ASSOCIATED INDUSTRIES OF MASSACHUSETTS

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2021 Edition

LEAVES of ABSENCE

A REFERENCE GUIDE

STATE LAW

- Massachusetts Paid Family Medical Leave Act (MPFML)
- Massachusetts Parental Leave Act (MPLA)
- Massachusetts Domestic Violence Leave
- Massachusetts Earned Sick Time (EST)
- The Small Necessities Leave Act (SNLA)
- Pregnant Workers Fairness Act

FEDERAL LAW

- The Family and Medical Leave Act (FMLA)
- Military Leave

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ASSOCIATED INDUSTRIES OF MASSACHUSETTS
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Boston, MA 02108

AIM engages in public policy work on behalf of thousands of Massachusetts employers who together employ one out of five residents of the commonwealth. We do so guided by the belief that only a vibrant, private-sector economy creates opportunity that binds the social, governmental, and economic foundations of our commonwealth. Our top-notch government affairs advocates work tirelessly on Beacon Hill and Capitol Hill in support of the issues that matter to employers: the cost of health care and energy; employment law; the legislative budget, taxes, and finance; and workforce development and regulations.

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ABOUT THIS GUIDE

This guide provides information on federal and state laws that establish mandated job protected leave for employees. It also includes information on discretionary leaves. Given the number of new and amended leaves of absence laws that apply in Massachusetts, the guide has been rewritten to encompass all of the new developments. The applicability, eligibility, frequency and duration elements of each leave law vary by statute. That means that coverage under some of the laws may overlap and thus run concurrently though not always. The applicability of these laws to a particular employer is governed by different eligibility thresholds including number of employees, duration of employment and employee status (full-time, part-time, etc). Each employer should pay careful attention to these thresholds to determine if that law applies to its business.

The guide covers two federal laws, the Family and Medical Leave Act (FMLA), and the Uniformed Services Employment and Reemployment Act (USERRA). It also includes information on seven Massachusetts leave laws, including the new Paid Family and Medical Leave Act (PFMLA), Massachusetts Parental Leave Act (MPLA), the Small Necessities Leave Act (SNLA), Domestic Violence Leave Act (DVLA), Earned Sick Time (EST), the Military Leave Law and the Pregnant Workers Fairness Act (PWFA). This guide also includes information on minor leave laws including Jury Duty/Witness Leave, Meal Breaks/Rest periods, Voting, paid Holidays, and Nursing/Breastfeeding. The guide also includes information on many of the most common employer-based discretionary leaves such as vacation, bereavement, "coffee" breaks, scheduled shutdowns and personal leaves of absence. It is not intended to be a complete analysis of the laws and employer practices but to address what generally happens when an employee requests, or an employer designates, a leave under statute or policy. All citations for the employment statutes are to the Massachusetts General Laws (MGL).

CONTENTS

I. THE FAMILY AND MEDICAL LEAVE ACT (Federal)

All Massachusetts based employers with one or more employees must prepare for the new Massachusetts Paid Family and Medical Leave Act which is being phased in between now and July 2021. While some aspects of the PFMLA are the same or similar to the FMLA, many sections are not and need close attention to ensure compliance.

A. OVERVIEW

The Family and Medical Leave Act (FMLA) requires employers with 50 or more employees to grant eligible employees up to 12 weeks of unpaid leave during a 12-month period for one or more of the following reasons:

- The birth, or placement for adoption or foster care of the employee's child; or to care for that child during the 12-month period after birth or placement
- To care for the employee's child, spouse or parent, if the child, spouse or parent has a serious health condition
- To attend to the employee's own serious health condition that renders the employee unable to perform the essential functions of his or her job
- Certain circumstances related to military service (see below).

To be subject to the FMLA, an employer must have 50 or more employees during at least 20 or more work weeks of the current or previous calendar year. (Employers not subject to the FMLA may elect to follow the provisions of the law but are not required to do so.) If eligible, the employee must be allowed to continue group health insurance coverage on the same basis as if the employee were working, and must generally be reinstated into the same, or equivalent, position after the leave, though certain exceptions to reinstatement may apply. Those exceptions are discussed below. Employers are prohibited from taking any negative employment action against employees who exercise their right to take FMLA leave.

B. DEFINITIONS

Eligible Employees: Eligible employees are those

- who have been employed by the employer for at least 12 months, which need not be consecutive* and;
- who have worked at least 1,250 hours for the employer during the 12-month period immediately prior to the commencement of the leave; and
- who work at an employer that has 50 or more employees within a 75-mile radius.

* Breaks in employment that occur in a period of seven years or less must be counted in determining whether the employee has been employed by the employer for at least 12 months.

If an employee is maintained on the payroll for any part of a week, including any periods of paid or unpaid leave (sick, vacation) during which other benefits or compensation are provided by the employer (e.g., workers' compensation, group health plan benefits, etc.), the week counts as a week of employment.

The 75-mile distance is measured by surface miles, using surface transportation over public streets, roads, highways and waterways, by the shortest route from the facility where the eligible employee needing leave is employed.

Calculating the 1,250-hour requirement

The U.S. Department of Labor (DOL) has clarified that "hours worked" for calculating the 1,250- hour requirement need not include time paid but not actually worked (for example, paid vacation, personal or sick leave, meal breaks and holidays) and also does not include any unpaid leave or periods of layoff. Hours worked beyond 40 in a week (i.e. overtime hours) are included only on an hour by hour basis in the calculation to determine if an employee is eligible. Military leave also counts as active employment in determining whether an employee has met the requirement of having 12 months' service and completing 1,250 work hours to qualify for FMLA leave. Exempt employees are presumed to work 40 hours a week for the purposes of calculating the 1,250 hours.

Establishing the "12-month period"

The FMLA allows for up to 12 weeks of job protected leave within a "12-month period." It is the responsibility of the **employer** to designate which 12-month period it will use for purposes of calculating its employees' 12-week entitlement. The 12-month may be:

- The calendar year
- Any other fixed 12-month "leave year" such as a fiscal year, or a year starting on an employee's "anniversary" date
- The 12-month period measured forward from the date each individual employee's first FMLA leave begins
- A "rolling" 12-month period measured backward from the commencement date, each time any employee uses FMLA leave

Failure to designate an FMLA 12-month period will result in the employee being given the most beneficial leave period available among the various options. This could result in an employee piggybacking two 12-week periods of leave where they might otherwise be entitled to only one 12-week period. If an employer intends to change its 12-month period designation, it must give its employees at least 60 days advance notice of the change.

Key Employee: A salaried FMLA-eligible employee who is among the highest paid 10 percent of all employees employed by the employer within 75 miles of the worksite and whose absence would create an undue hardship for the employer.

Child: A biological, adopted, or foster child, stepchild, legal ward or child of a person standing *"in loco parentis"* (in place of a parent), who is under 18 or is incapable of self-care because of a mental or physical disability. Persons who stand in loco parentis include those with day-to-day responsibilities to care for and financially support a child even if there is no biological or legal relationship.

Spouse: A husband or wife as defined or recognized under Massachusetts law for purposes of marriage. (Note: Massachusetts law does not recognize common law marriage except in cases where the common law marriage was established in another state that does recognize it and the couple relocates to Massachusetts and the couple continues to present itself as a married couple.)

Parent: The biological parent or an individual who stands in loco parentis to the employee, but the leave entitlement does not extend to a mother-in-law or father-in-law.

Next of Kin: In the following order of priority: blood relatives who have been granted legal custody of a covered service-member, brothers and sisters, grandparents, aunts and uncles, and first cousins, unless the covered service-member has specifically designated in writing another blood relative for purposes of military caregiver leave.

Serious Health Condition: An illness, injury, impairment, or physical or mental condition that involves inpatient care in a hospital, hospice, or residential medical care facility, or continuing treatment by a health care provider.

> The FMLA definitions of a "serious health condition" are varied and often complex. For example, one of the definitions requires more than three consecutive/calendar (not work) days of incapacity plus two visits to a healthcare provider for treatment to trigger eligibility for leave. Under the regulations, the two visits to a healthcare provider must occur within 30 days of the start of the period of incapacity, and the first visit must occur within seven days of the first day of incapacity. Additionally, the regulations provide a list of common ailments, such as colds and flu, which the DOL believes will be helpful in identifying ailments that ordinarily will not qualify for FMLA leave.

Health Care Provider: A doctor of medicine or osteopathy who is authorized to practice medicine or surgery by the Commonwealth of Massachusetts, or any other person determined by the U.S. Secretary of Labor to be "capable of providing health care services". Podiatrists, dentists, clinical psychologists, optometrists and chiropractors performing certain treatments and who are authorized to practice in the Commonwealth of Massachusetts are included within the definition of "health care provider." The regulations include any health care provider who is recognized by the employer or is accepted by the employer's group health plan to certify the existence of a health condition or substantiate a claim for health care and related services. This definition includes clinical social workers, nurse practitioners and nurse-midwives who are authorized to practice under Massachusetts law.

- On July 20, 2020 the US Department of Labor inserted a new FAQ in which it stated that telemedicine visits will be counted as in person visits at least until the end of this calendar year.

- Others "capable of providing health care services" include:
  - Christian Science Practitioners listed with the First Church of Christ, Scientist in Boston, MA.
  - Any health care provider from whom an employer or the employer's group health plan's benefits manager will accept certification of the existence of a serious health condition to substantiate a claim for benefits; and
  - A health care provider listed above who practices in a country other than the United States, who is authorized to practice in accordance with the law of that country, and who is performing within the scope of his or her practice as defined under such law.

C. REQUESTING/DESIGNATING FMLA LEAVE - WHOSE RESPONSIBILITY IS IT?

It is the employer's responsibility to designate the FMLA leave as soon as it has sufficient information to indicate that an employee is missing work for an FMLA-qualifying reason.

When the need for leave is foreseeable, an employee must give the employer at least 30 days' advance notice. If the employee gives less notice, the employee must respond to a request from the employer to explain the failure to provide the full 30 days, and the employer may be able to delay job protected leave, if it chooses to do so, depending on the facts of the situation.

If it is not possible for an employee to provide 30 days' notice, the employee must provide notice "as soon as is practicable." The FMLA regulations provide that, "it should be practicable for the employee to provide notice of the need for leave either the same day or the next business day." Further, it "generally should be practicable for the employee to provide notice of leave that is unforeseeable within the time prescribed by the employer's usual and customary notice requirements applicable to such leave."

