



May 20, 2019

Re: Negotiators of the new paid family and medical leave program (see SECTION 29 of chapter 121 of the Acts of 2018) propose six legislative amendments to support successful implementation

Dear Governor Baker, Senate President Spilka and House Speaker DeLeo:

The Commonwealth adopted landmark legislation last session establishing the paid family and medical leave program. This agreement resulted in several statewide ballot questions being removed from consideration in November 2018.

The complex new law was forged following months of detailed negotiations between legislative and executive leaders, members of the Raise Up Massachusetts coalition and representatives from the business community all working collaboratively to achieve a meaningful compromise.

New relationships and open lines of communication between our groups were established during the process of those negotiations. This continued spirit of collaboration has led us to agree to advocate collectively for several changes to the paid family and medical leave law prior to its full implementation. Our focus is limited to the paid family and medical leave law and does not extend to the minimum wage.

As we embark on full scale implementation of the new law, which will impact millions of workers across the state and tens of thousands of employers, the members of the Raise Up Massachusetts coalition and representatives from the business community are working together to ensure a successful rollout of this new program for employees and employers alike. In the course of our work together we have identified the need for a three month extension of the July 1, 2019 deadline for approval of employers' private paid family and medical leave plans and the commencement of the required plan contributions. In addition, there are five other amendments to chapter 121 of the Acts of 2018 that are necessary for clarification of rights and responsibilities of stakeholders to effect the smooth implementation and operation of the new law.

The state's Labor & Workforce Development Secretariat is to be commended for its efforts developing and distributing new draft regulations, as well as its outreach to employees and employers through listening sessions across Massachusetts. As the result of feedback provided to the Secretariat and the newly created Department of Family and Medical Leave at the statewide listening sessions, the department issued an extension of the deadline for securing state approval of proposed private plans to September 20, 2019. We are grateful to the department and the Labor Secretariat for recognizing the need for an extension and taking steps, within the scope of the department's authority, to address that need.

However, given the lack of employer clarity on the regulations, the importance of communicating with employees regarding payroll deductions, and the ability for insurance providers to offer a private sector option, we continue to support and urge legislative action on the proposed amendment extending the deadline for private plan approvals and the commencement of required contributions from July 1, 2019, to October 1, 2019, as well as the additional five clarifying amendments to the statute described below.¹

Importantly, this proposed three month statutory extension would not impact any of the benefits or the timing for eligibility of benefits under the new law.

Given the complexity of this new law and its impact on employees and employers, we continue to work collaboratively through the implementation process. As the result of this process, and after considering feedback from stakeholders at the statewide listening sessions, we write to urge the adoption of the following legislative amendments that concern the paid family and medical leave law only.

These priority amendments will ensure greater clarity for employers, insurance providers (endeavoring to develop and provide products to employers), employees applying for the leaves covered by the new law, and health care providers certifying the need for leave. In addition, the clarifying amendments align core principles of the Massachusetts paid family and medical leave law with the federal Family and Medical Leave Act (FMLA), a common goal of all stakeholders, including the Commonwealth's Department of Family and Medical Leave.

Specifically:

1. Intermittent Leave – This amendment would clarify that leave taken on an intermittent or reduced leave schedule reduces the amount of remaining leave available to a covered worker. This change tracks the language of the federal FMLA.
2. Serious health condition – This amendment clarifies that eligibility for medical leave for the covered individual's own serious health condition arises where such a serious health condition "makes the covered individual unable to perform the functions of the covered individual's job". Again, this change aligns our state paid family and medical leave law with the federal FMLA.

As a group we also support the Administration's original request of the Internal Revenue Service (IRS) to provide direction as to how the paid family leave and medical leave benefits should be treated for tax purposes. We appreciate that the Department of Family and Medical Leave has provided initial guidance subject to IRS interpretation. However, should the IRS not provide formal guidance in time for July 1, 2019, we would urge the Department of Revenue (DOR) to issue formal interim guidance subject to a final IRS determination. Given the tax treatment in other states, DOR interim guidance would be helpful.

