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MASSACHUSETTS PASSES PAID FAMILY AND MEDICAL LEAVE LAW

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 “Leave Law”). The Leave Law will create a permanent sales tax holiday, increase the minimum wage over the next five years, and create a new paid family and medical leave program in Massachusetts. This article will focus on the leave portions of the bill, which requires covered employers to offer qualified employees up to 12 weeks of paid family leave and up to 20 weeks of paid medical leave. The Leave Law will become effective on January 1, 2021. However, the Leave Law will be funded through employer and employee contributions, and those contributions will begin on July 1, 2019. Highlights of the Leave Law are detailed below:

Covered Employer

Covered employers include any employers with at least one employee working in the state of Massachusetts.

Covered Employee

The Leave Law defines a “covered individual” as:

- 1) a current employee of a Massachusetts employer;
- 2) a self-employed individual who has elected coverage under the Leave Law and reported self-employment earnings; or,
- 3) a former employee, assuming that the employee has not been separated from employment for more than 26 weeks from the employee’s separation date.

Permitted Uses of Leave

A covered employee may use family leave for the following purposes:

- 1) to bond with his/her child during the first 12 months after the child’s birth, or the first 12 months after a child is placed with the employee for adoption or foster care;
- 2) 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; or
- 3) to care for a family member with a serious health condition.

A covered employee may use medical leave to care for his/her own serious health condition. The Leave Law defines “serious health condition” 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.

MASSACHUSETTS PASSES PAID FAMILY AND MEDICAL LEAVE LAW (CONTINUED)

Waiting Period for Use of Leave

Generally, benefits are not payable to an employee until after the seventh day that an employee is on family or medical leave. However, there is no seven day waiting period for benefits if an employee is taking family leave immediately after an approved medical leave for childbirth, to bond with their new baby.

Duration of Leave

The duration of leave depends on the type of leave an employee takes. Employees are eligible for:

- 1) up to a total of 12 weeks to:
 - a. bond with his/her child;
 - b. care for a family member with a serious health condition; or
 - c. manage 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;
- 2) up to 20 weeks for the employee's own serious health condition;
- 3) up to 26 weeks for the care of a family member who is a covered service member.

Employees cannot take more than 26 weeks of paid leave per benefit year.

Intermittent Leave

Employees may take intermittent leave or work a reduced schedule and be paid on a prorated basis. However, bonding leave for a new baby may not be taken intermittently unless the employer and employee agree otherwise.

Maximum Benefit Amount

Employees on either family or medical leave would earn 80% of their wages up to 50% of the state average weekly wage (currently \$669.03), in addition to 50% of their wages above that amount. Employees may only earn up to a total of \$850 per week (which may be adjusted annually).

Funding of Leave

The Leave Law creates a new state agency, the Department of Family and Medical Leave (the "Department"), to administer the paid family and medical leave program. The Leave Law will be paid for by a mandatory .63% payroll tax contribution, or an adjusted amount set annually by the Department, and submitted to a state trust fund. The tax will be effective on July 1, 2019. For medical leave, employers with 25 or more employees may deduct up to 40% of the payroll tax contribution amount (currently set at .63%) from the employee's wages; and for family leave, the employer may deduct up to 100% of the payroll tax contribution from the employee's wages. Currently, there is no guidance on how this varied deduction will work, but the Leave Law requires the Department to draft proposed regulations by March 31, 2019.

Employers with fewer than 25 employees are exempt from paying the **employer share** of the payroll tax contributions.

Employer Opt- Out Option

Employers may apply to the Department for approval to use a private family and medical leave plan comparable to what the Leave Law requires.

Employee Benefits While on Leave

Employers must continue an employee's health coverage while that employee is on family or medical leave. Taking family or medical leave will not affect an employee's right to accrue vacation time, sick leave, bonuses, advancement, seniority, length of service credit, or other employment benefits.

MASSACHUSETTS PASSES PAID FAMILY AND MEDICAL LEAVE LAW (CONTINUED)

Employer Notice Requirement

Employers have two notice obligations under the Leave Law. First, employers are required to post a notice detailing employees' rights under the Leave Law in a conspicuous location in the workplace. The Department will issue the workplace notice in English, Spanish, Chinese, Haitian Creole, Italian, Portuguese, Vietnamese, Laotian, Khmer, Russian, and any other language that is the primary language of at least 10,000 or one-half of one percent of all residents of the state. Employers are required to post the notice in English, as well as any language other than English which is the primary language of five or more employees.