It is the responsibility of the employer to designate leave as FMLA-qualifying and giving notice of the designation to the employee within five business days of having enough information to determine whether the leave is FMLA qualifying. AIM suggests that employers provide employees with the appropriate FMLA paperwork available from the Department of Labor website (dol.gov, and search for FMLA forms) as soon as an employer becomes aware that the leave may qualify under the FMLA.

If the employer does not designate FMLA leave when it commences, the employer may retroactively designate the leave, with appropriate notice to the employee, provided that the employer's failure to timely designate leave would not cause harm or injury to the employee. In cases where leave would qualify for FMLA protection, the employer and employee can mutually agree that leave be retroactively designated as FMLA leave.

The FMLA does not require that employees be paid while on authorized leave. Employers may, however, require employees to substitute any paid time for which they are eligible, such as short-term disability, sick days, personal days, or earned vacation, for the otherwise unpaid FMLA leave. In situations where the employer chooses not to require the use of paid time, employees may be allowed the choice of using paid time to which they are entitled. In these situations, employers can require employees to meet all of the normal requirements of paid leave policies before allowing substitution of accrued paid leave for unpaid FMLA. For example, if a vacation policy requires that vacation be taken in full day increments, an employer can deny substitution for an employee's one-half day FMLA leave. Employers are encouraged to include a policy statement that FMLA and any substituted paid benefits are used concurrently.

Absences resulting from a workers' compensation injury or illness that meet the definition of a "serious health condition" under the FMLA may, at the employer's discretion, be designated as FMLA leave to be counted against the employee's 12-week entitlement. The employer's policy must include this provision, and employees must be notified up front.

D. MEDICAL CERTIFICATION PROCESS

If the employer requests medical certification, the employee is responsible for providing a complete and sufficient certification, generally within 15 calendar days after the employer's request. The regulations make it clear that employers' representatives contacting the employee's health care provider must be limited to a health care provider, HR professional, leave administrator, or management official, and cannot be the employee's direct supervisor. Additionally, employers may ask health care providers only for information required by the certification form. Most significantly, employers that believe a medical certification is incomplete or insufficient must notify the employee in writing about what information is lacking and then give the employee seven calendar days to fix the deficiency. If an employee does not cure the deficiency, the employer may deny FMLA leave.

E. FMLA FOR FAMILIES OF MILITARY PERSONNEL

The FMLA also includes two military based types of protected leave:

1. **Injured Service Member Family Leave ("Caregiver Leave")** - Under Caregiver Leave, the FMLA permits an employee who is the spouse, son, daughter, parent, or next of kin of a member of the Armed Forces to take up to 26 workweeks of leave. This leave is provided to care for a "member of the Armed Forces, including a member of the National Guard or Reserves" who is "undergoing medical treatment, recuperation, or therapy, is otherwise in outpatient status, or is otherwise on the temporary disability retired list, for a serious injury or illness." This includes veterans who are undergoing treatment for a serious illness or injury incurred in the line of active duty and who were members of the Armed Forces, including the National Guard or Reserves, within the five years preceding the treatment. A covered condition is any injury or illness incurred in the line of duty while on active duty "that may render the member medically unfit to perform the duties of the member's office, grade, rank, or rating." Such leave, when combined with all other FMLA Leave, may not exceed a combined total of 26 weeks in a "single 12-month period" beginning on the first day of Caregiver Leave and ending 12 months later.
2. **Family Member Military Duty Exigency Leave ("Exigency Leave")** - Under the second type of military leave, employees may use 12 weeks of FMLA leave for (1) a qualifying exigency arising out of a covered family member's active duty or call to active duty in the Armed Forces in support of a contingency plan or operation or (2) a qualifying exigency arising out of a covered family member's active duty in the regular Armed Forces when that family member is deployed to a foreign country.

   "Qualifying exigencies" include:

   - short-notice deployment
   - military events and related activities
   - child care and school activities
   - financial and legal arrangements
   - counseling
   - rest and recuperation
   - post-deployment activities, and
   - additional activities where the employer and employee agree to the leave.

F. ESTABLISHING A COMPANY FMLA POLICY

AIM encourages every employer with 50 or more employees as defined earlier to establish an FMLA general notice policy. If the employer has an employee handbook, the general notice should be included in the handbook. The regulations now require that employers who do not maintain an employee handbook distribute a copy of the general notice to each employee at the time of the employee's hire. The notice may be in either paper or electronic form.

Individual policies will differ as they reflect the management style and culture of that employer. However, all policies should contain the following elements:

1. **General Requirements** Outline of the law and who is covered
2. **Definitions** Eligible employees, child, spouse, parent, next of kin, serious health condition, continuing treatment, health care provider
3. **Notice Requirements** Of employee and employer

4. **Types of Leave** Family Leave, Medical leave, Injured Service Member Family Leave, Family Member Military Duty Exigency Leave; intermittent or reduced schedule leave
5. **Substitution of Other Leaves** Vacation, short-term disability, personal time, Parental Leave, Domestic Violence Leave, Earned Sick Time leave, Pregnant Workers Fairness Act, etc., including a statement that these are used concurrently with the FMLA leave and that the employee must abide by the employer's usual and customary notice requirements applicable to such leave.
6. **Designation of 12-Month Period** Explanation of the period within which the 12-week entitlement will apply. Note: consider the requirements of the MA PFML in establishing this decision. See the PFML discussion below for more information.
7. **Medical Certification** Requirement for supporting documentation and a fitness-for-duty certificate
8. **Reinstatement** Employee's right to return to the same or equivalent position following an FMLA leave
9. **Benefits** Any continuation and participation protection of health, pension or other benefits. How premiums for benefits will be handled by the company.
10. **FMLA Relationship with Other Laws** Massachusetts Parental Leave Act, Earned Sick Time, Domestic Violence Leave, Americans with Disabilities Act (ADA), Workers Compensation
11. **Husband and Wife Both Employed by Company** An aggregate of 12 weeks in the established 12-month period for the birth, adoption or foster care placement of a child or to care for a parent with a serious health condition

G. POSTING AND FORMS

It is the responsibility of the employer to notify employees of their rights under the law. The regulations require employers to provide general notice, rights and responsibilities notice, eligibility notice, and designation notice. Employers must post the general notice poster in a conspicuous location where employees will be able to see it. The posting requirement for the general FMLA notice can now be satisfied by electronic means if the electronic posting is in a conspicuous place on the employer's website, it is accessible to all applicants and current employees (not just on an internal intranet site), and all employees have access to company computers that post the information in a conspicuous manner. The FMLA poster is available from the U.S. DOL website at www.dol.gov and search for FMLA poster or FMLA notice. The current versions of the forms are valid through June 30, 2023.

If the employer has an employee handbook, the general notice should be included in the handbook. The regulations now require that employers who do not maintain an employee handbook distribute a copy of the general notice to each employee at the time of the employee's hire, either in paper or electronic form.

Compliance Tip: If a significant portion of an employer's labor force is literate in a language other than English, the employer must provide notice in that language. Significant portion is an undefined term, but employers should take a practical approach to determining if the requirement applies (i.e. an employer needs to make sure its employees understand their rights under the law). The DOL website includes a Spanish language version of the poster. Visit dol.gov and search for FMLA poster in Spanish.

The Department of Labor has recently developed optional-use forms which can be used by employers to provide required notices to employees, and by employees to provide certification of their need for leave for an FMLA qualifying reason. These forms are electronically fillable PDFs and can be saved electronically. New Forms here -www.dol.gov/agencies/whd/fmla/forms

- WH-380-E Certification of Health Care Provider for Employee's Serious Health Condition
- WH-380-F Certification of Health Care Provider for Family Member's Serious Health Condition
- WH-381 Notice of Eligibility and Rights & Responsibilities (Notice of Eligibility and Rights & Responsibilities)
- WH-382 FMLA Designation Notice
- WH-384 Certification of Qualifying Exigency for Military Family Leave
- WH-385 Certification for Serious Injury or Illness of Covered Service member - for Military Family Leave

Employers may also develop their own forms, but any such form cannot require more information than those developed by the Department of Labor.

H. RECORDKEEPING

The U.S. DOL, which enforces the FMLA, requires that covered employers keep and preserve records pertaining to compliance with this law, including basic payroll and employee identifying data; dates FMLA leave is taken; copies of employees' written leave requests; documents describing employer's benefits; policies and practices regarding employee leaves; records of any dispute regarding the designation of leave as FMLA leave; and records of medical certification.

Medical records created for the purposes of the FMLA must be maintained in accordance with the confidentiality rules on medical information imposed by the Americans with Disabilities Act (ADA). Under the ADA, data concerning medical histories or conditions of employees must be maintained separately from other personnel files, must be kept confidential and may be released only in certain limited circumstances.

I. BENEFITS CONTINUATION

1. **Health Insurance:** Employers are required to maintain group health insurance coverage during an FMLA leave under the same conditions as if the employee had not taken leave. If on paid leave, the employee's share of premium payments should be deducted from their pay in the usual manner. Employees on unpaid leave are responsible for making timely payments to the employer for their share of premium payments in accordance with instructions provided by the employer when the leave commences to avoid cancellation of their health insurance.

   If an employee is more than 30 days late paying his or her share of the health plan premium, coverage may be terminated, but only if written notice is provided at least 15 days before the date of termination. The termination may be retroactive to the date the premium was due if that is the employer's policy for other types of unpaid leave.

   However, coverage provided under the FMLA is not coverage for purposes of determining an employee's eligibility for COBRA and taking FMLA leave is not a qualifying event under COBRA. See below for more discussion on this topic.

2. **Other Benefits, Dental and Life Insurance, etc.:** The FMLA requires that employers continue only health insurance coverage during leave.

   NOTE: While health insurance is the only benefit the FMLA requires employers to continue during unpaid leave, the statute does require that employees returning from leave be restored with all the same benefits in the same manner and at the same levels as were provided when the leave began (subject only to benefits changes that may have affected the whole workforce). This means that returning employees cannot be required to re-qualify for any benefits that they enjoyed prior to the leave, such as being subjected to a physical examination or a waiting period before receiving coverage. If the employer elects to maintain benefits not related to health care during unpaid FMLA leave, the employer is entitled, at the conclusion of the leave, to recover only the costs incurred for paying the employee's share of any premiums.

