

SENATE No. 2446

The Commonwealth of Massachusetts

In the One Hundred and Eighty-Ninth General Court
(2015-2016)

SENATE, Tuesday, July 19, 2016

The committee on Ways and Means, to whom was referred the Senate Bill establishing a family and medical leave and temporary disability leave insurance program (printed as House, No. 4351),-- reports, recommending that the same ought to pass with an amendment substituting a new draft with the same title (Senate, No. 2446).

For the committee,
Karen E. Spilka

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FAMILY AND MEDICAL LEAVE

Section 1. As used in this chapter, the following words shall have the following meanings unless the context clearly requires otherwise:

“Average weekly wage”, as provided in subsection (w) of section 1 of chapter 151A and shall be calculated using the base period earnings as defined in subsection (a) of said section 1 of said chapter 151A.

“Benefit year”, benefit year as defined in subsection (c) of section 1 of chapter 151A.

“Child”, a biological, adopted or foster child, a stepchild, a legal ward or a child of a person standing in loco parentis who is: (i) under 18 years of age; or (ii) at least 18 years of age and incapable of self-care because of an intellectual or physical disability.

“Contributions”, payments made by an employer or employee to the family and Employment Security Trust Fund established in section 8.

“Department”, the department of family and medical leave established in section 3.

“Director”, the director of the department of family and medical leave.

“Employee”, as provided in subsection (h) section 1 of chapter 151A; provided, however, that family child care providers, as defined in subsection (a) of section 17 of chapter 15D, shall be deemed employees for the purposes of this chapter; and provided further, that a person hired to temporarily replace an employee on family care leave or temporary disability leave shall not be considered an employee for the purposes of this chapter.

32 “Employer”, as provided in subsection (i) of section 1 of chapter 151A; provided,
33 however, that for purposes of this chapter, the department of early education and care shall be
34 deemed the employer of family child care providers, as defined in subsection (a) of section 17 of
35 chapter 15D, and the PCA quality home care workforce council established in section 71 of
36 chapter 118E shall be the employer of personal care attendants, as defined in section 70 of said
37 chapter 118E; and provided further, that a political subdivision or its instrumentalities shall not
38 be subject to this chapter unless it adopts this chapter under section 10.

39 “Employment”, employment as defined in subsection (k) section 1 of chapter 151A.

40 “Employment benefits”, benefits provided or made available to employees by an
41 employer including, but not limited to, group life insurance, health insurance, disability
42 insurance, sick time, annual or vacation leave, educational benefits and pensions or other
43 retirement accounts.

44 “Family member”, spouse, child, parent or an individual who stands in loco parentis to an
45 employee.

46 “Family care benefits”, wages paid to an employee on family care leave.

47 “Family care leave”, leave taken by an employee from employment to provide care for a
48 family member for 1 of the following reasons: (i) to bond with the employee's child during the
49 first 12 months after the child's birth or the first 12 months after the placement of the child for
50 adoption or foster care with the employee; or (ii) a serious health condition of a family member.

51 “Health care provider”, health care provider as defined in section 1 of chapter 111.

52 “Premium”, the amount paid by the employer, the employee or an independent contractor
53 into the family and employment security trust fund to receive family care benefits and temporary
54 disability benefits.

55 “Serious health condition”, an illness, injury, impairment or other physical or mental
56 condition that involves either: (i) inpatient care in a hospital, hospice or residential medical
57 facility; or (ii) continuing treatment by a health care provider.

58 “State average weekly wage”, the average weekly wage in the commonwealth as
59 determined under subsection (a) of section 29 of chapter 151A.

60 “Temporary disability benefits”, wages to an employee who is on temporary disability
61 leave from employment.

62 “Temporary disability leave”, leave taken by an employee from employment due to a
63 serious health condition of the employee that renders the employee unable to perform the
64 functions of the employee’s position.

65 “Wages”, wages as defined in subsection (s) of section 1 of chapter 151A.

66 “Weekly benefit amount”, the amount of wages paid to an employee on a weekly basis
67 while on temporary disability leave or family care leave.

68 Section 2. (a) There shall be a department of family and medical leave within the
69 executive office of labor and workforce development which shall be administered by a director.
70 The director shall oversee the administration of family care benefits and temporary disability
71 benefits. The director may hire staff, subject to the approval of the secretary of labor and
72 workforce development, as needed to fulfill the powers and duties of the department.

