SENATE . . . . . No. 2477

Senate, July 30, 2016 -- Text of the Senate Bill establishing a family and medical leave and temporary disability leave insurance program (Senate, No. 2477) (being the text of Senate, No. 2446, printed as amended)

The Commonwealth of Massachusetts

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

An Act establishing a family and medical leave and temporary disability leave insurance program.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

SECTION 1. Section 150 of chapter 149 of the General Laws, as appearing in the 2014 Official Edition, is hereby amended by inserting after the figure "151", in line 41, the following words:- or of chapter 175M.

SECTION 2. Subsection (c) of section 46 of chapter 151A of the General Laws is hereby amended by striking out clause (3), inserted by section 7 of chapter 70 of the acts of 2016, and inserting in place thereof the following clause:-

(3) to the heads of the departments of career services, transitional assistance, revenue, veterans' services, family and medical leave and the office of Medicaid and industrial accidents, information necessary in the performance of their official duties.

SECTION 3. The General Laws are hereby amended by inserting after chapter 175L the following chapter:-

12 CHAPTER 175M.

13 FAMILY AND MEDICAL LEAVE

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

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

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

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

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

25 "Department", the department of family and medical leave established in section 3.

26 "Director", the director of the department of family and medical leave.

27 "Employee", as provided in subsection (h) section 1 of chapter 151A; provided, however,
28 that family child care providers, as defined in subsection (a) of section 17 of chapter 15D, shall
29 be deemed employees for the purposes of this chapter; and provided further, that a person hired
30 to temporarily replace an employee on family care leave or temporary disability leave shall not
31 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; (ii) a serious health condition of a family member; or
51 (iii) because of a qualifying exigency pursuant to the Family and Medical Leave Act, 29 U.S.C.
52 2612(a)(1)(e), arising out of the family member of the employee being on active duty in the
53 armed forces of the United States.

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

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

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

61 “Small business employer”, an employer with 10 or fewer employees.

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

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

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

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

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

72 Section 2. (a) There shall be a department of family and medical leave within the
73 executive office of labor and workforce development which shall be administered by a director.

74 The director shall oversee the administration of family care benefits and temporary disability
75 benefits. The director may hire staff, subject to the approval of the secretary of labor and
76 workforce development, as needed to fulfill the powers and duties of the department.

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

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

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

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

94 Section 3. (a) An employee shall be eligible for temporary disability leave or family care
95 leave if the employee has accrued at least 1,250 hours of service for an employer. A participating

96 independent contractor shall be eligible for temporary disability leave or family care leave if the
97 independent contractor has paid a premium for at least 2 consecutive quarters during the past 12-
98 month base period prior to the claim.

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

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

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

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

112 (d) An employee who has taken temporary disability leave or family care leave shall be
113 restored to the employee's previous position, or to a substantially similar position, with the same
114 status, pay, employment benefits, length of service credit and seniority the employee had at the
115 beginning of the leave. An employer shall not be required to restore an employee who has taken
116 temporary disability leave or family care leave to the previous or to a substantially similar
117 position if other employees of equal length of service credit and status in the same or

118 substantially similar positions have been laid off due to economic conditions or other changes in
119 operating conditions affecting employment during the period of leave; provided, however, that
120 the employee shall be extended the same rights or benefits, if any, extended to employees of
121 equal length of service in the equivalent position.

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

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

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

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

137 Section 4. (a) No temporary disability benefits or family care benefits shall be paid
138 during the first 7 consecutive calendar days of such leave. An employee may, but shall not be
139 required to, utilize accrued sick, vacation or any other paid time off during the first 7 consecutive

140 calendar days of such leave. An employee or independent contractor who receives temporary
141 disability benefits due to pregnancy and requests family care leave for the birth of a child shall
142 receive family care benefits immediately upon approval of the family care leave.

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

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

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

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

161 Section 5. (a) Each employer shall keep posted in a conspicuous place on each of its
162 premises a workplace notice prepared by the department providing notice of benefits available
163 under this chapter. The workplace notice shall be issued in English, Spanish, Chinese, Haitian
164 Creole, Italian, Portuguese, Vietnamese, Laotian, Khmer, Russian and any other language that is
165 the primary language of at least 10,000 or ½ of 1 per cent of all residents of the commonwealth.
166 Each employer with 5 or more employees whose primary language is not English shall post the
167 workplace notice in the primary language of that workplace, if such notice is available from the
168 department.

