

CLIENT ALERT: Massachusetts “Grand Bargain” Raises Minimum Wage, Ends Sunday and Holiday Premium Pay, Creates Paid Family and Medical Leave - By Sean P. O’Connor

On June 28, 2018, Massachusetts Governor Charlie Baker signed into law “An Act Relative to Minimum Wage, Paid Family Medical Leave and the Sales Tax Holiday.” The law has been called the “Grand Bargain” because of compromises among business groups and advocates, and its primary features include these major changes to Massachusetts employment law:

- Increasing the state minimum wage rate from \$11.00 to \$15.00 per hour and from \$3.75 to \$6.75 per hour for tipped employees;
- Reducing and eventually eliminating most Sunday and holiday premium pay requirements;
- Revising the payment/calculation of tipped employees’ wages; and
- Creating a new state-administered paid family and medical leave program.

Increases to the Massachusetts Minimum Wage

In 2014, Massachusetts increased the state minimum wage over a three-year period from \$8.00 per hour (\$2.63 for tipped employees) to the current rate of \$11.00 per hour (\$3.75 for tipped employees). Now, the state minimum wage will again increase incrementally, reaching \$15.00 per hour (\$6.75 for tipped employees) in 2023. Massachusetts will join New York and California with the highest state-wide minimum wage rate so far. The scheduled increases are below:

Massachusetts Minimum Wage Rate

Effective Date	Required Hourly Rate of Pay
Current	\$11.00
January 1, 2019	\$12.00
January 1, 2020	\$12.75
January 1, 2021	\$13.50
January 1, 2022	\$14.25
January 1, 2023	\$15.00

Massachusetts Minimum Wage Rate for Tipped Employees (also referred to as the “Service Rate”)

Effective Date	Required Hourly Rate of Pay
Current	\$3.75
January 1, 2019	\$4.35
January 1, 2020	\$4.95

January 1, 2021	\$5.55
January 1, 2022	\$6.15
January 1, 2023	\$6.75

Reductions and Ultimate Elimination of Sunday and Holiday Premium Pay Requirements

One of the key concessions to businesses in the Grand Bargain was to eliminate Sunday and holiday premium pay requirements for retailers. Under the Massachusetts blue laws, most retailers are required to pay employees at least one and one-half times their regular rate for hours worked on Sundays and various holidays; though this requirement does not apply to most exempt employees. Through the new law, the multiplier for Sunday premium pay will be incrementally reduced, and ultimately eliminated over five years. This rate reduction/elimination will similarly apply to the premium pay requirements for most holidays.

Here is the schedule for the upcoming rate reductions:

Effective Date	Premium Pay Multiplier
Current	1.5
January 1, 2019	1.4
January 1, 2020	1.3
January 1, 2021	1.2
January 1, 2022	1.1
January 1, 2023	1.0

The elimination of these premium pay requirements will surely be welcome news to many employers. Of course, employers must still comply with other overtime pay obligations – including the usual requirements for overtime after 40 hours in a week under state or federal law.

Impact on the Payment/Calculation of Tipped Employees' Wages

The Grand Bargain contains a little-discussed provision that may have a significant impact on businesses with tipped employees. As of January 1, 2019, employers will be required to calculate the difference between the minimum wage rate and an employee's service rate (assuming it is lower than the minimum wage) "at the completion of each shift worked by the employee." Previously, employers were only required to perform this calculation weekly. This new requirement is sure to create an administrative burden for employers. It is certain to create a financial burden as well, with employers no longer being able to rely upon a week's worth of tips to help offset slower shifts where employees receive less tips. This will be particularly true following the increases to the minimum wage rates.

The New Massachusetts Paid Family and Medical Leave Program

The Grand Bargain created the Department of Family and Medical Leave (the "Department") within the Executive Office of Labor and Workforce Development. The Department will immediately begin to establish a state program for paid family and medical leave, in many respects mirroring the state unemployment benefits program.

Thus, from all appearances, as of 2021, Massachusetts will have a new state-administered public benefit program providing paid family and medical leave. The granting of paid family and medical leave benefits (as is now the case with unemployment) will largely be an interaction between the employee seeking the benefits and the state, with the employer in the middle, making regular payments to finance the fund, processing claims paperwork as necessary, and, presumably, agreeing to or contesting claims as they arise.