73 The department shall administer claims for temporary disability benefits and family care
74 benefits and implement an appeals process for claims denied. The department may also
75 investigate any claims and refer violations of this chapter to the attorney general. Claims for
76 temporary disability benefits and family care benefits shall be filed with the department and
77 handled under the procedures prescribed in sections 1, 10, 11, 12, 14, 15 and 16 of chapter 30A.

78 The department shall inform employees and employers about the availability of
79 temporary disability leave and benefits and family care leave and benefits, the requirements for
80 receiving such leave and benefits and how to apply for such leave and benefits. The department
81 shall maintain a website and phone line to provide employers and employees with such
82 information, in addition to information related to the status of a filed claim for temporary
83 disability benefits or family care benefits.

84 (b) The attorney general shall be responsible for the enforcement of this chapter and may
85 promulgate rules and regulations to carry out this chapter; provided, however, that penalties or
86 violations recovered under this chapter shall be deposited in the Family and Employment
87 Security Trust Fund.

88 (c) All presumptions shall be made in favor of the availability of leave and the payment
89 of family care benefits and temporary disability benefits under this chapter.

90 Section 3. (a) An employee shall be eligible for temporary disability leave or family care
91 leave if the employee has accrued at least 1,250 hours of service for an employer. A participating
92 independent contractor shall be eligible for temporary disability leave or family care leave if the
93 independent contractor has paid a premium for at least 1 quarter during the past 12-month base
94 period prior to the claim.

95 An employee or independent contractor shall be eligible for a maximum of 16 weeks of
96 family care leave in a benefit year.

97 An employee or independent contractor shall be eligible for temporary disability leave for
98 a maximum of 26 weeks in a benefit year. An employee or independent contractor may take an
99 aggregate of not more than 26 weeks of temporary disability leave and family care leave under
100 this chapter in the same benefit year.

101 (b) An employee may take leave under this chapter intermittently or on a reduced leave
102 schedule, provided that the employee and the employer agree to the intermittent or reduced leave
103 schedule and document it in a manner determined by the department. The employer shall engage
104 in a timely, good faith and collaborative process with the employee to determine a reasonable
105 intermittent or reduced leave schedule.

106 (c) An employee or independent contractor on temporary disability leave or family care
107 leave shall receive a weekly benefit amount, as determined under section 4.

108 (d) An employee who has taken temporary disability leave or family care leave shall be
109 restored to the employee's previous position, or to a substantially similar position, with the same
110 status, pay, employment benefits, length of service credit and seniority the employee had at the
111 beginning of the leave. An employer shall not be required to restore an employee who has taken
112 temporary disability leave or family care leave to the previous or to a substantially similar
113 position if other employees of equal length of service credit and status in the same or
114 substantially similar positions have been laid off due to economic conditions or other changes in
115 operating conditions affecting employment during the period of leave; provided, however, that

116 the employee shall be extended the same rights or benefits, if any, extended to employees of
117 equal length of service in the equivalent position.

118 (e) The taking of temporary disability leave or family care leave shall not affect an
119 employee's right to receive accrued vacation time, sick time, bonuses, advancement, seniority,
120 length of service credit or other employment benefits, plans or programs for which the employee
121 was eligible at the date of the employee's leave. The employer shall continue to provide for and
122 contribute to the employee's employment-related health insurance benefits, if any, for the
123 duration of an employee's temporary disability leave or family care leave under the same terms
124 and conditions as those in effect prior to the employee's leave.

125 (f) Nothing in this chapter shall be construed to affect a collective bargaining agreement,
126 company policy or other federal, state or municipal law that provides greater or additional rights
127 to temporary disability leave or family care leave than those provided under this chapter.

128 (g) Nothing in this chapter shall be construed to permit an employer to compel an
129 employee to exhaust rights to any sick, vacation or personal time prior to or while taking leave
130 under this chapter.

131 (h) Leave taken under this chapter shall run concurrently with leave taken under either
132 section 105D of chapter 149 or the federal Family Medical Leave Act, 29 U.S.C. 2611, et. seq.

133 Section 4. (a) No temporary disability benefits or family care benefits shall be paid
134 during the first 7 consecutive calendar days of such leave. An employee may, but shall not be
135 required to, utilize accrued sick, vacation or any other paid time off during the first 7 consecutive
136 calendar days of such leave. An employee or independent contractor who receives temporary

137 disability benefits due to pregnancy and requests family care leave for the birth of a child shall
138 receive family care benefits immediately upon approval of the family care leave.

139 (b) The weekly benefit amount for an employee or independent contractor on temporary
140 disability leave or family care leave shall be replaced at a rate of 50 per cent of an employee's or
141 independent contractor's average weekly wage; provided, however, that the maximum weekly
142 benefit amount shall not exceed \$1,000 dollars per week.