Second, employers are required to issue a written notice (which will be provided by the Department) to new employees within 30 days of hire in the employee's primary language that includes:

- 1) an explanation of the Leave Law benefits, including the right to continuation of health insurance;
- 2) the employee's contribution amount;
- 3) the employer's contribution amount;
- 4) the name and mailing address of the employer;
- 5) the identification number assigned to the employer by the Department;
- 6) instructions on how to file a claim for Leave Law benefits;
- 7) the mailing address, email address, and phone number of the Department; and
- 8) any other information that is deemed necessary by the Department.

Employees must sign a written acknowledgement upon receipt of the above information, or sign a statement that indicates the employee's refusal to sign such acknowledgement.

Prohibited Employer Actions

Employers may not restrict or deny an employee's rights under the Leave Law, nor can an employer discriminate against an employee for exercising his/her rights to take leave that is protected under the Leave Law.

Employer Penalties for Violations

An employer who violates any of the provisions of the Leave Law is subject to monetary penalties, for each separate violation by the employer.

ACTION REQUIRED

Covered employers should ensure that employees are provided Paid Family and Medical Leave by January 1, 2021, and that they begin employer (if applicable) and employee premium payments by July 1, 2019. Affected employers should also review the guidelines and post the notices that the Department is required to provide in March 2019.

For the complete details, read "[An Act Relative to Minimum Wage, Paid Family Medical Leave and the Sales Tax Holiday.](#)"

COMPLIANCE REMINDER: FORM 5500 FILINGS DUE JULY 31, 2018 FOR CALENDAR YEAR PLANS

Employers that have fully-insured or self-funded health plans that are subject to ERISA (**note:** church and governmental health plans are not subject to ERISA), and that have at least 100 participants in their health plan as of the first day of the plan year, are required to file a Form 5500. The purpose of the Form 5500 is to report certain financial and operational information about an employer's benefit plan to the federal government. It also satisfies the employer/plan administrator's annual reporting requirements imposed under the Internal Revenue Code (IRC) and the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended.

The Form 5500 is due by the last day of the seventh month following the last day of the plan year. **That means for a 2018 calendar year plan (beginning on January 1st, and ending on December 31st), the Form 5500 must be filed with the government by no later than July 31, 2018.** The Form 5500 must be signed and filed electronically, along with any required schedules and attachments, through the EFAST2 system. If an employer is unable to meet this deadline, an employer has the ability to file an extension to the filing date of up to two and a half months from the original due date of the Form 5500, by submitting IRS Form 5558.

There are significant penalties for failing to file a Form 5500. The **penalty** the Department of Labor can impose is currently **\$2,140 per day** for a plan administrator's failure or refusal to file a complete or accurate Form 5500.

Instructions for Filing Form 5500

STEP ONE: REGISTERING FOR CREDENTIALS

Any person serving as the plan administrator who is authorized and charged with signing the Form 5500 will need to register for their credentials (i.e., electronic signature). The DOL strictly requires that the PIN not be shared. The e-signature attests that the e-signer has examined the report and is responsible for the report being complete and e-filed.

1. Identify the signers, including back-up signers
2. Go to the [DOL website](#) to register for credentials
3. Select "Filing Signer" under the list of User Types
4. Answer two security questions
5. Retrieve your Credentials Notification email and click the link in the email that will take you the EFAST2 website. Answer the security question when prompted.
6. Accept the PIN Agreement
7. If you are the signer of the Form 5500, accept the Signature Agreement
8. Create a password to use for the DOL's Form 5500 website (the online form will automatically generate a User ID)
9. Once the registration is complete, the e-signer will receive a PIN that serves as the e-signature.

STEP TWO: E-FILING YOUR FORM 5500

Employers and brokers typically use third-party software authorized by the DOL rather than iFILE. Once the Form 5500 is generated, these software systems run a validation process to help find any errors that may have been discovered by the EFAST2 system. Once this process is complete, you will receive notification to finalize, sign and submit the Form 5500. Make sure your attachments are PDFs.

- Finalize and submit the Form 5500 using your PIN
- The E-signer will be notified if the file was accepted within 20 minutes
- If there were errors, the notice will notify you of those errors and request a modification before resubmitting "as is" or as an "amended filing"

To check on the status of your filing or if you lost your PIN, you may call 1-866-GO-EFAST (463-3278) for assistance.

COMPLIANCE REMINDER: FORM 5500 FILINGS DUE JULY 31, 2018 (CONTINUED)

Summary Annual Report

Employers/plan administrators that are required to file a Form 5500 are also required to furnish a copy of a Summary Annual Report (SAR) to participants within the plan, pursuant to the Employee Retirement Income Security Act of 1974 (ERISA), as amended. An SAR summarizes some of the financial information contained within the Form 5500, and must be distributed to participants within a health and welfare plan.

