

HOUSE No. 3703

The Commonwealth of Massachusetts



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To the Honorable Senate and House of Representatives,

Pursuant to Section 5 of Article LXIII, as amended by Article XC, Section 4 of the Amendments to the Constitution, I am today signing House Bill No. 90, “An Act financing a program for improvements to the Unemployment Insurance Trust Fund and providing relief to employers and workers in the Commonwealth” and returning certain sections for your consideration.

We pride ourselves on making Massachusetts a great place to live, work, and raise a family. My Administration is proud of the work we have done in collaboration with the Legislature since 2015 to protect Massachusetts workers and to create economic opportunity for large and small businesses. In particular, over the last year, we have worked together to provide relief and stability to Massachusetts businesses and workers during the COVID pandemic. Today, we are pleased to continue that partnership by signing into law several key initiatives to support the Commonwealth’s employers and employees who have been faced with unprecedented challenges as a result of the pandemic.

This legislation takes a thoughtful and comprehensive approach in delivering critical relief to facilitate economic recovery for the people of Massachusetts. To support business recovery, this legislation provides immediate Unemployment Insurance (UI) rate relief by freezing the experience rate of employers for calendar years 2021 and 2022 at rate schedule “E,” thereby slowing the annual employer UI contribution growth rate. Without this freeze employer contribution rates would be based on the much higher rate schedule “G.”

We recognize that relief to businesses must not come at the expense of the solvency of the UI Trust Fund at a time when the finances of the Commonwealth's unemployment benefit system have been stressed at unprecedented levels. Thus, this legislation authorizes the Commonwealth to issue special obligation bonds. These bonds, secured by a special assessment on employers, will repay the federal advances made to the Commonwealth from the federal unemployment account for the fiscal years 2020 to 2025 and establish positive trust fund solvency with which to pay benefits and other related expenses. Given the significant increase in unemployment claims resulting from the pandemic, these federal advances were necessary to assure payment of all UI compensation due. Utilizing capital markets for the purposes of repaying these advances enables costs to be spread out in a way that provides upfront relief to employers while immediately restoring trust fund solvency.

Following a year of historic levels of unemployment and financial stress, this legislation also creates a number of tax relief measures that help to ease taxpayers' burden. Specifically, this legislation excludes federal Paycheck Protection Program (PPP) loans and Economic Injury Disaster Loan (EIDL) advances from taxable income for individual taxpayers. It also makes the first \$10,200 in unemployment compensation received in 2020 and 2021 nontaxable for taxpayers below 200% of the Federal Poverty Level.

In addition to those critical UI and tax relief measures, the Legislature included a provision which would require employers to provide paid sick leave to their employees for certain COVID-related reasons. Similar (although not identical) to a federal COVID paid leave program, employers would need to offer approximately a week's paid leave to employees who are sick with, isolated or quarantined due to COVID, or are securing immunization, or caring for family members in the same circumstances. This will ensure that employees and their families are provided necessary protections from the spread of COVID-19 and it is a goal that I support. The mandate aptly addresses needs – immunization, isolation, and quarantine – that were not contemplated when the state's Paid Family and Medical Leave program was designed.

While I am signing this legislation almost in its entirety, I am also recommending certain changes to two areas of the sick leave law that will simplify implementation for employers and provide increased certainty for employees. First, I recommend that the state mandate fit squarely within the footprint of the federal Emergency Paid Sick Leave program, so that small and medium-sized employers who are compliant with federal requirements can be assured they also meet the state mandate. Also, in concert with the federal program, we propose that compensation be no less than an employee's regular rate of pay, up to \$850, or two-thirds of the regular rate of pay for family leave. Including this additional clarity will raise the floor for many workers who stand to benefit from this law. While these differences and certain technical adjustments are subtle, they will reduce onerous compliance work for employers already burdened by economic challenges brought on by the global pandemic.

Second, I recommend that funding for the leave program be converted to a tax credit of \$40 per employee (regardless of whether the employee takes leave) for employers who lack access to the tax credit available under the federal program. As currently designed, the proposed sick leave program could be abruptly suspended when the \$75 million allotted to fund it runs out, which would create uncertainty for both employers and workers. With my amendment, while the funding level of \$75 million would remain the same, the program would have a set end date, providing predictability for employers and employees alike. Employers will no longer need to report leave in near real time to the Commonwealth, and employees will have the assurance that the leave benefit will remain available through September.

Importantly, converting to a tax credit will also avoid privacy law challenges. In the legislation's current form, employers would be collecting medical information about their employees, records that must be handled in compliance with HIPAA, FMLA, and other federal and state laws governing the privacy of medical records, a responsibility that already exists in the context of employer management of sick leave. They would then be required to transmit such data to the Executive Office for Administration and Finance, creating a troubling information sharing arrangement for sensitive personal and medical data. Transitioning this benefit to a tax credit will achieve the same goals, while eliminating such privacy concerns and improving predictability for employees and employers.