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

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

183 (b) The employee shall give at least 2 weeks' notice to the employer of the anticipated
184 starting date of the leave, the anticipated length of the leave and the expected date of return or
185 shall provide notice as soon as practicable if the delay is for reasons beyond the employee's
186 control. If an employer fails to provide notice of this chapter as required under subsection (a), the
187 employee's notice requirement shall be waived.

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

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

201 Certification for temporary disability leave shall include, but not be limited to: (i) the date
202 on which the serious health condition commenced; (ii) the expected period of time the employee
203 plans to be on temporary disability leave; (iii) a description of the serious health condition from a

204 health care provider as required by the department; and (iv) a statement from the health care
205 provider confirming that the employee is unable to work due to the serious health condition.

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

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

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

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

225 (c) An employee shall not be eligible to receive temporary disability benefits or family
226 care benefits if the director finds that the employee, for the purpose of obtaining these benefits,
227 has willfully made a false statement or representation, with actual knowledge of the falsity
228 thereof or has willfully withheld a material fact concerning the facts required to be certified
229 pursuant to this subsection. If found ineligible by the department, an employee may be liable for
230 the repayment of any received temporary disability benefits or family leave benefits to the
231 Family and Employment Security Trust Fund.

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

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

244 (c) An employer may require an employee to provide up to 50 per cent of the contribution
245 required by this section; provided, however, that a small business employer may require an

246 employee to provide up to 100 per cent of the contribution required by this section. An employer
247 may contribute an amount that is greater than the amount contributed by the employee.

248 Section 8. (a) There shall be a Family and Employment Security Trust Fund, which shall
249 be administered by the director exclusively for the purposes of this chapter. The trust fund shall
250 consist of: (i) employer and employee contributions collected pursuant to section 6 together with
251 any interest earned thereon; (ii) property or securities acquired through the use of money
252 belonging to the trust fund together with any earnings of such property and securities; (iii) fines
253 and penalties collected under this chapter; and (iv) other money received from any source,
254 including any grants, gifts, bequests or money authorized by the general court or other party
255 specifically designated to be credited to the trust fund. Money remaining in the fund at the end of
256 a fiscal year shall not revert to the General Fund. Amounts credited to the fund shall not be
257 subject to further appropriation. The trust fund shall maintain an annualized amount of at least
258 140 per cent of the previous year's expenditure.

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

263 (c) The director shall expend money from the trust fund to provide weekly benefits under
264 section 4. Temporary disability benefits and family care benefits shall be paid from the trust fund
265 to employees or participating independent contractors. An employer's bankruptcy or
266 noncompliance with this chapter shall not interfere with an employee's ability to collect
267 temporary disability benefits and family care benefits under this chapter. Temporary disability

268 benefits or family care benefits paid from the trust fund to such an employee may be recovered
269 through bankruptcy proceedings or from the noncomplying employer. The director shall
270 institute administrative and legal action to recover temporary disability benefits or family care
271 benefits paid through the trust fund.

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

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

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

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

290 (b) It shall be unlawful for an employer to retaliate by discharging, firing, suspending,
291 expelling, disciplining or in any other manner discriminating against an employee who has filed
292 a complaint or instituted a proceeding or caused a proceeding to be instituted under this section,
293 has testified or is about to testify in an inquiry or proceeding or has given or is about to give
294 information connected to an inquiry or proceeding relating to this chapter.

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

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

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

313 (2) An employee shall not be assessed attorneys' fees under paragraph (1) if, after
314 exercising reasonable and diligent efforts after filing a suit, the employee moves to dismiss the
315 action against the employer or files a notice agreeing to a voluntary dismissal within a reasonable
316 time after determining that the employer would not be found liable for damages.

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

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

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

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

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

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

337 SECTION 6. The first paragraph of said subsection (b) of said section 4 of said chapter
338 175M is hereby amended by adding the following sentence:- The department shall annually
339 adjust the maximum weekly benefit amount to reflect changes in the United States Bureau of
340 Labor Statistics Consumer Price Index for the Boston-Cambridge-Quincy consolidated
341 metropolitan statistical area or its successor index.

342 SECTION 7. The department of family and medical leave shall promulgate regulations to
343 implement this act not later than January 1, 2018.

344 SECTION 7A. Sections 1, 2 and proposed sections 3 to 9, inclusive, of proposed chapter
345 175M of the General Laws shall take effect on January 1, 2018.

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

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