In order to ensure that there is a smooth roll out, we would also support the line item appropriation as proposed in H.74 line item (7003-0300) for \$3,500,000 currently pending before House Ways & Means. This appropriation would support the department's communication and outreach plan to employers and individuals.

¹ However, per existing law, workers will not begin to access benefits until January 2021.

Attached hereto is a copy of draft language of the proposed amendments to chapter 121 of the Acts of 2018 for your consideration and review. We have worked collaboratively to identify, prioritize and draft the language to make these important changes that can positively impact the immediate issues facing employers and employees during this implementation period.

Please contact us if you have any questions or need additional information on any of these topics. We appreciate your leadership and support for paid family and medical leave.

Sincerely,

Debra Fastino, Executive Director, Coalition for Social Justice and Co-Chair, Raise Up Massachusetts

John R. Regan, Associated Industries of Massachusetts (AIM)

JD Chesloff, Massachusetts Business Roundtable (MBR)

Elizabeth Whiteway, Senior Attorney, Greater Boston Legal Services

Carolyn Ryan, Greater Boston Chamber of Commerce

Chris Condon, Political Director, SEIU 509 and Steering Committee Member, Raise Up Massachusetts

Nancy Creed, Springfield Regional Chamber

Jesse Mermell, President, Alliance for Business Leadership, and Steering Committee Member, Raise Up Massachusetts

Proposed Language for a three month statutory extension

An Act relative to paid family and medical leave

SECTION 1. SECTION 30 of chapter 121 of the Acts of 2018 is hereby amended by striking out clause (iii) in its entirety and replacing it with the following:- (iii) on October 1, 2019, commence the collection of contributions required under subsection (a) of section 6 of said chapter 175M at an initial rate of 0.63 per cent of the employee's wages, provided that the department shall increase the contribution rate on or before July 1, 2020, if the collection of contributions at the initial rate of 0.63 per cent is insufficient to meet the projected claims for calendar year 2021;

The full original section of the act is below:

SECTION 30. The department of family and medical leave shall: (i) immediately begin to establish the family and medical leave program under chapter 175M of the General Laws; (ii) not later than March 31, 2019, publish for public comment and hearing, pursuant to section 2 of chapter 30A of the General Laws, proposed regulations necessary to establish procedures for the collection of contributions, and for the filing and timely processing of claims for benefits, under chapter 175M of the General Laws; (iii) on July 1, 2019, commence the collection of contributions required under subsection (a) of section 6 of said chapter 175M at an initial rate of 0.63 per cent of the employee's wages; (iv) on January 1, 2021, begin to pay leave benefits pursuant to section 8 of said chapter 175M; (v) not later than October 1, 2021, begin annually fixing the contribution rate and publish the first annual report pursuant to subsection (e) of section 7 of said chapter 175M; (vi) not later than October 1, 2021, make the initial annual adjustment to the maximum weekly benefit amount pursuant to paragraph (2) of subsection (b) of section 3 of said chapter 175M; and (vi) not later than July 1, 2019, promulgate all regulations necessary to implement said chapter 175M.

A. Proposed amendments to Chapter 121 of the Acts of 2018

1. SECTION 29 of chapter 121 of the Acts of 2018 is hereby amended by adding the following words to clause (2) of subsection (a) of section 2 of chapter 175M after the word "condition":-

that makes the covered individual unable to perform the functions of the covered individual's position. This provision shall be construed consistent with the equivalent provision of the Family and Medical Leave Act of 1993, codified at 29 U.S.C. § 2612(a)(1)(D). A covered individual who is a former employee shall be considered unable to perform the functions of the covered individual's position where the covered individual is unable to perform the functions of the covered individual's most recent position or other suitable employment as that term is defined under section 25(c) of chapter 151A