3. **Pension and Other Retirement Programs**: Any period of FMLA leave, paid or unpaid, may not be treated as a break in service for purposes of vesting and eligibility to participate in such programs. If any plan requires an employee to be employed on a specific date to be credited with a year of service for vesting, contributions or participation purposes, an employee on unpaid FMLA leave on that date shall be deemed to have been employed on that date. Unpaid FMLA leave periods, however, need not be treated as credited service for purposes of benefit accrual, vesting or eligibility to participate. While this seems rather confusing, the net effect is to credit unpaid FMLA periods whenever failing to do so would cause the employee to lose any portion of a retirement program benefit that the employee had already accrued prior to taking leave, but not to require the employee to get any extra benefit based solely on the unpaid leave period.

J. RETURNING FROM FMLA LEAVE

1. **Medical Certification:** An employer may require an employee who is out on FMLA due to their serious health condition to provide a fitness-for-duty certification if it is the employer's practice to do so for non-FMLA medical leaves as well. The employer must notify the employee of this requirement in the FMLA designation notice provided at the beginning of the leave. Additionally, under the regulations, an employer may require that the fitness for duty certification specifically address the employee's ability to perform the essential functions of his or her job. To do this, an employer must provide the employee with a list of the essential functions of the employee's job no later than with the FMLA designation notice, and must indicate in the designation notice that the certification must address the employee's ability to perform those essential functions.
2. **Restoration of Position:** FMLA regulations establish that an employee has the right to (a) the same position that he/she had prior to taking FMLA leave or (b) an "equivalent" position upon return from FMLA leave. An "equivalent" position has been defined as one that has substantially the same pay, duties, conditions, responsibilities, privileges, status, skill, effort, and authority as the employee's previous position. The FMLA does not prohibit an employer from accommodating an employee's request to be restored to a different shift, schedule, or position which better suits the employee's personal needs on return from leave, or to offer a promotion to a better position. Any such agreement should be documented in writing at the time to prevent a misunderstanding in the future. However, an employee cannot be induced by the employer to accept a different position against the employee's wishes.
3. **Intermittent or Reduced Leave:** When medically necessary, an employee may take "intermittent" leave (leave taken in separate blocks of time due to single qualifying reason) or "reduced schedule" leave (where an employee continues to work but less than the normal number of days/hours). An employer must account for the time taken during the leave:
   - In an increment no greater than the shortest period of time that the employer uses to account for use of other forms of leave provided that it is not greater than one hour; and
   - that an employee's FMLA leave entitlement may not be reduced by more than the amount of leave actually taken.

An employer may not require an employee to take more leave than is necessary to address the circumstances that precipitated the need for the leave, provided that the leave is counted using the shortest increment of leave used to account for any other type of leave.

***Compliance Tip**: In the case of the use of FMLA leave following the birth or placement of a healthy child, an employee may only take intermittent or reduced leave if the employer agrees.*

4. **Light-Duty Assignments:** Time spent performing "light duty" work does not count against an employee's FMLA leave entitlement. If an employee agrees to perform a light-duty assignment, he or she is not on FMLA leave.
5. **Key Employee Exception:** An employer may deny reinstatement to an employee on FMLA leave provided the employer has notified the employee he/she is a key employee. A key employee is a salaried (as defined in the FLSA) FMLA-eligible employee who is among the highest paid 10 percent of all the employees employed by the employer. In order to deny job restoration to a key employee, an employer must determine that the restoration of the employee to employment will cause substantial and grievous economic injury to the operations of the employer, not whether the absence of the employee will cause such substantial and grievous injury. To use this provision an employer must notify the employee in writing that he or she qualifies as a key employee as well as the consequences of that designation.

   A key employee's rights under FMLA continue unless and until the employee either gives notice that he or she no longer wishes to return to work, or the employer actually denies reinstatement at the conclusion of the leave period. After notice of key employee status has been given, a key employee is still entitled to request reinstatement at the end of the leave period even if the employee did not return to work in response to the employer's notice. The employer must then again determine whether there will be substantial and grievous economic injury from reinstatement, based on the facts at that time. If it determines that substantial and grievous economic injury will result, the employer must notify the employee in writing (in person or by certified mail) of the denial of restoration.

K. COBRA

Taking FMLA leave does not trigger a qualifying event for the purposes of COBRA because the employee is presumed to be employed for the duration of the FMLA authorized leave. Rather, the FMLA and (COBRA) operate in sequence. A COBRA qualifying event only occurs if the employee loses health insurance coverage because he/she does not return to work after an FMLA leave or notifies an employer of his or her intent not to return to work.

L. FMLA FREQUENTLY ASKED QUESTIONS

Q. Must the 12 months of employment be consecutive or can the FMLA apply when a break in service has occurred?

A. The 12 months do not need to be consecutive employment as long as the employee has worked at least 1,250 hours within the 12 months immediately preceding the commencement of the leave.

Q. What happens to employees on FMLA leave if a company experiences a layoff during this time?

A. The FMLA does not entitle employees to any greater rights than they would have had if they had not taken FMLA leave. Therefore, FMLA permits an employee to be laid off during an FMLA leave provided the employer can demonstrate that the layoff would have occurred had the employee been actively at work. If a layoff occurs, the employee's rights under FMLA, including health insurance continuation, cease on the date of the layoff unless the employer's policy or a union contract provide more generous treatment.

Q. Can an employee be disciplined for using FMLA leave?

A. No, the FMLA makes it unlawful to interfere with, restrain or deny the exercise of any right provided under the FMLA. Employees can be disciplined, however, for failure to comply with the employer's reasonable requests, policies and practices related to providing notice of the need for leave, making a good faith effort to submit medical certification and/or fitness for duty information, maintaining contact with the employer, etc. Care must be exercised to ensure that people on FMLA leave are treated no more stringently than those on other types of statutory or company leave.

Q. Can an unmarried employee request FMLA leave for the birth of his or her child?

A. Yes. An employee is entitled to FMLA leave for the birth, adoption or foster care placement of the employee's child, and to take care of that child during the 12-month period after birth or placement. The FMLA does not require that parents be married to qualify for FMLA leave for the birth, placement or care of a child. If unmarried, however, the non-birthing parent would not be entitled to take FMLA leave related to the serious health condition of the birthing parent as Massachusetts does not recognize common law marriage.

Q. Can an employer deduct time in less than full-day increments for an exempt employee on intermittent leave?

A. Yes. According to the regulations promulgated under the Fair Labor Standard Act, (541.602 (7)), an employer may track the partial days off used by an exempt employee and deduct that time without jeopardizing the position's exempt status. AIM suggests caution prior to implementation of this practice as it may run counter to the work culture the employer wants to maintain within its exempt staff.

Q. Can an employer count holidays occurring in the course of an employee's intermittent leave against an employee's FMLA leave?

A. It depends. Under the regulations, if an employee takes a full workweek of FMLA leave during which a paid holiday falls, the holiday counts against the employee's FMLA entitlement. If the employee takes FMLA leave in increments of less than a full workweek, and a holiday falls on a leave day, that day does not count against the employee's 12-week FMLA leave entitlement.

The previous version of this guide contained a significant number of frequently asked questions from the Department of Labor website. All of the FMLA related FAQs are available by visiting the following link: www.dol.gov/agencies/whd/fmla/faq.

Readers interested in learning more about the Covid related FAQs may search on this link: www.dol.gov/agencies/whd/fmla/pandemic#q12

II. Uniformed Services Employment and Reemployment Rights Act (USERRA) leave (Federal)

A. OVERVIEW

The Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) clarifies and strengthens the Veterans' Reemployment Rights (VRR) statute.

USERRA is intended to minimize an employee's disadvantages when that person needs to be absent from their civilian employment to serve in the U.S. uniformed services. Specifically, USERRA expands the cumulative length of time that an individual may be absent from work for uniformed services duty while retaining reemployment rights.

USERRA covers individuals who serve in the uniformed services and applies to all employers in the public and private sectors. USERRA provides that an employer may not discriminate in employment against or take adverse employment action against any person serving in the uniformed services and must provide enhanced protection for disabled veterans. This requires an employer to make reasonable efforts to accommodate a disabled veteran.

The U.S. Department of Labor regulations regarding employer's rights and responsibilities under USERRA are presented in question-and-answer format and explain how USERRA protects against discrimination and retaliation because of military service; prevents service members from suffering disadvantages due to performance of their military obligations; and affords them ample time to report back to jobs following completion of their service obligations. The information can be found on the U.S. Department of Labor website at www.dol.gov/agencies/vets/programs/userra.

B. DEFINITIONS

Service in the Uniformed Services: Duty on a voluntary or involuntary basis in a uniformed service including active duty, active duty for training, initial active duty for training, inactive duty training, full-time National Guard duty, and any period a person is absent from employment for an examination to determine the person's fitness to perform military duty

Uniformed Services: The Armed Forces; the Army National Guard and the Air National Guard when engaged in active duty for training, inactive duty training, or full-time National Guard duty; the commissioned corps of the Public Health Service and any other category of persons designated by the president of the United States in time of war or national emergency

C. REEMPLOYMENT RIGHTS AND LIMITATIONS

Any employee absent from employment due to service in the uniformed services is entitled to reemployment rights and benefits under USERRA for up to five years. USERRA provides that returning service-members are reemployed in the job that they would have attained had they not been absent for military service (the long-standing "escalator" principle), with the same seniority, status and pay, as well as other rights and benefits determined by seniority. USERRA also requires that reasonable efforts (such as training or retraining) be made to enable returning service members to refresh or upgrade their skills to help them qualify for reemployment. The law clearly provides for alternative reemployment positions if the service member cannot qualify for the "escalator" position. USERRA also provides that while an individual is performing military service, he or she is deemed to be on a furlough or leave of absence and is entitled to the non-seniority rights accorded other individuals on non-military leaves of absence. An employee should give advance written or verbal notice of such service to the employer except when such notice is impossible or unreasonable.

