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Massachusetts "Grand Bargain" Creates Paid Family and Medical Leave, Increases the Minimum Wage and Eliminates Retail Premium Pay Obligations

On June 28, 2018, Massachusetts Governor Charlie Baker signed the so-called "Grand Bargain," which was a legislative compromise to avoid three ballot questions in November elections concerning the minimum wage, paid family leave and a reduction in the state sales tax. The Grand Bargain creates a paid family and medical leave program, mandates a gradual increase in the state minimum wage, and phases out premium pay obligations for Sunday or holiday work for retail employees. Employers should take note as they update their policies and plan for the upcoming years.

Paid Family and Medical Leave

The new Massachusetts Family and Medical Leave Act (Act) will be one of the most progressive paid family and medical leave laws in the nation. Effective January 1, 2021, employees will be eligible to take up to 12 weeks of paid family leave, and up to 20 weeks of paid medical leave for the employee's own serious medical condition, per benefit year. An employee caring for a covered service member with a serious injury or illness that was incurred in the line of duty on active duty in the armed forces may take up to 26 weeks of related paid family leave. The maximum amount of combined paid family and medical leave an employee would be able to take in a benefit year is 26 weeks. After an initial seven-day waiting period, eligible employees will receive 80% of their average weekly wages, up to 50% of the state average weekly wage (subject to change annually), plus 50% of the employee's wages above the state average weekly wage, up to a maximum of $850 per week. The weekly benefit is prorated for employees who take leave intermittently.

Leave can generally be taken for the same reasons available under the federal Family and Medical Leave Act (FMLA), and will run concurrent with FMLA leave. Like the FMLA, the Act provides for intermittent leave, and requires employers to restore employees who take family or medical leave 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. Unlike the FMLA, however, the Act applies to all employers and employees—there are no minimum required number of employees or length of service or hours worked requirements for employees as is the case under the FMLA. The law also provides that certain former employees who meet financial eligibility requirements may be eligible for paid leave benefits if their leave starts within 26 weeks following their separation from employment. Also of significance, the law creates a presumption of retaliation for "any negative change in the seniority, status, employment benefits, pay or other terms or conditions of employment of an employee" during an employee's leave or for the six-month period after returning from leave. To rebut the presumption, an employer must prove with clear and convincing evidence that it had an independent justification for the employment decision. This presumption is a radical shift from the prior legal landscape.

Effective July 1, 2019, Massachusetts employers will be required to begin contributing to a Family and Employment Security Trust Fund, which will fund the benefits for eligible employees. Beginning July 1, employers will be required to contribute 0.63% of each employee's wages to the fund. The Act provides that employers with 25 or more employees may deduct up to 40% of the contribution from employee wages for medical leave and up to 100% of the contribution for family leave, but the statute is silent on exactly how those deductions are to be implemented. Proposed regulations addressing these and other aspects of the law are expected to be issued by March 31, 2019. Note that employers may opt out of the public state funding

plan if they offer benefits equal to or greater than the state benefit program. The process for opting out is also expected to be clarified by the forthcoming regulations.

Also effective July 1, 2019, employers must post a notice explaining the benefits available to employees, the employee's contribution amount and obligations, and information on how to file a claim for benefits. The notice must be provided in English and in any other language that is the primary language of five or more employees.

While employers await the proposed regulations, they should consider reviewing their current leave practices to consider how those policies may need to change in light of this new law.

Minimum Wage Increases

Massachusetts' minimum wage is currently $11.00 per hour. Effective January 1, 2019, the minimum wage will increase to $12 per hour, with subsequent $.75 increases each January 1 until the minimum wage reaches $15 per hour ($6.75 per hour for tipped employees) on January 1, 2023.

Premium Pay for Sunday and Holiday Work

Over the next five years, the Grand Bargain will phase out the premium pay requirement for retail employees. Currently, nonexempt retail employees must be paid at the rate of one-and-one-half times their regular rate for work on Sundays and certain holidays. That premium will decrease to 1.4 times the regular rate on January 1, 2019, 1.3 times the regular rate on January 1, 2020, and so forth until the premium pay obligation is eliminated entirely on January 1, 2023. Note that other requirements of the Massachusetts "Blue Laws," such as voluntariness of work and the requirement to secure permits to work on certain holidays, remain in full force.

As the various aspects of the Grand Bargain begin to take effect, employers should keep abreast of developments and watch for additional guidance to come.

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