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In This Edition:

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NEW PAID FAMILY LEAVE LAW IN MASSACHUSETTS

Massachusetts now joins a growing list of states, currently, California, District of Columbia, New Jersey, New York, Rhode Island and Washington, requiring paid family leave.

On June 28, 2018, Governor Baker signed a "grand bargain" bill (Chapter 121 of the Acts of 2018; H 4640), a component of which provides for a paid family leave benefit. Briefly, the paid family leave provisions of the law will require employers situsted in the Commonwealth to fund the benefit by way of a payroll tax; the benefit would then be paid out through a trust fund.

Following is an overview of this law. As with any new law, it is hoped that future implementing regulations may provide clarifications to these provisions, especially as it relates to funding the benefit.

What employers are subject to law?

Employers employing one or more employees working in Massachusetts. State and local governments are not subject to the paid leave requirements unless adopted by the governing body.

Who is entitled to the leave?

All employees working in Massachusetts without regard to length of service or hours worked, appear to be eligible for paid family or medical leave. Leave is also available for certain terminated employees within 26 weeks following termination. Further, self-employed individuals who choose to pay into the fund are also eligible.

What are the reasons for which leave can be taken?

For *medical leave purposes*, up to 20 weeks of medical leave would be available due to the employee's own serious health condition.

Continued from Page 1

For *family leave purposes*, an eligible individual is entitled to 12 weeks of family leave for the following events:

- To bond with a child during the first 12 months following the child's birth, or the first 12 months following placement of a child for adoption or foster care;
- Due to a qualifying exigency relating to a family member's military service, or to care for a family member who is a covered service member with a serious injury or illness incurred or aggravated in the line of duty (in this event, up to 26 weeks of leave may be taken); or
- To care for a family member's serious health condition. For this purpose, *family member* includes the employee's child, spouse or domestic partner, or parent; the parent of a spouse or domestic partner; a person who stood in loco parentis to the employee when he/she was a minor child; or, the employee's grandchild, grandparent or sibling.

The combined total of available family and medical leave is capped at 26 weeks per benefit year, generally defined as 52 consecutive weeks.

Similar to the federal Family and Medical Leave Act (FMLA), leave can be taken on an intermittent or reduced scheduled basis in appropriate circumstances. However, an employer would have discretion as to offering intermittent or reduced scheduled leave for baby bonding events.

How is the benefit funded?

Beginning July 1, 2019, Massachusetts employers will begin contributing to the Family and Employment Security Trust Fund through a mandatory payroll tax of 0.63%, subject to periodic adjusting. Contributions can be funded strictly by the employer, or shared between employer and employee at varying percentages depending on the type of leave and size of employer. Small employers, those with 24 or fewer employees, can deduct the full amount from the employee's wages. Future guidance will need to explain how these amounts will be delineated.

When do benefits begin?

Upon a qualifying event, an eligible employees would file a benefit claim, together with supporting documentation, with the Department of Family and Medical Leave (DFML) within 90 calendar days following the start of the leave. Such benefits may be reduced if a claim is not timely filed.

Benefits begin following the filing of the claim, subject to a one-week waiting period. The 7-day waiting period is waived if medical leave relating to childbirth is immediately followed by family leave.

What is the benefit amount?

The weekly benefit amount is calculated based on 80% of the covered individual's wages up to 50% of the state average weekly wage, and then 50% of his/her wages above that amount, up to an $850/week cap (adjusted annually).

Weekly benefit payments paid under this program would be offset by payments received from other sources such as a government program, workers' compensation, temporary or permanent disability benefits, or the employer's disability policy or program.

What are the employee notice obligations?

When the leave is foreseeable, an employee is obligated to provide an advanced 30-day notice to the employer of the need for leave, together with the anticipated duration of the leave. An employee is obligated to provide notice as soon as practicable is the need for leave is due to reasons beyond the employee's control.

Are employers required to notify employees about this leave?

Yes. The employers have both a workplace posting obligation, as well as written notification obligation.

Beginning July 1, 2019, employers are required to post a workplace notice in a conspicuous place at its business locations. The DFML is charged with creating a model poster to be used, in both English and other primary languages. In addition, employers will be required to provide a written summary of the benefit to their employees upon hire that explains the benefit, the employee and employer's contribution amount, as well as the obligations under the law, and procedures for filing a claim for benefits.

Civil penalties for failure to comply with the notification ranged from $50 per employee for first violations, increasing to $300 per employee for subsequent failures.