Upon the completion of a period of service in the uniformed services, the person shall notify the employer of the person's intent to return to a position of employment with such employer as follows:

1. **In the case of a person whose period of service in the uniformed services was less than 31 days:** By reporting to the employer not later than the beginning of the first full regularly scheduled work period on the first full calendar day following the completion of the period of service and the expiration of eight hours after a rest period allowing for the safe transportation of the person from the place of that service to the person's residence
2. **In the case of a person whose period of service in the uniformed services was for more than 30 days but less than 181 days**: By submitting an application for reemployment with the employer not later than 14 days

after the completion of the period of service; or if submitting such application within such period is impossible or unreasonable through no fault of the person, the next first full calendar day when submission of such application becomes possible

3. **In the case of a person whose period of service in the uniformed services was for more than 180 days:** By submitting an application for reemployment with the employer not later than 90 days after the completion of the period of service
4. **In the case of a person who is hospitalized for, or convalescing from, an illness or injury incurred in, or aggravated during the performance of service in the uniformed services:** By reporting to the person's employer at the end of the period that is necessary for the person to recover from such illness or injury such period of recovery may not exceed two years. However, the two-year period may be extended by "the minimum time required to accommodate a circumstance beyond an individual's control that would make reporting with the two-year period impossible or unreasonable.

D. REEMPLOYMENT POSITIONS

An employer is not required to reemploy a person if:

- the employer's circumstances have so changed as to make such reemployment impossible or unreasonable;
- such employment would impose an undue hardship on the employer; or
- the employment from which the person leaves to serve in the uniformed services is for a brief, non-recurrent period and there is no reasonable expectation that such employment will continue indefinitely or for a significant period.

An employer seeking not to reemploy someone returning to work following military service has the burden of proof to show by a preponderance of the evidence it cannot rehire the employee.

E. CONTINUATION OF HEALTH PLANS

In any case in which an employee (or the employee's dependents) has coverage under a health plan, including a group health plan, in connection with the employee's employment, and the employee is absent from work due to service in the uniformed services, the employer shall provide the employee the right to elect to continue coverage at the employee's expense. The maximum period of coverage of a person and the person's dependents under such an election shall be the lesser of:

1. The 24-month period beginning on the date on which the person's absence begins; or
2. The day after the date on which the person fails to apply for or return to a position of employment

A person who elects to continue health-plan coverage under this paragraph may be required to pay not more than 102 percent of the full premium under the plan, except that in the case of a person who performs service in the uniformed services for less than 31 days, such person may not be required to pay more than the employee share, if any, for such coverage. While similar to COBRA in operation, health insurance continuation under USERRA is a separate program that only applies to people on military duty and their dependents.

F. POSTER

The mandatory USERRA poster is available at the U.S. Department of Labor website here. www.dol.gov/sites/dolgov/files/VETS/legacy/files/USERRA_Private.pdf

G. FREQUENTLY ASKED QUESTIONS

The previous version of this guide contained a significant number of frequently asked questions from the Department of Labor website. USERRA-related FAQs are available by visiting the following link: webapps.dol.gov/dolfaq/go-search-dol-faqs.asp?look_for=userra

III. THE MASSACHUSETTS PAID FAMILY AND MEDICAL LEAVE ACT

A. OVERVIEW

The Massachusetts Paid Family and Medical Leave Act (PFMLA) was passed in 2018 and has been phased in since October 1, 2019. While some aspects of the law are consistent with the FMLA discussed above, the two laws do not completely overlap and there are many important distinctions employers need to be aware of in order to comply with the new Massachusetts law.

For example, one key difference between the two laws is that while the FMLA only offers job protected leave, the PFMLA is a partial wage replacement of up to at least a maximum dollar amount per week established annually every autumn by the state for the duration of the leave. The weekly maximum benefit amount is subject to an annual adjustment. The PFML law also includes contract workers and employees who left employment no more than 26 weeks prior to filing a PFML claim.

The PFMLA also incorporates by reference important elements of the Massachusetts Unemployment Insurance (UI) law, especially key definitions.

To be subject to the PFMLA, an employer must have one or more employees and the employee(s) must have worked a sufficient amount of time for the employer to qualify for unemployment benefits. In addition to the partial wage replacement, an eligible employee must be allowed to continue group health insurance coverage on the same basis as if the employee were working, and must generally be reinstated into the same, or equivalent, position after the leave, though certain exceptions to reinstatement may apply. Those exceptions are discussed below. Employers are prohibited from taking any retaliatory employment action against employees who exercise their right to take PFMLA leave.

This document will review information associated with the State run plan, however, companies may opt out of the State plan and purchase an insured plan or self-insure. More information here www.mass.gov/info-details/request-a-paid-family-and-medical-leave-exemption

B. KEY DEFINITIONS

The definitions for this law are available by clicking on this link www.mass.gov/doc/department-of-family-and-medical-leave-clean-72420/download and searching for the definition you need.

C. LEAVE BENEFITS

Up to 12 weeks - Family Leave

- A covered individual may take leave to bond with the covered individual's 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 covered individual. **(as of 1-1-21)**
- A covered individual may take leave to care for a family member with a serious health condition. **(as of 7-1-21)**

Up to 20 weeks - Medical leave (as of 1-1-21)

- Eligible covered individual may take up to 20 weeks for their own serious health condition that makes the covered individual unable to perform the functions of the person's position. This covers eligible former employees as well.

Up to 26 weeks - Combined Family and Medical Leave in one benefit year

Up to 26 weeks - Servicemember related leave (as of 1-1-21)

- A covered individual may take leave due to a 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.

Intermittent/Reduced-schedule Leave

The following leaves may be taken on an intermittent leave or reduced schedule:

- Family leave to bond with a new child may be taken only if the employer and employee agree.
- Family leave to care for a family member with a serious health condition may be taken when medically necessary.
- Family leave related to care for a servicemember with a serious health condition may be taken when medically necessary.
- Medical leave related to a covered individual's own serious health condition may be taken if medically necessary.

Whether taking leave intermittently or on a reduced-schedule basis, the individual is still entitled to the full leave duration as defined above. The minimum increment for payment for intermittent leave is 15 minutes or the increment of time recognize by the company policy for other leaves of absence.

Job Restoration

An employee taking PFML leave shall be restored to the employee's previous or equivalent position, with the same status, pay, employment benefits, length-of-service credit and seniority as of the date of leave. Exceptions to the job restoration include:

- If other employees of equal length of service credit and status in the same or equivalent positions have been laid off due to economic conditions or other changes in operating conditions affecting employment during the period of leave;
- Provided the employee who has taken leave shall retain any preferential consideration for another position to which the employee was entitled as of the date of leave.

Right to employment benefits

Taking PFML 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, plans or programs.

Health insurance continuation

During an employee's family or medical leave, an employer must provide for and contribute to the employee's employment-related health insurance benefits, if any, at the level and under the conditions coverage would have been provided if the employee had continued working continuously for the duration of such leave. (Though not stated in the law, the presumption is that the employee is expected to continue to contribute his/her portion as well.)

Additional company based/Collective Bargaining Agreements (CBA) rights

The PFML law shall not:

- reduce an employer's obligations to comply with any company policy, law or CBA that provides for greater or additional rights to leave than those provided for by this law;
- in any way curtail the rights, privileges or remedies of any employee under a CBA or employment contract; or
- in any way allow an employer to compel an employee to exhaust rights to any sick, vacation or personal time prior to or while taking leave under this law.

Leave/benefit coordination

PFML leave runs concurrently with leave taken under the Massachusetts Parental Leave, and the Federal Family and Medical Leave Act (FMLA). Employees who take PFML leave while ineligible for FMLA may be able to take leave under the FMLA in the same benefit year only to the extent they remain eligible for concurrent leaves under this law. Employers are encouraged to run the PFML and FMLA benefit years concurrently, where possible. Any change to the FMLA benefit year requires a 60-day notice from the employer.

An employer may require that payment made under the PFML be concurrent or coordinated with payment made or leave allowed under the terms of disability or family care leave under a CBA or employer policy provided the employee will receive the greater of the various benefits that are available for the covered reason. Any leave provided under a CBA or employer policy that is used by the employee for a covered reason and paid at the same or higher rate than leave available under PFML shall count against the allotment of leave available under PFML. An employer must give employees written notice of this requirement.

D. CONTRIBUTIONS

An employer or a covered business must submit contributions to the Family and Employment Security Trust Fund based on the rates established annually by the DFML according to the following statutory schedule.

Family Leave

- employer may contribute up to 100% of the established family leave charge,
- the employer may have the employee contribute up to 100% of the charge or
- they may share the cost between them based on an employer established percentage

Medical Leave

- an employer must contribute no less than 60% of the established medical leave charge, with the employee being required to contribute the difference.

Contributions to the trust fund are based on earnings up to the social security taxable wage base which is adjusted annually. The wage base for 2021 is $142,800 but is adjusted every October.

Small business exception - an employer having less than 25 employees in the Commonwealth is not required to pay the employer portion of premiums for family and medical leave as listed above. However, each such employer must collect and submit 100% of the family leave contribution and 40% of the medical leave contribution on behalf of its employees.

Penalties

An employer or covered business entity that fails or refuses to make contributions shall be assessed an amount equal to its total annual payroll for each year, or the fraction of the year for which it failed to comply, multiplied by the then-current annual contribution rate required by the law in addition to the total amounts of benefits paid to covered individuals for whom it failed to make contributions.

Such contributions shall be treated as taxes for administration and collection purposes and shall be subject to the provisions outlined in the state tax code. Such contributions shall also be treated as debts owed to DFML.

DFML may issue refunds if the contributions required result in duplicative charges.

E. WORKPLACE POSTER

Each employer and covered business entity must post in a conspicuous place on each of its premises a workplace notice prepared or approved by DFML providing notice of benefits available under this law. The poster is available 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 1/2 of one per cent of all residents of the Commonwealth.

The required workplace notice shall be in English and each other language which is the primary language of 5 or more employees or self-employed individuals of that workplace, if such notice is available from the department.

F. NOTIFICATION TO EMPLOYEES

Within 30 days of starting employment, each employer must issue to each employee the following written information provided or approved by DFML in the employee's primary language:

- an explanation of the availability of family and medical leave benefits provided under this chapter, including rights to reinstatement and continuation of health insurance;
- the employee's contribution amount and obligations under this chapter;
- the employer's contribution amount and obligations under this chapter;
- the name and mailing address of the employer;
- the identification number assigned to the employer by the department;
- instructions on how to file a claim for family and medical leave benefits;
- the mailing address, email address and telephone number of the department; and
- any other information deemed necessary by the department.

An employer must confirm delivery of the notice through either:

- a written acknowledgement of receipt of the information, or
- a signed statement indicating the employee's refusal to sign such acknowledgement.

The notification criteria also applies to a covered business entity each time the entity contracts with a self-employed individual.