2. SECTION 29 of chapter 121 of the Acts of 2018 is hereby amended by adding the following words to subclause (C) of clause (2) of subsection (c) of section 2 of chapter 175M after the word "chapter":-

beyond the amount of leave actually taken

3. SECTION 29 of chapter 121 of the Acts of 2018 is hereby amended in clause (2) of subsection (a) of section 5 of chapter 175M by adding the following words after “department”:-

, including a statement by the health care provider that the covered individual is unable to perform the functions of the covered individual’s position, and a statement of the medical necessity, if any, for intermittent leave or leave on a reduced leave schedule, and the expected duration of the intermittent leave or reduced leave schedule

4. SECTION 29 of chapter 121 of the Acts of 2018 is hereby amended in clause (3) of subsection (a) of section 5 of chapter 175M by adding a comma and the following words after the word “member”:-

, a statement of the medical necessity, if any, for intermittent leave or leave on a reduced leave schedule, and the expected duration of the intermittent leave or reduced leave schedule

5. SECTION 29 of chapter 121 of the Acts of 2018 is hereby amended in subclause (iii) of clause (7) of subsection (a) of section 5 of chapter 175M by adding a comma and the following words after the word “department”:-

, including a statement of the medical necessity, if any, for intermittent leave or leave on a reduced leave schedule, and the expected duration of the intermittent leave or reduced leave schedule

B. Redline of Proposed Changes to Section 2 (a)(2); Section 2 (c)(2)(C); Section 5 (a)(2); Section 5 (a)(3); and Section 5 (a)(7), as amended, read as follows:

1. Section 2 (a)(2) Medical leave shall be available to any covered individual with a serious health condition that makes the covered individual unable to perform the functions of the covered individual’s position. This provision shall be construed consistent with the equivalent provision of the Family and Medical Leave Act of 1993, codified at 29 U.S.C. § 2612(a)(1)(D). A covered individual who is a former employee shall be considered unable to perform the functions of the covered individual’s position where the covered individual is unable to perform the functions of the covered individual’s most recent position or other suitable employment as that term is defined under section 25(c) of chapter 151A.
2. Section 2 (c)(2)(C) The taking of leave on an intermittent or reduced leave schedule pursuant to this paragraph shall not result in a reduction in the total amount of leave to which the covered individual is entitled under this chapter beyond the amount of leave actually taken.

3. Section 5 (a)(2) Certification for a covered individual taking medical leave shall be sufficient if it states the date on which the serious health condition commenced, the probable duration of the condition, and the appropriate medical facts within the knowledge of the health care provider as required by the department, including a statement by the health care provider that the covered individual is unable to perform the functions of the covered individual's position, and a statement of the medical necessity, if any, for intermittent leave or leave on a reduced leave schedule, and the expected duration of the intermittent leave or reduced leave schedule.

4. Section 5 (a)(3) Certification for a covered individual taking family leave because of the serious health condition of the family member of the covered individual shall be sufficient if it states the date on which the serious health condition commenced, the probably duration of the condition, the appropriate medical facts within the knowledge of the health care provider as required by the department, a statement that the covered individual is needed to care for the family member, an estimate of the amount of time that the covered individual is needed to care for the family member, and a statement of the medical necessity, if any, for intermittent leave or leave on a reduced leave schedule, and the expected duration of the intermittent leave or reduced leave schedule.

5. Section 5 (a)(7) Certification for a covered individual taking family leave to care for a family member who is a covered servicemember shall be sufficient if it includes: (i) the date on which the serious health condition commenced; (ii) the probable duration of the condition; (iii) the appropriate medical facts within the knowledge of the health care provider as required by the department, including a statement of the medical necessity, if any, for intermittent leave or leave on a reduced leave schedule, and the expected duration of the intermittent leave or reduced leave schedule; (iv) a statement that the covered individual is needed to care for the family member; (v) an estimate of the amount of time that the covered individual is needed to care for the family member; and (vi) an attestation by the covered individual that the health condition is connected to the covered servicemember's military service as required by this chapter.