This program will be administered through a state trust fund (the Family and Employment Security Trust Fund) for the primary purpose of providing paid family and medical leave benefits to eligible individuals. The fund will be financed in various ways, including required payroll contributions equal to 0.63 percent of an employee's weekly wages to be divided equally between the employer and employee. Other covered business entities and certain self-employed individuals may also be required to make contributions to the fund. The fund will begin collecting contributions on July 1, 2019 and start paying benefits on January 1, 2021.

Eligibility

The law seemingly applies to Massachusetts employers of all sizes, with few exceptions. Employees will be eligible for family and medical leave benefits if they meet the same financial eligibility requirements for unemployment benefits under state law. These requirements currently include, for example, that employees have earned at least \$4,700 during the last four completed calendar quarters and 30 times the weekly benefit amount they would be eligible to collect.

This Client Alert focuses on the law's applicability to employers and their employees, but it is important to note that the law also contains provisions related to former employees, as well as other business entities and the self-employed individuals (e.g. independent contractors) they might contract with.

Permissible Uses of Family and Medical Leave

The law's coverage expands over time. Beginning January 1, 2021, eligible employees will be allowed to use paid *family* leave as follows:

- to bond with a 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;
- because of 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
- in order to care for a family member who is a covered servicemember.

As of January 1, 2021, eligible employees will also be able to use paid *medical* leave for their own serious health conditions.

Then, as of July 1, 2021, eligible employees will also be allowed to use paid *family* leave to care for a family member with a serious health condition.

The law defines family member to include: spouses, domestic partners, children, parents or parents of a spouse or domestic partner of the covered individual; people who stood *in loco parentis* to the covered individual when the covered individual was a minor child; or grandchildren, grandparents or siblings of the covered individual.

The law defines covered servicemember to include:

- a member of the Armed Forces, including the National Guard or Reserves, who is (a) undergoing medical treatment, recuperation or therapy; (b) otherwise in outpatient status; or (c) is otherwise on the temporary disability retired list for a serious injury or illness that was incurred by the member in the line of duty on active duty, or a serious injury or illness that existed before the beginning of the member’s active duty and was aggravated by service in the line of duty on active duty; or
- a former member of the Armed Forces, including the National Guard or Reserves, who is undergoing medical treatment, recuperation or therapy for a serious injury or illness that was incurred by the member in line of duty on active duty, or a serious injury or illness that existed before the beginning of the member’s active duty and was aggravated by service in line of duty on active duty and manifested before or after the member was discharged or released from service.

Limitations on Leave Entitlements

Employees cannot use more than 12 weeks of paid *family* leave in a benefit year. However, they may use up to 26 weeks of paid *family* leave in a benefit year if they are doing so to care for a family member who is a covered servicemember. Employees are further restricted from using more than 20 weeks of *medical* leave in a benefit year. In all, employees are prohibited from using more than 26 total weeks of paid family and medical leave in the same benefit year.

Type of Leave Being Taken	Maximum Entitlement in a Single Benefit Year
Paid Family Leave	12 weeks
Paid Family Leave to Care for a Covered Servicemember	26 weeks
Paid Medical Leave	20 weeks
Any Combination of Paid Family and Medical Leave	26 weeks

Under the law, a benefit year will be the 52-week period beginning on the Sunday immediately preceding the first day that family or medical leave commences. Note: For those familiar with the operation of federal Family and Medical Leave Act of 1993 (“FMLA”), this creates a “rolling forward” benefit year, not a “rolling back” benefit year, and not a calendar year.

Note also: the law specifically provides that an eligible employee may take both a medical leave during pregnancy and/or childbirth recovery (if supported by appropriate documentation), as well as family leave that immediately follows.

Coordination with Other Leaves

Use of paid family or medical leave shall run concurrently with any applicable leave the employee may have under the FMLA and/or the Massachusetts Parental Leave Act. Employees may use, but cannot be compelled to use, any accrued sick, vacation or personal time while taking family or medical leave. Employers still remain obligated to comply with any policies, collective bargaining agreements or laws that afford greater or additional rights than those provided by the new law.

Employers who already have separate disability or family care leave policies can require that the new statutory paid leave will run concurrently with the pre-existing policy leave. The employer must provide employees with written notice that it has adopted this method, and employees must receive the greater of the benefits available from each source.