143 An employee on an intermittent or reduced leave schedule shall receive a prorated
144 weekly benefit amount, as determined by the department.

145 (c) The weekly benefit amount shall be reduced by the amount of wages or wage
146 replacement an employee receives while on temporary disability leave or family care leave under
147 any of the following: (i) a government program or law including, but not limited to,
148 unemployment insurance, worker's compensation other than for permanent partial disability
149 incurred prior to the temporary disability claim or under other state or federal temporary or
150 permanent disability benefits law; or (ii) a permanent disability policy or program of an
151 employer.

152 The weekly benefit amount shall be reduced by the amount of wage replacement an
153 employee receives while on temporary disability leave or family care leave under any of the
154 following, if the aggregate amount an employee would receive exceeds the employee's average
155 weekly wage: (i) a temporary disability policy or program of an employer; or (ii) a paid sick,
156 vacation, family, or medical leave policy of an employer.

157 Section 5. (a) Each employer shall keep posted in a conspicuous place on each of its
158 premises a workplace notice prepared by the department providing notice of benefits available

159 under this chapter. The workplace notice shall be issued in English, Spanish, Chinese, Haitian
160 Creole, Italian, Portuguese, Vietnamese, Laotian, Khmer, Russian and any other language that is
161 the primary language of at least 10,000 or ½ of 1 per cent of all residents of the commonwealth.
162 Each employer with 5 or more employees whose primary language is not English shall post the
163 workplace notice in the primary language of that workplace, if such notice is available from the
164 department.

165 Each employer shall issue to each employee, not more than 30 days from the beginning
166 date of the employee's employment, the following written information provided or approved by
167 the department: (i) an explanation of the availability of temporary disability leave and benefits
168 and family care leave and benefits provided under this chapter; (ii) the employee's contribution
169 amount and obligations under this chapter; (iii) the name and mailing address of the employer;
170 (iv) the identification number assigned to the employer by the department; (v) instructions on
171 how to file a claim for temporary disability benefits or family care benefits; (vi) the address and
172 telephone number of the department; and (vii) any other information deemed necessary by the
173 department. Delivery is made when an employee provides written acknowledgement of receipt
174 of the information.

175 Any employer who fails to comply with this subsection shall be punished, for a first
176 violation, by a fine of not less than \$50 and not more than \$300 and for a subsequent violation by
177 a fine of not less than \$300 and not more than \$1,000. The employer shall have the burden of
178 demonstrating compliance with this subsection.

179 (b) The employee shall give at least 2 weeks' notice to the employer of the anticipated
180 starting date of the leave, the anticipated length of the leave and the expected date of return or

181 shall provide notice as soon as practicable if the delay is for reasons beyond the employee's
182 control. If an employer fails to provide notice of this chapter as required under subsection (a), the
183 employee's notice requirement shall be waived.

184 Section 6. (a) An employee taking family care leave or temporary disability leave under
185 this chapter may be required to provide certification to the employer and the department. An
186 employee shall provide certification supporting a request for leave under this chapter as soon as
187 practicable; provided, however, that an employer shall not delay temporary disability leave or
188 family care leave or delay payment of benefits for the period in which leave is taken for
189 employees entitled to a weekly benefit under section 3, if the employer has not yet received the
190 certification.

191 The department shall process the notification and certification upon receipt and provide
192 notice to the employer and employee of its determination of the employee's eligibility for
193 benefits. The department shall provide a process for independent contractors to provide notice
194 and certification to receive benefits. An independent contractor, employer or employee may
195 appeal the departments' eligibility determination, according to the process established by the
196 department.

197 Certification for temporary disability leave shall include, but not be limited to: (i) the date
198 on which the serious health condition commenced; (ii) the expected period of time the employee
199 plans to be on temporary disability leave; (iii) a description of the serious health condition from a
200 health care provider as required by the department; and (iv) a statement from the health care
201 provider confirming that the employee is unable to work due to the serious health condition.

202 Certification for family care leave shall include, but not be limited to: (i) the expected
203 period of time the employee plans to take family care leave; (ii) a statement affirming that the
204 employee is needed to care for a family member or bond with a child; and (iii) relevant medical
205 information provided by a health care provider.

206 The department may request updated information, including updated medical
207 information, from an independent contractor or employee to ensure accurate updates of the actual
208 period of temporary disability leave or family care leave. An independent contractor or employee
209 shall provide additional notification to the department and employer, if applicable, of the actual
210 date an independent contractor or employee returns to work and is no longer collecting benefits.