The employer or covered business entity has the burden of demonstrating compliance with this subsection. If an employer fails to provide notice of this chapter as required under subsection (a), the employee's notice requirement shall be waived.

Penalties

An employer or covered business entity that fails to comply with these notification requirements is subject to the following penalties:

- First violation, a civil penalty of $50 per employee and per self-employed individual with whom it has contracted,
- Each subsequent violation, a civil penalty of $300 per employee or self-employed individual with whom it has contracted.

G. WEEKLY BENEFITS

No benefits are payable during the first seven (7) calendar days of PFML leave though the employee may utilize company provided accrued sick, vacation or other paid leave provided during those first seven (7) days. But as noted above the employer may not compel the employee to use sick , vacation or other accrued paid time during the first seven (7) days.

The weekly benefit amount is based on the following formula:

- the portion of the covered individual's average weekly wage that is equal to or less than 50 per cent of the state average weekly wage shall be replaced at a rate of 80 per cent; and
- the portion of the covered individual's average weekly wage that is more than 50 per cent of the state average weekly wage shall be replaced at a rate of 50 per cent.

An example may help explain the calculation. (This calculation is based on the current State Average Weekly Wage (SAWW) effective for 2020 which is $1431.66. The SAWW is calculated in October of each year and will apply for the following calendar year).

1. Individual earns $1000 a week. Fifty percent of the SAWW is $715.83. Eighty percent of 50% equals $572.66. (see bullet one above).
2. Individual's wages above the SAWW is determined by subtracting $715.83 from $1000 equaling $284.17. That amount is replaced at a rate of 50% or $142.08. (See bullet two above)
3. The employee in this case would be entitled to $714.74 per week.

Maximum weekly benefit

The maximum weekly benefit amount was originally established at $850 a week. The law requires the DFML to annually, no later than October 1, adjust the maximum weekly benefit amount to be 64 per cent of the state average weekly wage and the adjusted maximum weekly benefit amount shall take effect on January 1 of the year following such adjustment.

Anyone taking leave on in intermittent or reduced leave schedule will have their weekly benefit amount prorated by DFML.

NOTE: Under an amendment to the law, the DFML is not required to make an adjustment to the maximum weekly benefit amount until October 2021.

Benefit offsets

Weekly benefit amounts will be reduced by the amount of wages or wage replacement that a covered individual receives for that period while on family or medical leave under these programs:

- any government program or law, including but not limited to unemployment insurance, workers' compensation, other than for permanent partial disability incurred prior to the family or medical leave claim, or under other state or federal temporary or permanent disability benefits law, or
- a permanent disability policy or program of an employer.

Weekly benefit amounts provided these programs will not be reduced unless the aggregate amount an employee would receive exceeds the employee's average weekly wage:

- a temporary disability policy or program of an employer;
- a paid family, or medical leave policy of an employer; or
- any wages received from another employer or covered business entity or through self-employment.

Voluntary payments

If an employer makes payments to an employee during any period of family or medical leave that are equal to or more than the amount required under this section, the employer shall be reimbursed out of any benefits due or to become due from the PFML trust fund for that employee covering the same period of time as the payments made by the employer.

H. REQUESTING LEAVE

An employee must give not less than 30 days' notice to the employer of the anticipated starting date of the leave, the anticipated length of the leave and the expected date of return or shall provide notice as soon as practicable if the delay is for reasons beyond the employee's control.

In response to a request for leave, the DFML will notify applicants of their eligibility determination or need for additional information within 14 days of receiving a claim and if determined to be eligible, will begin to pay benefits not less than 14 days after the eligibility determination. The department shall not require documentation of certification beyond the requirements established in this law

I. DFML NOTICE AND APPEALS PROCESS

The DFML must notify the employer within 5 business days after a claim has been filed in order to obtain the relevant information or records from the company regarding that individual. The DFML must also establish an administrative appeals process in the case of a denial of family or medical leave benefits. Any judicial review of a departmental decision shall be filed in the District Court and commenced within 30 days of the receipt of the decision. In any litigation the DFML will be automatically included as a defendant.

DFML enforcement responsibilities

DFML is responsible for enforcing the law and promulgating rules and regulations to enforce this law. The law is designed to be liberally construed as remedial to provide job-protected family and medical leave benefits.

J. PROHIBITED ACTS/PENALTIES

The PFML act defines a number of illegal employment actions including:

- An employer cannot retaliate by discharging, firing, suspending, expelling, disciplining, threatening or in any other manner discriminating against an employee for exercising any right or interfering with the exercise of any right under this law.
- An employer cannot retaliate by discharging, firing, suspending, expelling, disciplining, threatening or in any other manner discriminating against an employee who has filed a complaint or instituted or caused to be instituted a proceeding under this law, has testified or is about to testify in an inquiry or proceeding or has given or is about to give information connected to any inquiry or proceeding relating to this section.

- An employer cannot negatively affect the seniority, status, employment benefits, pay or other terms or conditions of employment of an:
  - employee during a PFM leave or during the 6-month period following an employee's leave or restoration to a position, or
  - employee who has participated in proceedings or inquiries pursuant to this section within 6 months of the termination of proceeding

Any such action shall be presumed to be retaliation.

To rebut any charge of retaliation, an employer must show by clear and convincing evidence that:

- the employer's action was not retaliatory and
- that the employer had sufficient independent justification for taking such action and would have taken the same action, regardless of the employee's use of leave, restoration to a position or participation in proceedings or inquiries as described in this subsection.

An employer found to have taken any legal action against any employee shall:

- rescind any adverse action in the employee's terms of employment and
- offer reinstatement to any terminated employee and be subject to legal action.

Legal remedies

An employee or former employee may within 3 years after the violation occurs, institute a civil action in the superior court with rights to a jury trial. All remedies include all common law tort claims and shall be in addition to any legal or equitable relief provided in this section. Remedies may include:

- issuing temporary restraining orders or preliminary or permanent injunctions to restrain continued violations of this section;
- reinstating the employee to the same position held before the violation or to an equivalent position;
- reinstating full fringe benefits and seniority rights to the employee;
- compensating the employee for 3 times the lost wages, benefits and other remuneration and the interest thereon; and
- order payment by the employer of reasonable costs and attorneys' fees.

K. SELF-EMPLOYED INDIVIDUALS

A self-employed individual may elect coverage under this law and become a covered individual for an initial period of not less than 3 years. To do so the self-employed individual must file a notice in writing with the DFML and make contributions to the Family and Employment Security Trust Fund. The law also provides that a participating self-employed individual shall not be eligible for benefits until that individual has made such required contributions for at least 2 calendar quarters of the individual's last 4 completed calendar quarters. The department shall establish a process by which self-employed individuals may elect coverage under this law.

Contributions

A self-employed individual who is electing coverage under this law is responsible for all contributions as required by the law.

An employer or a covered business entity with a workforce that has more than 50 per cent self-employed individuals as reported on IRS form 1099-MISC shall include those self-employed individuals as employees for the purposes of this law.

An employer or other business or trade that is a covered business entity shall count covered contract workers as employees for the purposes of this subsection.

- For medical leave, a covered business entity shall not deduct more than 40 per cent of the contribution required under subsection (a) to the trust fund for the income paid to each covered contract worker.
- For family leave, a covered business entity shall not deduct more than 100 per cent of the contribution required under subsection (a) to the trust fund for the income paid to each covered contract worker.

L. CONCURRENT LEAVES

Depending on the circumstances, an employer may count available time under the FMLA (see above) and MPLA (see below) concurrently with time taken under the Massachusetts paid family and medical leave act.

IV. Massachusetts Parental Leave Act

A. OVERVIEW

The Massachusetts Parental Leave Act (MPLA) provides that employers of six or more employees are required to provide up to eight weeks of unpaid (paid at employer's discretion) parental leave to eligible full-time employees for the purpose of childbirth or for adopting a child under 18 years of age (or under 23 if the child is mentally or physically disabled). To be eligible, an employee must have completed the initial probationary period set by the terms of employment, not to exceed three (3) months, or, if there is no such probationary period, has been employed by the same employer for at least three (3) consecutive months as a full-time employee. The provisions about employment protection and benefit protection remain in effect. It is anticipated that the MCAD will issue an updated guidance interpreting the new law as it did the former law.

Massachusetts law requires that this law be posted in the workplace (M.G.L.c.149§105D). In cases where the FMLA and/or PFML also applies, FMLA, PFML, and MPLA leaves may run concurrently though it is the responsibility of the employer to designate the two leaves as running concurrently.

Some of the new provisions include:

- Allows an employer to agree that the employee may take more than eight (8) weeks of leave. However, if the employer does so, the employer must inform the employee in writing prior to the start of the leave that the extended leave will not result in extended job and benefits protection. Otherwise all reinstatement rights will continue beyond eight (8) weeks.
- Provides that two parents with same employer get an aggregate of eight (8) weeks, not eight (8) weeks each.
- Changes the notification provision to state "two weeks or "**notice as soon as practicable**" if the delay is for reasons beyond the individual's control.

NOTE: While employers must comply with the new law, the MCAD has only issued a poster and has not replaced the existing Massachusetts Maternity Leave Act (MMLA) guidance with an MPLA guidance. Therefore, much of this section relies on the existing MMLA guidance.

B. DEFINITIONS

Employee: While the law does not define employee, the text of the law states that to be eligible, an employee must be employed for at least three (3) months and work full-time. Full-time is to be defined by the employer.

Employer: An individual, partnerships and corporations, having six or more employees.

Massachusetts Commission Against Discrimination (MCAD): The state agency charged with enforcing the MPLA.

C. USE OF ACCRUED VACATION, PERSONAL AND SICK TIME DURING PARENTAL LEAVE

Unlike FMLA authorized leaves, employers cannot require an employee to use accrued paid vacation, paid sick time or personal time concurrently with all or part of the parental leave, even if such requirement is imposed upon similarly situated persons who take leave for other reasons. An employee may voluntarily choose to use any accrued vacation, paid sick time or paid/unpaid personal time concurrently with all or part of the parental leave.

D. JOB RESTORATION AFTER LEAVE

The MPLA requires that an employee on parental leave be restored to his/her previous or a similar position upon return to employment following leave. That position must have the same status, pay, length of service credit and seniority as the position the employee held prior to leave. If an employee's job was changed temporarily because of the birthing mother's pregnancy prior to leave (e.g., her hours were reduced or her duties were changed as an

accommodation), the employee should be restored to the same or similar position held prior to such temporary change. An employee on MPLA leave has no greater rights than if not on MPLA leave. Therefore, an employee may be laid off during an MPLA leave and health benefits can also be terminated unless more generous treatment is provided through the employer's policy or through a collective bargaining agreement.