Does the law provide employment protections?

Yes. An employee returning from leave is entitled to be returned to the same or an equivalent position. During leave, the employee continues to accrue vacation time, sick leave, bonuses, or other employment benefits.

In addition, employers must continue to provide, as well as contribute its contribution to the employee's health insurance benefit.

Can an employer's existing leave plan satisfy the requirements of the law?
Yes. If an employer's existing leave program provides the same or greater benefits, then the employer can opt-out of participating in the state program by filing an application with the DFML. Employers have the option to provide paid family and medical leave coverage through an approved private plan, the state plan, or a combination of both.

How does this law coordinate with other leave laws?
Leave taken under the Massachusetts paid family and medical leave law runs concurrently with other permitted leave laws, such as the federal FMLA and Massachusetts Parental Leave law.

Who will be administering the law?
The law calls for the establishment of a new state agency to be known as the Department of Family and Medical Leave (DFML) to administer the benefit.

When does the law take effect?
Employer and employee contributions begin on July 1, 2019. Benefits for employees taking their own personal medical leave become available on January 1, 2021. Family leave benefits become available on July 1, 2021.

Association Health Plans Rules Finalized

It has been the goal of the current Administration to expand the availability of association health plans (AHPs), as directed by an Executive Order on October 12, 2017. This Executive Order directs the Affordable Care Act's governing agencies (Departments of Health and Human Services, Labor and Treasury) to develop ways for expanding access to association health plans for small employers. The intended result would allow AHPs to be available to small businesses that are in the same line of business to join together to offer healthcare coverage to their employees, either through existing organizations or new ones established, for the express purpose of offering group health coverage. Formation of AHPs would also allow the purchase of insurance across state lines.

In response to this directive, the Department of Labor (DOL) issued proposed rules and standards for establishing AHPs on January 5, 2018, following by **final rules** published on June 21, 2018. These rules expand the definition of association by loosening the commonality of interest standard, and by allowing self-employed individuals to participate. Notably, an AHP established in accordance with these rules avoids some of the small group health insurance rules imposed by the Affordable Care Act, such as rate restrictions and the obligation to provide essential health benefits.

The final AHP rules are more fully discussed in our CBIZ Health Reform Bulletin, ***Association Health Plans - Final Rules Released*** (HRB 139, 6/22/2018). Further, the DOL has established a **dedicated AHP webpage** for additional information including regulations, fact sheet and FAQs.

IRS Proposes Changes for Electronic Filing of Forms

The Internal Revenue Service (IRS) is proposing a change in the required electronic filing of certain reporting and disclosure forms. Specifically, these **regulations**, if finalized, would require an employer to aggregate all of its forms including the Form W-2, the Form 1099 series, and the Forms 1094 and 1095-B and C series, to determine whether it meets the 250-form threshold. An employer is obligated to file forms electronically with the IRS if it files 250 or more forms. Currently, an employer is not required to collectively file different types of forms; these proposed rules would require aggregation. Further, if an employer is required to file electronically, then any corrected forms must likewise be filed electronically.

The IRS is proposing these rules because it believes it is simpler and more cost effective to file electronically. It does provide a way to seek a waiver from the electronic filing requirements if the filer believes it would be too burdensome.

Comments on these regulations are due by July 30, 2018. If these regulations are finalized, they are expected to take effect for filings due on or after January 1, 2019. Small employers who have been exempt from the 250-threshold electronic filing requirements will want to keep an eye on this matter.

Fiduciary Investment Advice Rules: The Final Chapter

The DOL's Employee Benefits Security Administration (EBSA) fiduciary investment advice rules have officially been declared null and void. The U. S. Fifth Circuit Court of Appeals rendered a judgement in the form of a mandate on June 21, 2018 in the matter of *Chamber of Commerce v. U.S. Dep't of Labor (*2018 WL 1325019, 5th Cir. 2018). The Court's judgement vacates EBSA's fiduciary investment advice rules that would have expanded ERISA's definition of fiduciary and the related prohibited transaction exemptions.

This means that the fiduciary standards now return to ERISA's five-part prior rule standards for defining fiduciary and investment advice. Under these rules, an individual could be deemed a fiduciary if, for a fee, he/she (1) provides advice or makes recommendations on investments, (2) on a regular basis, (3) in accordance with a mutual agreement or understanding that the advice, (4) would serve as the primary basis for investment decisions, (5) that would be individualized to the particular needs of the plan.

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