211 The department shall develop certification forms, as well as any other necessary forms or
212 notices, for temporary disability leave and family care leave and make them available on the
213 department's website.

214 (b) Medical or health information required under this section shall be treated as
215 confidential and not disclosed except with permission from the employee who provided it unless
216 disclosure is otherwise required by law. Nothing in this section shall be construed to require an
217 employee to provide as certification any information from a health care provider in violation of
218 section 1177 of the Social Security Act, 42 U.S.C. 1320d-6, or the regulations promulgated
219 under section 264(c) of the Health Insurance Portability and Accountability Act of 1996, 42
220 U.S.C. 1320d-2.

221 (c) An employee shall not be eligible to receive temporary disability benefits or family
222 care benefits if the director finds that the employee, for the purpose of obtaining these benefits,
223 has willfully made a false statement or representation, with actual knowledge of the falsity

224 thereof or has willfully withheld a material fact concerning the facts required to be certified
225 pursuant to this subsection. If found ineligible by the department, an employee may be liable for
226 the repayment of any received temporary disability benefits or family leave benefits to the
227 Family and Employment Security Trust Fund.

228 Section 7. (a) An employer shall secure temporary disability benefits and family care
229 benefits for employees by making contributions, solely or jointly with employees, to the Family
230 and Employment Security Trust Fund established in section 8 in the form and manner
231 determined by the department. Contributions shall be proportionate to the employee's salary;
232 provided, however, that the maximum earnings upon which a contribution is calculated shall not
233 exceed the amount of earnings subject to taxation for a given year under the federal Social
234 Security's Old-Age, Survivors, and Disability Insurance program.

235 (b) An independent contractor may secure temporary disability benefits and family care
236 benefits by making contributions to the Family and Employment Security Trust Fund established
237 in section 8 in the form and manner determined by the department; provided, however, that an
238 independent contractor shall be responsible for the full contribution amount paid by an employer
239 and employee jointly.

240 (c) An employer may require an employee to provide up to 50 per cent of the contribution
241 required by this section. An employer may contribute an amount that is greater than the amount
242 contributed by the employee.

243 Section 8. (a) There shall be a Family and Employment Security Trust Fund, which shall
244 be administered by the director exclusively for the purposes of this chapter. The trust fund shall
245 consist of: (i) employer and employee contributions collected pursuant to section 6 together with

246 any interest earned thereon; (ii) property or securities acquired through the use of money
247 belonging to the trust fund together with any earnings of such property and securities; (iii) fines
248 and penalties collected under this chapter; and (iv) other money received from any source,
249 including any grants, gifts, bequests or money authorized by the general court or other party
250 specifically designated to be credited to the trust fund. Money remaining in the fund at the end of
251 a fiscal year shall not revert to the General Fund. Amounts credited to the fund shall not be
252 subject to further appropriation. The trust fund shall maintain an annualized amount of at least
253 140 per cent of the previous year's expenditure.

254 (b) The administration of this fund shall be supported through the fund and the director
255 shall pay all expenses incurred in administering this chapter; provided, however, that the costs of
256 administering the benefits under this chapter shall not exceed 5 per cent of the amount deposited
257 under subsection (a) for each fiscal year.

258 (c) The director shall expend money from the trust fund to provide weekly benefits under
259 section 4. Temporary disability benefits and family care benefits shall be paid from the trust fund
260 to employees or participating independent contractors. An employer's bankruptcy or
261 noncompliance with this chapter shall not interfere with an employee's ability to collect
262 temporary disability benefits and family care benefits under this chapter. Temporary disability
263 benefits or family care benefits paid from the trust fund to such an employee may be recovered
264 through bankruptcy proceedings or from the noncomplying employer. The director shall
265 institute administrative and legal action to recover temporary disability benefits or family care
266 benefits paid through the trust fund.

267 (d) To accumulate funds for the payment of temporary disability benefits and family care
268 benefits and administrative costs, employers and employees or participating independent
269 contractors shall pay an amount determined by the director and based on the employee's salary
270 or the independent contractor's income. Contributions made under section 7 shall be transmitted
271 to the trust fund in the manner determined by the department.

272 (e) Annually, not later than October 1, the director shall certify to the secretary of labor
273 and workforce development the estimated costs for benefits and administrative services provided
274 by the department for the coming year. Rates of employer contribution to the trust fund shall be
275 adjusted annually consistent with the needs of the operation of the trust fund.