E. SEX DISCRIMINATION ISSUES

An employer may not deny a pregnant employee the right to work or restrict job functions, such as heavy lifting or travel, during or after pregnancy or childbirth when the employee is physically able to perform the necessary functions of her job. The mere fact of pregnancy does not automatically establish a disqualifying disability. An employer may not, therefore, use an employee's pregnancy, childbirth or potential or actual use of MPLA leave as a reason for an adverse job action, such as refusing to hire or promote, discharging, lay off, fail to reinstate or otherwise restricting an employee's duties. (See Pregnant Workers Fairness Act discussion below)

Normal pregnancy and related short-term medical conditions may, at some point, incapacitate a pregnant employee from performing her usual work for a short period of time. When an employee is unable to perform some or all of the functions of her job, such as heavy lifting, because of pregnancy or a related condition, an employer must offer her the opportunity to perform modified tasks, alternative assignments or a transfer to another available position if the employer offers such opportunities to employees who are temporarily disabled for other reasons. Failure to do so may constitute sex discrimination. It may also constitute sex discrimination for an employer to base employment decisions on a pregnant employee's reproductive capacity. For this reason, employers may not adopt policies that limit or preclude a pregnant employee from performing specific jobs or tasks, such as performing physical labor or working with hazardous substances.

Furthermore, discrimination against an employee exercising his/her rights under this law may well constitute retaliation, a separate basis for a discrimination charge by an employee.

F. PREGNANCY-RELATED MEDICAL CONDITIONS AS A DISABILITY

Chapter 151B's prohibitions against disability discrimination protect employees who have a pregnancy-related disability. Generally, a normal, uncomplicated pregnancy will not be considered a disability even if the employee is unable to work for a period of time as a result of the pregnancy or childbirth. A pregnant employee will be considered a "disabled person," however, if she can show that she has a pregnancy-related physical or mental impairment that substantially limits a major life activity, or that she is regarded as having or has a history of such impairment. (See Pregnant Workers Fairness Act discussion below)

If the employee is disabled at the expiration of her parental leave, however, the employer may have an obligation to provide a reasonable accommodation to her disability. In some circumstances, additional leave may constitute such reasonable accommodation.

G. CONCURRENT LEAVES

In many instances, the MPLA, PFML, and FMLA will overlap. Where leave is taken for a reason specified in PFML, FMLA and MPLA, the leave may be counted simultaneously against the employee's entitlement under each law. For example, a female employee who takes a leave for the purpose of giving birth may be covered under the PFML, FMLA and MPLA. In such an instance, provided that all PFML and FMLA requirements are met, the employee's leave may count simultaneously against her 12-week entitlement under PFML, 12-week entitlement under the FMLA and her eight-week entitlement under the MPLA. During the overlapping period, the rules most favorable to the employee will apply.

In other instances, however, the MPLA may entitle an employee to leave in addition to leave taken under the FMLA. Thus, for example, if a pregnant employee takes 12 weeks of FMLA leave for a purpose other than birth or adoption of a child, she will still have the right to take eight weeks of parental leave under the MPLA. Unlike the FMLA, the MPLA does not require an employer to specifically designate leave as MPLA leave.

Under the MPLA, an employee may take a parental leave each time for each birth or adoption of a child. Thus, for example, if an employee adopts a child in January and his/her second child is born in October, the employee would

be entitled to two separate eight-week parental leaves under the MPLA for a total of 16 weeks. Additionally, the MCAD has taken the position that a multiple birth results in entitlement to multiple MPLA leaves, i.e., the birth of twins will result in the employee being entitled to 16 weeks of MPLA leave. By contrast, under the PFML and FMLA, leave is limited to a maximum of 12 weeks in a 12-month period.

H. NOTICE AND POSTING REQUIREMENTS

All employers must post a notice in a conspicuous place that contains at least the following information:

Pursuant to MGL ch. 151B, §4(1) and ch. 149, §105D, every full-time employee is entitled as matter of law to at least eight weeks' parental leave if the employee complies with the following conditions:

- The law clarifies that the right to leave applies to employees who have completed an initial probationary period set by the terms of employment, but which is not greater than three (3) months; and
- The employee gives two weeks' notice of the expected departure date or provides notice as soon as practicable, and gives notice that the employee intends to return to the job following the leave.

The employee is entitled to return to the same or a similar position without loss of employment benefits for which the employee was eligible on the date leave commenced if the employee terminates parental leave within eight weeks. (The guarantee of a same or similar position is subject to certain exceptions specified in MGL ch. 149, §105D.) Accrued sick leave benefits shall be provided for parental leave purposes under the same terms and conditions that apply to other temporary medical disabilities. Any employer policy or collective bargaining agreement that provides for greater or additional benefits than those outlined in this notice shall continue to apply.

I. MPLA QUESTIONS AND ANSWERS

The previous version of this guide included a number of FAQ's drawn from the MCAD website. We have removed them as they refer to the Massachusetts Maternity Leave Law and not the MA Parental Leave Law. The MCAD does have a brief fact sheet on the MPLA available here.

For anyone interested in reading the MMLA FAQ's it is available here.

V. Massachusetts Domestic Violence Leave

A. OVERVIEW

This Massachusetts leave law provides legal protections for victims of domestic violence. The law applies to employers of 50 or more employees. It requires that covered employers provide up to 15 days of job protected leave during a 12-month period. This leave is in addition to all other forms of leave available to employees though it may overlap for up to five (5) days with the domestic violence leave provisions of the Earned Sick Time law (see below).

B. DEFINITIONS

"**Abuse**", (i) attempting to cause or causing physical harm; (ii) placing another in fear of imminent serious physical harm; (iii) causing another to engage involuntarily in sexual relations by force, threat or duress or engaging or threatening to engage in sexual activity with a dependent child; (iv) engaging in mental abuse, which includes threats, intimidation or acts designed to induce terror; (v) depriving another of medical care, housing, food or other necessities of life; or (vi) restraining the liberty of another.

"**Abusive behavior**", (i) any behavior constituting domestic violence, (ii) stalking, (iii) sexual assault, as defined in the criminal codes, and (iv) kidnapping.

"**Domestic violence**", abuse against an employee or the employee's family member by: (i) a current or former spouse of the employee or the employee's family member; (ii) a person with whom the employee or the employee's family member shares a child in common; (iii) a person who is cohabitating with or has cohabitated with the employee or the employee's family member; (iv) a person who is related by blood or marriage to the employee; or (v) a person with whom the employee or employee's family member has or had a dating or engagement relationship.

"**Employees**", individuals who perform services for and under the control and direction of an employer for wages or other remuneration.

"**Family member**", (i) persons who are married to one another; (ii) persons in a substantive dating or engagement relationship and who reside together; (iii) persons having a child in common regardless of whether they have ever married or resided together; (iv) a parent, step-parent, child, step-child, sibling, grandparent or grandchild; or (v) persons in a guardianship relationship.

C. PURPOSES OF THE LAW

The use of this leave must be directly related to abusive behavior such as a need for medical attention, counseling, victim services or legal assistance; to secure housing; obtain a protective order from a court; appear in court or before a grand jury; meet with a district attorney or other law enforcement official; or to attend child custody proceedings or address other issues directly related to the abusive behavior against the employee or family member of the employee.

D. UNPAID LEAVE

According to the law, the employer has sole discretion on whether any leave taken under this section shall be paid or unpaid with the exception of the five paid sick days for domestic violence leave available under the earned sick time law (see below).

E. NOTIFICATION REQUIREMENTS

The law also requires employees to give appropriate advance notice consistent with the employer's leave policy unless the employee faces imminent danger to his/her health or safety.

There is no notice required if there is a threat of imminent danger to the health or safety of an employee or the employee's family member but the employee must notify the employer within three (3) workdays that the leave was taken or is being taken due to domestic violence. Any one of the following people notifying the employer is sufficient:

- the employee,
- family member of the employee or
- employee's counselor, social worker, health care worker,
- member of the clergy, shelter worker,
- legal advocate or other professional who has assisted the employee

F. DOCUMENTATION

Employers cannot take an adverse action against any employee using this leave for any unauthorized absence within 30 days from the unauthorized absence or last day of unauthorized absence as long as the employee provides the necessary documentation to support the absence. Examples of necessary documentation covering either the employee or the employee's family member include:

- A court issued protective order
- An official document from a court, provider or public agency
- A police report or statement of a victim or witness provided to police,
- Documentation attesting to perpetrator's guilt
- Medical documentation of treatment for the abusive behavior
- A sworn statement provided by a professional who has assisted the employee
- A sworn statement from the employee attesting to being a victim of abusive behavior.

G. DOCUMENT RETENTION

Any of the documents provided by the employee to support time off for domestic violence may only be maintained in the employee's employment record for as long as needed for the employer to make a determination as to whether the employee is eligible for leave under this section.

All information related to the employee's leave under this section must be kept confidential by the employer and not disclosed unless:

- requested or consented to, in writing, by the employee
- ordered to be released by a court of competent jurisdiction;
- otherwise required by applicable federal or state law;
- required in the course of an investigation authorized by law enforcement, including, but not limited to, an investigation by the attorney general; or
- necessary to protect the safety of the employee or others employed at the workplace.

Prior to seeking any leave under this statute, an employee must exhaust all his or her available annual or vacation leave, personal leave and sick leave unless the employer waives this requirement.

The law also makes it clear that an employer cannot coerce, interfere with, restrain or deny the exercise of, or any attempt to exercise, any rights provided under this section or to make leave requested or taken hereunder contingent upon whether or not the victim maintains contact with the alleged abuser.

The law is enforced by the attorney general. The new law also requires employers with 50 or more employees to notify each employee of the rights and responsibilities provided by this law including those related to notification requirements and confidentiality.