The SAR must be delivered to employees within two (2) months of the Form 5500 filing deadline. **This means that for a calendar-year plan, the SAR must be provided to employees by September 30, 2018.** If an employer requests an extension to the deadline for filing the Form 5500, the deadline to distribute the SAR is two months after the extended Form 5500 deadline. For calendar-year plans, the deadline extension to submit an employer's Form 5500 is normally October 15th, so the extended deadline for the SAR to be delivered to employees would be December 15th of that year.

The SAR must be furnished in a way that is "reasonably calculated to ensure actual receipt" by the participant, using a method "likely to result in full distribution."

Acceptable Methods of Delivery for SARs

- ✓ First class mail
- ✓ Hand-delivery with signature acknowledgement; or
- ✓ Electronic distribution (e.g., email) if the employee has access to a computer as part of his/her daily job duties.
 - For employers/plan administrators that choose to distribute the SAR electronically, we recommend sending the document as an email attachment, with an explanation in the body of the email listing what documents are attached to the email, and the reason(s) the document is being delivered to the employee.

Note: The Department of Labor has indicated that merely posting plan documents on a company intranet site or leaving plan documents in a break room is **not** sufficient delivery.

Sample Cover Letter Language for Distributing SARs

Attached please find the *[company name]* Summary Annual Report (SAR) for the *[year]* Plan Year. The SAR is intended to provide plan participants with a summary of the Form 5500 annual report filed with the Department of Labor. This SAR is being distributed to you as required under the Employee Retirement Income Security Act of 1974 ("ERISA"). You may request a paper copy of this document free of charge; to do so, please contact *[department or person]*.

Please note that not all employees may be eligible to participate in all of the benefits available under the plan. Please consult your Plan materials for specific eligibility information. If you have any questions with respect to this information, please contact *[department or person]*.

QUESTION OF THE MONTH

For Purposes of the Form 5500 Small Plan Filing Exemption, How Do We Show That Our Welfare Benefit Plan Is Going Above or Dropping Below the 100-Participant Threshold?

QUESTION: Our welfare benefit plan had over 100 participants at the beginning of the 2017 plan year. However, it had fewer than 100 participants at the beginning of the 2018 plan year, so it is now a small welfare benefit plan exempt from filing Form 5500. Do we need to file something to show that the plan now has under 100 participants?

ANSWER: The plan's Form 5500 for the 2017 plan year should reflect that no Form 5500 will be filed for the 2018 plan year due to the decrease in participants. As your question indicates, small unfunded, insured, and combination unfunded/insured welfare plans are exempt from filing Form 5500. A small plan for this purpose is one that covers fewer than 100 participants at the beginning of the plan year, even if the number of participants reaches or exceeds 100 during the year. A plan that has been filing Form 5500s may stop doing so for any year in which it has fewer than 100 participants at the start of the plan year. Because the filing deadline for a plan year (seven months after the end of the plan year, with extensions possible) occurs after the next plan year begins, the plan administrator knows when filing Form 5500 for the year just ended whether a filing will be required for the next year. So, when you file Form 5500 for the 2017 plan year, you already know that no filing will be required for the 2018 plan year. To alert the DOL not to expect a 2018 Form 5500, enter Code "4R" on line 8b (along with other applicable codes for the plan), indicating that the plan will qualify for the filing exemption for 2018. Failing to include this code on the 2017 filing may generate an inquiry from the DOL when it doesn't receive a 2018 Form 5500 for the plan.

If, in the future, the plan again covers 100 or more participants as of the beginning of a plan year, you will need to resume filing Form 5500. In that case, enter Code "4S" on line 8b of the first Form 5500 filed after the hiatus, indicating that the exemption applied (and forms were not filed) for the intervening year(s). For example, if your plan covers more than 100 participants at the beginning of the 2019 plan year, enter Code 4S on line 8b of the 2019 Form 5500.

Plans going under and over the threshold like this should not, in Part I of the main body of the Form, check the "final return/report" or "first return/report" boxes on line B. And do not confuse this exemption with the so-called "80-120" rule, which permits a plan that is not exempt from filing Form 5500 to continue filing the same financial Schedule (Schedule H for large plans or Schedule I for small plans) so long as it has at least 80 covered participants but not more than 120.

Source: EBIA

CONTACTS



Christopher K. Bao, Esq.
 Manager, Employee Benefits Compliance
 & Regulatory Affairs, MMA West
 Chris.Bao@MarshMMA.com
 +1 415 230 7224



Brittany D. Botterill, Esq.
 Manager, Employee Benefits Compliance
 & Regulatory Affairs, MMA West
 Brittany.Botterill@MarshMMA.com
 +1 858 587 7511



Leah N. Nguyen, Esq.
 Manager, Employee Benefits Compliance
 & Regulatory Affairs, MMA West
 Leah.Nguyen@MarshMMA.com
 +1 949 540 6924