276 (f) An employer to whom the department has sent a request for wage and employment
277 information for an employee claiming temporary disability benefits or family care benefits shall
278 complete and file that information not later than 10 days after the date the request was sent. If an
279 employer does not respond within those 10 days, that employer may be held liable for any
280 related costs incurred by the department.

281 Section 9. (a) It shall be unlawful for an employer to retaliate by discharging, firing,
282 suspending, expelling, disciplining or in any other manner discriminating against an employee
283 for exercising a right to which such employee is entitled under this chapter or to interfere with
284 the exercise of a right to which such employee is entitled under this chapter.

285 (b) It shall be unlawful for an employer to retaliate by discharging, firing, suspending,
286 expelling, disciplining or in any other manner discriminating against an employee who has filed
287 a complaint or instituted a proceeding or caused a proceeding to be instituted under this section,

288 has testified or is about to testify in an inquiry or proceeding or has given or is about to give
289 information connected to an inquiry or proceeding relating to this chapter.

290 (c) Any negative change in the seniority, status, employment benefits, pay or other terms
291 or conditions of employment of an employee who has been restored to a position pursuant to this
292 chapter that occurs within 6 months of such restoration or of an employee who has participated
293 in proceedings or inquiries pursuant to this section within 6 months of the termination of
294 proceedings shall be presumed to be retaliation under this section.

295 (d) An employee or former employee aggrieved by a violation of this section may, within
296 2 years, institute a civil action in the superior court. A party to the action shall be entitled to a
297 jury trial. All remedies available in common law tort actions shall be available to prevailing
298 plaintiffs and shall be in addition to any legal or equitable relief provided in this section. The
299 court may: (i) issue temporary restraining orders or preliminary or permanent injunctions to
300 restrain continued violations of this section; (ii) reinstate the employee to the same position held
301 before the retaliatory action or to an equivalent position; (iii) reinstate full fringe benefits and
302 seniority rights to the employee; (iv) compensate the employee for 3 times the lost wages,
303 benefits and other remuneration and the interest thereon; and (v) order payment by the employer
304 of reasonable costs and attorneys' fees.

305 (e) (1) Except as provided in paragraph (2), in any action brought by an employee
306 under subsection (d), if the court finds the action was without basis in law or in fact, the court
307 may award reasonable attorneys' fees and court costs to the employer.

308 (2) An employee shall not be assessed attorneys' fees under paragraph (1) if, after
309 exercising reasonable and diligent efforts after filing a suit, the employee moves to dismiss the

310 action against the employer or files a notice agreeing to a voluntary dismissal within a reasonable
311 time after determining that the employer would not be found liable for damages.

312 (f) Nothing in this section shall be deemed to diminish the rights, privileges or remedies
313 of an employee under any other federal or state law or regulation or under any collective
314 bargaining agreement or employment contract; provided, however, that the institution of a
315 private action in accordance with subsection (d) shall be deemed a waiver by the plaintiff of the
316 rights and remedies available to the plaintiff for the actions of the employer under any other
317 contract, collective bargaining agreement, state law, rule or regulation or under the common law.

318 (g) An employer shall conspicuously display notices reasonably designed to inform its
319 employees of their protection and obligations under this section and use other appropriate means
320 to keep its employees so informed.

321 Section 10. A city, town or authority may adopt this chapter upon a majority vote of the
322 local legislative body or the governing body. For the purposes of this section, a vote of the
323 legislative body shall take place in a city by a vote the city council subject to its charter, in a
324 town by a vote at a town meeting and for an authority by a vote of its governing body.

325 Section 11. The department shall promulgate regulations to implement this chapter.

326 SECTION 4. Subsection (b) of section 4 of chapter 175M of the General Laws, inserted
327 by section 3, is hereby amended by striking out the figure “50” and inserting in place thereof the
328 following figure:- 70.

329 SECTION 5. Said subsection (b) of said section 4 of said chapter 175M is hereby further
330 amended by striking out the figure “70”, inserted by section 4, and inserting in place thereof the
331 following figure:- 90.

332 SECTION 6. The first paragraph of said subsection (b) of said section 4 of said chapter
333 175M is hereby amended by adding the following sentence:- The department shall annually
334 adjust the maximum weekly benefit amount to reflect changes in the United States Bureau of
335 Labor Statistics Consumer Price Index for the Boston-Cambridge-Quincy consolidated
336 metropolitan statistical area or its successor index.

337 SECTION 7. Sections 1 to 3, inclusive shall take effect on January 1, 2018.

338 SECTION 8. Section 4 shall take effect on January 1, 2019.

339 SECTION 9. Section 5 and 6 shall take effect on January 1, 2020.