VI. Massachusetts Earned Sick Time Leave Law

A. OVERVIEW

The Massachusetts Earned Sick Time (EST) law requires businesses with 11 or more employees to offer up to 40 hours of paid sick time per calendar year. Businesses with fewer than 11 employees will be required to offer up to 40 hours of unpaid time to workers each calendar year. The law applies to full-time, part-time seasonal and temporary employees. The Attorney General's office maintains a web page to inform all parties about rights and responsibilities under the earned sick time law. The web site includes the regulations, the statute, an FAQ page that is regularly updated and a poster in multiple languages. The information is available from the Attorney General's website at www.mass.gov/info-details/earned-sick-time.

COMPLIANCE TIP: The regulations offer a more detailed explanation of some of the law's nuances, providing employers with different options on how to comply with the law. Employers should carefully review the regulations, and the frequently asked questions (FAQ's) when adopting, modifying and implementing their earned sick time policy.

B. DEFINITIONS

"**Child**", a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person who has assumed the responsibilities of parenthood. There is no age limit in the definition of a child.

"**Earned paid sick time**", the time off from work that is provided by an employer to an employee as computed under subsection (d) that can be used for the purposes described in subsection (c) and is compensated at the same hourly rate as the employee earns from the employee's employment at the time the employee uses the paid sick time; provided, however, that this hourly rate shall not be less than the effective minimum wage under section 1 of chapter 151.

"**Earned sick time**", the time off from work that is provided by an employer to an employee, whether paid or unpaid, as computed under subsection (d) that can be used for the purposes described in subsection (c).

"**Employee**", any person who performs services for an employer for wage, remuneration, or other compensation, except that employees employed by cities and towns shall only be considered Employees for purposes of this law if this law is accepted by vote or by appropriation as provided in Article CXV of the Amendments to the Constitution of the Commonwealth.

"**Employer**", any individual, corporation, partnership or other private or public entity, including any agent thereof, who engages the services of an employee for wages, remuneration or other compensation, except the United States government shall not be considered an Employer and cities and towns shall only be considered Employers if they elect to be covered.

"**Health care provider**", the meaning given this term by the Family and Medical Leave Act, inclusive, as it may be amended and regulations promulgated thereunder.

"**Parent**", a biological, adoptive, foster or stepparent of an employee or of an employee's spouse; or other person who assumed the responsibilities of parenthood when the employee or employee's spouse was a child.

"**Spouse**", the meaning given this term by the marriage laws of the commonwealth.

C. EARNED SICK TIME USES

Earned sick time may be used by an employee for the following reasons:

- care for the employee's child, spouse, parent, or parent of a spouse, who is suffering from a physical or mental illness, injury, or medical condition that requires home care, professional medical diagnosis or care, or preventative medical care.
- care for the employee's own physical or mental illness, injury, or medical condition that requires home care, professional medical diagnosis or care, or preventative medical care;
- attend a routine medical appointment or a routine medical appointment for the employee's child, spouse, parent, or parent of spouse;
- address the psychological, physical or legal effects of domestic violence; or
- travel to and from an appointment, a pharmacy, or other location related to the purpose for which the time was taken.

D. AMOUNT OF LEAVE

Eligible employees earn a minimum of one hour of sick time for every 30 hours worked up to a maximum of 40 hours per year. Exempt employees will earn paid sick time based upon the assumption of a 40-hour work week, unless their normal work week is less than 40 hours, and in that case their paid time would accrue based upon their normal work week. Employees may begin to use earned sick time on the 90th day after hire.

Employees will be able to carry over up to 40 hours of earned unused sick time to the next calendar year, but may not use more than 40 hours in a calendar year. Employers will not be required to pay employees for earned unused sick time at the end of their employment.

E. DOCUMENTING LEAVE

Employers may require written certification of the need for sick time when more than 24 consecutive work hours of earned sick time are requested. But employers may not delay the taking of, or payment for, earned sick time because they haven't received the certification. The employee does not need to provide documentation for absences of fewer than 24 consecutive work hours.

F. NOTICE TO EMPLOYERS

When the use of earned sick time is foreseeable, the employee shall make a good faith effort to provide notice of this need to the employer in advance of the use of the earned sick time.

G. LIMITATIONS ON EMPLOYERS

It shall be unlawful for any employer to interfere with, restrain, or deny the exercise of, or the attempt to exercise, any right provided under or in connection with this section, including, but not limited to, by using the taking of earned sick time under this section as a negative factor in any employment action such as evaluation, promotion, disciplinary action or termination, or otherwise subjecting an employee to discipline for the use of earned sick time under this section.

H. SICK LEAVE AND PAID TIME OFF (PTO) POLICIES

Employers are not required to provide earned paid sick time if they already provide the same or equivalent sick time benefit under a paid time off or other paid leave policy. Any company policy must also need the accrual provisions of the earned sick time law to be a valid substitute.

I. NOTICE TO EMPLOYEES

Notice of rights under the law must be in English and other languages as required by law. Notice must be posted in a conspicuous location accessible to employees in every establishment where employees with rights under this section work, and provide a hard copy or electronic copy of this notice to all eligible employees, or include the employer's policy on earned sick time or the employer's allowable substitute paid leave policy in any employee manual or handbook. The notice must include the following:

(1) information describing the rights to earned sick time under this section;

(2) information about notices, documentation and any other requirements placed on employees in order to exercise their rights to earned sick time;

(3) information that describes the protections that an employee has in exercising rights under this section;

(4) the name, address, phone number, and website of the Massachusetts Attorney General's office where questions about the rights and responsibilities under this section can be answered; and

(5) information about filing an action under this section.

The law is enforced by the Attorney General's Fair Labor Division. The law also allows employees to file suits in court to enforce their earned sick time rights.

Please see the last page of this guide for links to the regulations and FAQ's on Earned Sick Time.

VII. THE SMALL NECESSITIES LEAVE ACT (State)

A. OVERVIEW

The eligibility criteria for the Small Necessities Leave Act (SNLA) is the same as for the FMLA. The SNLA (MGL ch. 149, §52D) requires that employers of 50 or more employees provide eligible employees with a right to 24 hours of unpaid leave during any 12-month period, for the purposes of:

- Participation in school activities directly related to educational advancement of a son or daughter of the employee, such as parent-teacher conferences or interviewing for a school
- Accompanying the son or daughter of an employee to routine medical or dental appointments, such as check-ups or vaccinations
- Accompanying an elderly relative of the employee to routine medical or dental appointments or appointments for other professional services relating to the elder's care, such as interviewing at nursing or group homes

NOTE: Given the breadth of the statute, the Fair Labor Division of the Massachusetts Attorney General's Office urges in its advisory on the SNLA that employers give a liberal interpretation to the purposes for which leave may be taken.

B. DEFINITIONS

"**Eligible Employees**": Employees of an employer with 50 or more employees who have worked for at least 12 months and at least 1,250 hours for that employer during the 12 months prior to the leave

"**Elderly Relative**": An individual 60 years old or older who is related by blood or marriage to the employee

C. REQUESTING/DESIGNATING SMALL NECESSITIES LEAVE - WHOSE RESPONSIBILITY IS IT?

As with the Family and Medical Leave Act, employees may elect, or employers may require employees, to substitute accrued paid leave for the leave provided under the statute. The law does not, however, require an employer to provide paid leave where it otherwise would not so provide. Violations of the law are punishable by a fine of not more than $500.

D. COMPANY POLICY AND POSTING REQUIREMENTS

The SNLA does not require a posting, nor is there a required form. People interested may find a guidance on SNLA on the Massachusetts Attorney General's website at www.mass.gov/info-details/massachusetts-law-about-small-necessities-act-leave

E. LEAVE GRANTED TO EXEMPT EMPLOYEES

Under both the FMLA and the SNLA, an employer may be required to give leave in the form of reduced hours or partial days off. The FMLA permits employers to withhold pay for such leave and expressly provides that an employer may do so for an exempt employee without affecting the employee's exempt (salaried) status under the Fair Labor Standards Act (FLSA). As a state law, the SNLA does not have the authority to provide an exception to the federal FLSA. Therefore, an employer that reduces the pay of an exempt employee because of a partial-day leave under the SNLA may jeopardize the employee's exempt status under the FLSA.

The U.S. Department of Labor has indicated that when a salary-basis employee is absent from work for a day or more for personal reasons, other than sickness or accident, the exemption will not be affected if deductions are made from the employee's salary for such absences in whole-day increments. For partial-day absences, the U.S. Department of Labor has also indicated that if an employer has a bona fide Paid Leave Plan pursuant to which employees can accrue and use vacation, holiday and/or sick pay, then it is permissible to substitute or reduce the accrued leave in the plan for the time an employee is absent even if it is less than a full day if, by substituting or reducing such leave, the employee receives in payment an amount equal to his or her guaranteed salary.

F. RELATIONSHIP BETWEEN THE FMLA AND SNLA

The Small Necessities Leave Act specifically addresses only the items outlined above. In all other areas, employers should refer to the provisions of the Family and Medical Leave Act for direction and guidance. Leave under the SNLA, however, is in addition to the FMLA.

VIII. MILITARY LEAVE (State)

Under Massachusetts law, an employer, if requested, must give up to 17 days in a calendar year for military leave to a regular employee. The leave may be paid or unpaid depending on company policy, but the leave must be given with reemployment rights for those on military reserve leave and with no loss of seniority (MGL ch. 149, §52A).

IX. PREGNANT WORKERS FAIRNESS ACT

Adopted in 2018, this law requires all Massachusetts employers with six or more employees to make a reasonable accommodation for an employee's pregnancy or pregnancy related condition, such as the need to express milk for a nursing child.

Examples of accommodation include more frequent or longer paid or unpaid breaks; time off to attend to a pregnancy complication or to recover from childbirth with or without pay; acquisition or modification of equipment or seating; temporary transfer to a less strenuous or hazardous position; job restructuring; light duty; private non-bathroom space for expressing breast milk; assistance with manual labor; or a modified work schedule.

The law prohibits:

- taking adverse action against an employee who requests a reasonable accommodation for her pregnancy or lactation.
- denying an employment opportunity (e.g. refusing to hire or promote) if the denial is based on the employer's need to make a reasonable accommodation based on employee's pregnancy;
- requiring an employee to accept an accommodation that the employee chooses not to accept, if it is unnecessary for the employee to perform the essential functions of the job;
- requiring an employee to take leave if another reasonable accommodation may be provided; and
- refusing to hire a person who is pregnant because of the pregnancy or because of a condition related to the person's pregnancy, if the person can perform the essential functions of the position with a reasonable accommodation and that reasonable accommodation would not impose an undue hardship on the business.

