Coverage for the law applies to any employer, regardless of size. In order for an employee to be eligible, he or she must meet the financial eligibility requirements to receive unemployment under Massachusetts law, which requires the individual to have earned (1) $4,700 during the last four completed calendar quarters and (2) thirty times the weekly benefit amount that person would be eligible to collect.

The paid family and medical leave program will be funded through a payroll tax increase of 0.63%, which will be split between the employer and employee. This increase will commence on July 1, 2019. The benefit amount that the employee will receive is calculated based on the state's average weekly wage and the individual's average weekly wage, with a maximum weekly benefit of $850.

The law allows for both intermittent and aggregate leave, meaning that a covered individual can take the leave all at once or spread out over separate periods of time as needed. Upon return from leave, the employee shall be restored to his or her previous position or a position of equal standing, unless the employer has laid off other positions of the same or equal standing while the covered individual was on leave.

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One of the more contentious aspects of the new law is the presumption against employers regarding retaliation. Under the law, if an employer fires or lays off a covered individual within six months of their return from covered leave, it is presumed that such action was taken in retaliation for the employee taking leave. The presumption extends to any negative change to a covered individual's seniority, status, or employment benefits. In such circumstance, employers can only avoid liability if they can show through clear and convincing evidence that the action was not retaliatory, they had sufficient and independent justification for such action, and they would have in fact taken the action regardless of the leave.

Employers who are found to have retaliated are subject to paying triple damages and the employee's attorneys' fees. Accordingly, employers will likely have a difficult time terminating poor performing employees who take advantage of protected leave, especially on an intermittent basis, which in effect would protect employees from retaliation for six months from each time he or she returns from intermittent leave.

While the law does not take effect in full until 2021, employers should be on the look-out for the regulations regarding implementation, which should be issued this year. Employers should also review the changes under the law with their payroll provider in advance of July 2019 to ensure that proper deductions and taxes are being withheld and paid. Additionally, employers will need to update their handbooks regarding the new leave to satisfy the notification requirement under the statute.

Lastly, it is critical that employers institute policies and consistent practices of documenting all workplace performance issues to ensure that sufficient documentation exists to justify the employer's adverse actions against employees (i.e. suspension, termination, etc.). Otherwise, employers will leave themselves exposed, among other issues, to poor performing employees using leave as a means to evade/delay termination or be at substantial risk for liability for a retaliation claim.

Dave Robinson coordinates Ruberto, Israel & Weiner's Employment Practice Group and is a member of the Litigation Practice Group. He can be reached at **dwr@riw.com**, 617-570-3562, or on Twitter at **@DWRobinsonesq**. Zachary Fayne contributed to the preparation of this article.

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