



EMPLOYMENT LAW ALERT (UPDATED)

MASSACHUSETTS ENACTS EMPLOYMENT LAW REFORMS, INCLUDING PAID FMLA LEAVE

On June 28, 2018, Governor Baker signed legislation that provides substantial new benefits and protections to employees in Massachusetts, while making a concession to employers by phasing out Sunday and certain holiday premium pay. The legislation was a negotiated compromise among the Legislature, Governor, and various interest groups to avoid related ballot questions this November. In addition to an annual sales tax holiday (on one weekend each August), the highlights of the legislation include:

Annual Phase Out of Sunday/Holiday Premium Pay. Currently, many retail businesses must pay non-exempt employees in Massachusetts 1.5 times their regular rate for all hours worked on Sundays and certain holidays. The legislation reduces this “premium pay” for all Sundays and 6 holidays as follows:

- to 1.4 times the regular rate, effective January 1, 2019;
- to 1.3 times the regular rate, effective January 1, 2020;
- to 1.2 times the regular rate, effective January 1, 2021;
- to 1.1 times the regular rate, effective January 1, 2022; and
- to 1.0 times the regular rate (i.e., no premium), effective January 1, 2023.

However, the existing law’s voluntariness and retaliation provisions remain; i.e., employers may not require employees to work on Sundays or certain holidays, and may not retaliate against employees who refuse to work on those days.

Annual Phase In of Increases In Minimum Wage. The Massachusetts minimum hourly wage will increase on an annual basis beginning on January 1, 2019 as follows:

- to \$12.00 (tipped rate to \$4.35), effective January 1, 2019;
- to \$12.75 (tipped rate to \$4.95), effective January 1, 2020;
- to \$13.50 (tipped rate to \$5.55), effective January 1, 2021;
- to \$14.25 (tipped rate to \$6.15), effective January 1, 2022; and
- to \$15.00 (tipped rate to \$6.75), effective January 1, 2023.

Creation of Paid Massachusetts Family and Medical Leave. The legislation creates a new paid family and medical leave benefit for all employees in Massachusetts (“MA FMLA”) with implementation dates beginning in July 2019, along with a new “Department of Family and Medical Leave” within the Massachusetts Executive Office of Labor and Workforce Development (“Department”), which will administer the paid benefit aspect of MA FMLA.

Beginning on July 1, 2019, the program will be funded by employer contributions, at an initial rate of 0.63 percent of employees’ wages (and, in certain cases, payments to independent contractors, as well). Small employers (fewer than 25 employees) may deduct 100 percent of these contributions from employees’ wages; larger employers may deduct a portion of the contributions. Even though contributions begin on July 1, 2019, the Department will not begin paying benefits to eligible employees until January 1, 2021 (see implementation dates in chart below).

The program uses many of the same definitions as, and is structured similarly to, the Massachusetts unemployment insurance program. The weekly MA FMLA wage replacement benefit amount (which is payable after the first seven days of a qualifying leave) is based upon a calculation that considers the average weekly wage of the employee and the average weekly wage in Massachusetts, with a maximum benefit of \$850 per week (adjusted annually based upon the state’s average weekly wage rate). Employees will be required to file claims directly with the Department. Both current

employees and former employees who have separated from employment within the prior 26 weeks are eligible for the wage replacement benefit.

With respect to leaves, employees are eligible for MA FMLA leave (regardless of whether they receive the wage replacement benefit described above) during a “benefit year” (the period of 52 consecutive weeks beginning on the Sunday immediately before any MA FMLA starts) as follows:

<u>TYPE OF LEAVE</u>	<u>EFFECTIVE DATE</u>	<u>AMOUNT OF LEAVE</u>	<u>INTERMITTENT/REDUCED SCHEDULE ALLOWED</u>
Because the employee has a serious health condition	1/1/2021	Up to 20 weeks	Yes, if medically necessary
To care for a family member* with a serious health condition	7/1/2021**	Up to 12 weeks	Yes, if medically necessary
To bond with the employee’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 employee;	1/1/2021	Up to 12 weeks	No, unless the employee and employer agree
Because of any qualifying exigency arising out of the fact that a family member* is on an active duty or has been notified of an impending call or order to active duty in the Armed Forces	1/1/2021	Up to 12 weeks	Yes
In order to care for a family member* who is a covered servicemember	1/1/2021	Up to 26 weeks	Yes, if medically necessary

*“Family member” is defined as “the spouse, domestic partner, child, parent or parent of a spouse or domestic partner of the employee; a person who stood in loco parentis to the employee when the employee was a minor child; or a grandchild, grandparent or sibling of the employee.”

**The statute contains an apparent inconsistency in that this type of leave does not go into effect until July 1, 2021, yet the wage replacement benefit for this type of leave goes into effect on January 1, 2021.

Employees may take no more than 26 weeks, in the aggregate, of MA FMLA leave per benefit year. MA FMLA runs concurrently with other types of statutory leave, such as leave under the federal Family and Medical Leave Act and the Massachusetts Parental Leave Act. Employees have rights to continued benefits and job restoration which are similar to those under the federal FMLA. The statute also requires employers to adopt a written policy and post a workplace notice regarding MA FMLA.

Notably, the MA FMLA statute contains broad anti-retaliation provisions, which are far stricter than those found in most other employment laws. The statute provides that any negative change in seniority, status, employment benefits, pay or other terms or conditions of employment which occurs while an employee is on MA FMLA or *during the 6 months after the employee returns from MA FMLA* will be *presumed* to be unlawful retaliation. The employer can rebut such presumption “only by clear and convincing evidence that such employer’s action was not retaliation against the employee and that the employer had sufficient independent justification for taking such action, and would have in fact taken such action, in the same manner and at the same time the action was taken, regardless of the employee’s use of leave.” The employee may file a court action for violation of the MA FMLA and recover, among other things, reinstatement, treble damages, and attorney’s fees and costs. An employer found to have retaliated against an employee must rescind any adverse action and offer reinstatement to any terminated employee.

Proposed regulations interpreting the MA FMLA are due to be published on or before March 31, 2019. We will keep you updated regarding developments on these issues. Please contact us if you have any questions regarding this or any other employment law issue.

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