Intermittent Leave and Reduced Schedules

Employees are allowed to take paid *medical* leave on an intermittent or reduced schedule basis when medically necessary. Paid *family* leave may be taken on an intermittent or reduced schedule basis, when medically necessary, to care for a family member with a serious health condition or to care for a covered servicemember. Paid *family* leave may also be taken on an intermittent or reduced schedule basis because of 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. Absent an agreement between the employer and employee, employees cannot take paid *family* leave on an intermittent or reduced schedule basis for the purpose of child bonding.

Benefit Payments While on Leave

Typically, employees will not be entitled to any benefit payments during the first seven days of family or medical leave (there is a limited exception for employees transferring from medical to family leave following the birth of a child). Employees may use any accrued sick or vacation time they have during this time.

Thereafter, employees will be entitled to receive a weekly benefit amount while on family or medical leave. Their weekly benefit amount will be determined by a formula that compares the employees' average weekly wage to that of the state average weekly wage. However, the state will annually establish a cap on the potential weekly benefit amounts, initially set at \$850.

The new law also establishes certain reductions or offsets that may affect the amount of an employee's weekly benefit, such as workers' compensation and certain disability plans. The Department will separately determine the weekly benefit amounts for employees on intermittent or reduced leave schedules.

The Department will fashion regulations about filing benefit claims. Claims must be filed within 90 days of the start of a leave or they could be subject to a benefit reduction. With few exceptions, all claims must also include satisfactory certifications supporting a request for leave, as provided for in the law. The law further provides that the Department provide a response regarding eligibility within 14 days of receiving a claim; and that it shall further pay any such benefits within 14 days of eligibility.

Leave Protections

Employees who take paid family or medical leave must be restored to their previous position, or to an equivalent position, with the same status, pay, employment benefits, length of service credit and seniority as of the date of leave. This will not apply where the employee's status would have changed anyway, such as a layoff or other adverse job action, due to changes in economic or other operating conditions. In such circumstances, employers may be obligated to provide employees with preferential hiring consideration.

While employees are on paid family or medical leave, employers are required to continue their health insurance benefits, if any, under the conditions the coverage would have been provided if the employees had not taken the leave. Paid family or medical leave also cannot 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.

Anti-Retaliation

Employers are prohibited from retaliating against employees for: exercising their rights under the law; filing a complaint or legal action related to the law; or otherwise participating in a proceeding related to the law. Employers are further prohibited from otherwise interfering with employees' exercise of their rights under the law.

Notably, the law creates an affirmative presumption of retaliation if there is any negative change in the terms or conditions of employment for an employee who: (a) is on leave; (b) is being restored to a position following leave; (c) was on leave within the past six months; (d) participates in proceedings related to the law; or (e) inquires about proceedings related to the law within six months of their termination. According to the law, this presumption of retaliation can only be rebutted by clear and convincing evidence that the employer's action was not retaliatory.

The law provides for civil lawsuits to be brought within three years of any retaliatory actions. Employers found to have retaliated against an employee may be required to rescind any adverse action, including the potential reinstatement of terminated employees. The law also provides for the potential award of attorney's fees as well as treble damages for lost wages, benefits and other remuneration.

Employee Notice Obligations

Unless an employer fails to comply with its notice obligations (discussed below), employees are required to provide at least 30 days' notice of the anticipated starting date of their leave, the anticipated length of the leave and the expected date of return. If such notice is delayed for reasons beyond the employee's control, the employee must provide notice as soon as practicable.

Employer Notice Obligations

Employers will be required to display a Department-approved posting in each workplace. They will

also be required to provide a written notice to all employees within 30 days of hire, and to obtain a written acknowledgment confirming the delivery of that notice.

Note: there are similar obligations for entities that contract with self-employed individuals.

Private Plan Alternative

Employers are allowed to apply to the Department for approval to satisfy their obligations under the law through a private plan. In order to be approved, a private plan must confer all of the same rights, protections and benefits provided to employees under the law without additional costs or restrictions. The law also sets forth various other requirements for plan approval, and further provides the Department with the ability to withdraw approval under certain conditions.

Next Steps for Employers

The paid family and medical leave program represents a substantial change in the law concerning family and medical leave for Massachusetts employers, but the law's leave provisions are not fully effective until 2021. Explanatory regulations are due in 2019. However, it is not too early for employers to start planning for the law's potential impact, including reconsideration of current leave policies, anticipatory collective bargaining positions and other advance considerations. This element of the "Grand Bargain" will surely garner far more attention as time passes.

Please contact your MBJ attorney with any questions you may have regarding the new paid family and medical leave program, or any of the other issues addressed herein.

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