An employer may claim an undue hardship if it can show the following: the nature and cost of the needed accommodation; the overall financial resources of the employer; the overall size of the business with respect to the number of employees and the number, type and location of its facilities; and the effect on expenses and resources or any other impact of the accommodation on the employer's business.

Employers may seek documentation about most aspects of the need for one or more reasonable accommodations from an appropriate healthcare or rehabilitation professional but may not seek documentation on the need for four specific accommodations:

- more frequent restroom, food or water breaks;
- seating;
- limits on lifting over 20 pounds; and
- private non-bathroom space for expressing breast milk.

Employers must notify their employees in writing of their rights under this law. It should include statements about the right to be free from discrimination exercising rights under this law and the right to reasonable accommodations for conditions related to pregnancy. The notice may be distributed via employee handbook, pamphlet or other means of notice to all employees including new employees at or prior to the commencement of employment; and an employee who notifies the employer of a pregnancy or an employee who notifies the employer of a condition related to the employee's pregnancy including, but not limited to, lactation or the need to express breast milk for a nursing child not more than 10 days after such notification.

This law is enforced by the Massachusetts Commission Against Discrimination.

X. OTHER MANDATORY LEAVES/BREAKS

A. JURY DUTY AND WITNESS LEAVE

Massachusetts law requires that employees called for jury duty be given time off from work to serve as a juror. A person cannot be disciplined or discharged for serving as a juror.

Under Massachusetts law, jurors traditionally serve one day or one trial, and employers are required to pay their employees in full for the first three days of service. After the third day, the court will pay the juror a daily stipend of $50. It is the employer's option to pay nothing, pay the difference between jury pay and regular pay or pay the employee's full regular pay (M.G.L.c.234A §41, §48, §49).

Persons who are subpoenaed to appear in criminal cases because they are victims of or witnesses to a crime may not be discharged from employment on that basis. Although no law directly addresses whether or not they should be paid for this time, other state statutes provide guidance by saying that individuals should not be penalized for missing work in order to serve as a witness, meaning they should not be docked in pay or otherwise disciplined (M.G.L. c. 268 §14A, §14B).

On the other hand, employees are sometimes subpoenaed to testify at hearings, trials, or other civil proceedings. If the legal issue has no relation to the employee's job, employers may require those employees to take personal or vacation time or may grant unpaid time off.

B. MEAL BREAKS

An unpaid meal break of 30 minutes must be given to each nonexempt employee working more than six hours. The employer may choose to provide pay for the meal break (M.G.L.c.149§100). An employee may waive a meal break if the employee voluntarily states this choice in writing. The employee, however, may revoke the waiver at any time. Any non-exempt employee working through a meal break must be paid for time worked and any time worked must count toward overtime.

The Fair Labor Division of the Massachusetts Attorney General's Office may also grant an exemption from the meal break law if it can be made without injury to the persons affected and for the following reasons:

- By nature of certain industry - glassworks, paper mills, ironworks, etc.
- The continuous nature of the process
- Collective bargaining agreements (M.G.L.c.149§101)

C. NURSING/BREASTFEEDING

Though this federal law has been effectively supplanted by the PWFA described above, it still remains in effect.

As part of the Affordable Care Act employers are now required to provide "reasonable" unpaid breaks for nursing mothers. The health care law amended the Fair Labor Standards Act (FLSA), requiring employers to provide:

1. A reasonable unpaid break every time an employee needs to express breast milk for her nursing child for one year after the child's birth; and
2. A place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public, which the employee may use to express breast milk.

Employers of fewer than 50 employees are exempt from this requirement if it would "impose an undue hardship by causing the employer significant difficulty or expense." The burden is on the employer to demonstrate the undue hardship.

D. VOTING

Employees are entitled to vote in any federal, state, or municipal election. All polling places in Massachusetts must be open a minimum of 13 hours - 7:00 a.m. to 8:00 p.m. - which eliminates most requests for leave to vote (M.G.L. c.149§178; c.53§43). However, Massachusetts law requires that employees who apply be granted a leave of absence to vote during the two hours after the polls open. There is no requirement that the employee be paid for this leave. Employers may request proof that the employee voted.

XI. Discretionary Leaves/Time-off

Many employers offer one or more of the following discretionary leaves as an employee benefit.

A. COFFEE BREAKS/REST PERIODS

There is no requirement for an employer to provide employees with rest periods (e.g., coffee breaks) under either federal or Massachusetts law. The Fair Labor Standards Act (FLSA) requires that if a break is given, and it is for 20 minutes or less, it must be paid. Breaks are part of a company's voluntary benefits practice

B. HOLIDAYS

Massachusetts and federal law recognize a number of holidays. The right of a business to open is based upon the nature of the business (retail, manufacturing, or non-manufacturing, non-retail, etc.) and local statue. In cases where businesses may open, they may be required to obtain permits from local government and in the case of retail, pay time and one-half wages. AIM produces an annual Legal Holidays Calendar which reviews this matter in detail. *Massachusetts now recognizes Juneteenth as a state holiday beginning in 2021.*

C. VACATION

Employers are not required to offer paid vacation. However, once an employer establishes a vacation policy, the employee must be paid for earned vacation either when the vacation is taken, at year-end (unless it is stated that vacation may be carried forward into the next year, or there is a "use it or lose it" provision); or at the time employment terminates. At the time of termination, the employee must be paid all vacation time that is accrued but unused. In the case of a voluntary separation, the employee may be paid on the next pay day. In the case of an involuntary termination, the employee must be paid on the date of termination. It is important that an employer's policy is very specific as to how vacation is accrued and under what circumstances it is deemed to be "due" the employee. This is because the Massachusetts Attorney General's Vacation Advisory states that paid vacation is to be regarded as deferred wages. Thus, a company may want to issue a written statement or policy that clearly separates paid vacations from any paid personal time. If this is not done, all paid personal time will be considered as vacation.

Please contact AIM for assistance in developing an effective vacation and/or paid time off policy.

D. BEREAVEMENT

There is no law requiring an employer offer any bereavement leave. Therefore, employers that offer the benefit are free to define eligibility (i.e. what relationship to the employee prompts the leave) and duration of the leave.

E. SCHEDULED SHUTDOWNS

Employers may elect to voluntarily close operations for a period of time, typically a week. While the employer is able to do so on its on schedule, an employer should try to provide employees as much advance notice as possible. The employer should also determine whether or not employees will be required to use vacation time during the leave or take the leave without pay. If the employer closes for an entire week, the FLSA permits the employer to not pay the exempt employee for that week if no work is performed. Any employer seeking to do this must take steps to ensure that the exempt employee does not perform work remotely during the shutdown week. Employees may become eligible for unemployment insurance benefits during some shutdown periods.

F. SHORT TERM DISABILITY/LONG TERMS DISABILITY

Employers may elect to offer one or both of these benefits. Typically, they are fully or partially funded by the employer. The duration, scope and value of the benefit are determined by the language negotiated in the contract.

G. DISCRETIONARY LEAVE OF ABSENCE

Employers may elect to offer a general leave of absence which may be available to employees on an as needed or permitted basis. Employers may offer it when the circumstances do not fit any of the existing statutory leaves. The duration, wage replacement percent, if any, and ability to combine it with other wage replacement programs depends on the employers established policies.

This Leaves of Absence Reference Guide has been prepared by the staff of Associated Industries of Massachusetts (AIM) and is intended as a quick reference for use by AIM members in understanding state and federal laws, regulations, and policies affecting employers in Massachusetts. The laws and regulations listed reflect the most common areas of concern. Substantive new or updated information added for 2020 is presented in color. The Reference Guide, however, must always be used within the context of each individual company's human resources practices and policies, as well as within the context of any union or other employment agreement. Please consult with your employment law attorney before taking any action based on this Reference Guide. The laws are current as of the time of this Guide's printing. Significant changes will be reflected in subsequent annual updates. Members are encouraged to sign up to receive AIM's bi-weekly e-newsletter, the HR Edge. AIM regularly publishes articles in the Edge updating members on new employment related developments based on statutory and regulatory changes as well as court decisions throughout the year.

XII. Resources

Massachusetts

Earned Sick Time Law: information available from the Attorney General's website.
www.mass.gov/info-details/earned-sick-time

Vacation Guidance: information available from the Attorney General's website
www.mass.gov/files/documents/2016/08/rt/vacation-advisory.pdf

SNLA Guidance: available from the Attorney General's website
www.mass.gov/files/documents/2016/08/rb/small-necessities-advisory.pdf

MA Parental Leave: information available from the MA Commission Against Discrimination website
www.mass.gov/service-details/parental-leave-in-massachusetts

MA Pregnant Workers Fairness Act: information available from the MA Commission Against Discrimination website www.mass.gov/service-details/mcad-guidance-on-the-pregnant-workers-fairness-act

MA Paid Family and Medical Leave: available from the Attorney General's website
www.mass.gov/orgs/department-of-family-and-medical-leave

Federal

Family & Medical Leave Act: poster summarizes the major provisions of the law and informs employees how to file a complaint. Revised version reflects military leave information. Poster must be displayed at all locations even if there are no eligible employees. www.dol.gov/agencies/whd/posters/fmla (*rev. 2016*)

Military Leave: Uniform Service Employment and Re-Employment Rights Act (USERRA) www.dol.gov/vets/programs/userra (*rev. 2008*)

aim
ASSOCIATED
INDUSTRIES OF
MASSACHUSETTS

EMPLOYER HOTLINE
800.470.6277

Monday - Friday | 8:30 AM to 5:00 PM

Real-world employer issues need AIM's real-time solutions. Call today!

Your AIM Corporate membership provides unlimited access to our Human Resource Hotline—a toll-free information and research line, for AIM Members only, staffed by our experienced HR and management professionals.

We can help you address a variety of human resource and management issues—virtually anything related to employee-employer relations, as well as, the proper application of state and federal employment laws and regulations.

AIM's HR Hotline receives hundreds of calls every week regarding topics such as:

- **COVID-19**
- **National Labor Relations Act**
- **Discrimination and Harassment**
- **Benefits and Compensation**
- **Corrective Action/Discipline or Discharge**
- **HR Trends and Benchmarking**
- **Workers Compensation**
- **Unemployment Insurance**
- **Recordkeeping**
- **Paid Family and Medical Leave**
- **Marijuana in the Workplace**
- **Domestic Violence Leave**
- **Wage and Hour Compliance**
- **Pay Equity**