For the reasons stated above and pursuant to Article LVI, as amended by Article XC, Section 3 of the Amendments to the Constitution of the Commonwealth of Massachusetts, I recommend Sections 13 to 17, inclusive, be amended by striking out the sections in their entirety and inserting in place thereof the following 5 sections:-

SECTION 13. The following definitions shall apply to sections 13 to 17, inclusive, and shall have the following meanings unless the context clearly requires otherwise:

“Child”, a biological, adopted or foster child, a stepchild or legal ward, a child to whom the employee stands in loco parentis or a person to whom the employee stood in loco parentis when the person was a minor child.

“COVID-19 Massachusetts emergency paid sick leave”, paid time-off that is compensated by an employer at the employee's regular rate of pay, and with the same employment benefits to which the employee is entitled from such employer as a term of the employee's employment, for the purposes described in paragraphs (1), (3), or (5) of subsection (b) of section 15, or at two-thirds of the employee's regular rate of pay and with the same employment benefits to which the employee is entitled from such employer as a term of the employee's employment, for the purposes described in paragraphs (2) or (4) of subsection (b) of said section 15; provided, however, that in no case shall the employee's hourly compensation be less than that provided under section 1 of chapter 151 of the General Laws; nor shall an employer be required to pay more than \$850 per week to any employee.

“Domestic partner”, a person not less than 18 years of age who: (i) is dependent upon the employee for support as shown by either unilateral dependence or mutual interdependence that is evidenced by a nexus of factors including, but not limited to: (A) common ownership of real or personal property; (B) common householding; (C) children in common; (D) signs of intent to marry; (E) shared budgeting; and (F) the length of the personal relationship with the employee; or (ii) has registered as the domestic partner of the employee with any registry of domestic partnerships maintained by the employer of either party, or in any state, county, city, town or village in the United States.

“Employee”, any person who performs services for an employer for wage, remuneration or other compensation, including employees employed by the commonwealth, its departments, sub-divisions, quasi-public agencies, but excluding persons employed by a municipality, district, political subdivision or its instrumentalities; provided, however, that notwithstanding any general or special law to the contrary, “employee” shall include a family child care provider, as defined in subsection (a) of section 17 of chapter 15D of the General Laws, and a personal care attendant, as defined in section 70 of chapter 118E of the General Laws.

“Employer”, any individual, corporation, partnership or other private entity, including any agent thereof, who engages the services of an employee for wages, remuneration or other compensation, or the commonwealth, its departments, sub-divisions or quasi-public agencies but excluding; any municipality, district, political subdivision or its instrumentalities; provided, however, that the United States government shall not be considered an “employer”; provided further, that an individual employer shall be determined by the federal employer identification number; provided further, that the department of early education and care shall be deemed the employer of family child care providers, as defined in subsection (a) of section 17 of chapter 15D of the General Laws; and provided further, that the PCA quality home care workforce council established in section 71 of chapter 118E of the General Laws shall be the employer of personal care attendants, as defined in section 70 of said chapter 118E.

“Employment benefits”, all benefits provided or made available to employees by an employer, including, but not limited to, group life insurance, health insurance, disability insurance, sick leave, annual or vacation leave, educational benefits and pensions.

“Family member”, the spouse, domestic partner, child, parent or parent of a spouse or domestic partner of the employee, a person who stood in loco parentis to the employee when such employee was a minor child or a grandchild, grandparent or sibling of the employee. For the purposes of this definition, “person who stood in loco parentis” shall not include a person with whom the employee has no personal relationship.

“Health care provider”, a health care professional licensed under chapter 112 of the General Laws or any other person licensed under federal or any state law to provide medical care or emergency medical services and authorized to provide such services in the commonwealth.

“Parent”, a biological, adoptive, foster or step-parent of an employee or of an employee’s spouse or domestic partner, a legal guardian of an employee or other person who stood in loco parentis when the employee or employee’s spouse or domestic partner was a minor child.

“Spouse”, a person who is married to the employee.

“Telework”, a work flexibility arrangement under which an employee performs the duties and responsibilities of such employee's position, and other authorized activities, from an approved worksite other than the location from which the employee would otherwise work.

SECTION 14. There shall be established a fund known as the COVID-19 Massachusetts Emergency Paid Sick Leave Fund to be administered by the executive office for administration and finance, or any department or agency thereof designated by the executive office. The purpose of the fund shall be to reimburse eligible employers for the cost of providing employees with federal emergency paid sick leave or COVID-19 Massachusetts emergency paid sick leave. There shall be credited to the fund all amounts that are transferred or authorized to be transferred thereto or directed to be deposited therein, and all amounts received as gifts, grants or contributions for the purposes of the fund, including funds transferred pursuant to section 22 of this act. Amounts credited to the fund shall not be subject to appropriation. Money in the fund shall not be considered part of the consolidated net surplus pursuant to section 5C of chapter 29 of the General Laws.

SECTION 15. (a)(1) Notwithstanding any general or special law to the contrary, as a result of the outbreak of the 2019 novel coronavirus, also known as COVID-19, as of the effective date of this section, an employer shall provide, (i) subject to section 16, COVID-19 Massachusetts emergency paid sick leave to its employees pursuant to paragraph (3) who are absent from and are unable to work pursuant to subsection (b) or (ii) leave that would meet the requirements to be claimed as qualified sick leave wages under section 3131 of chapter 21 of the Internal Revenue Code.

(2) The executive office for administration and finance, or any department or agency thereof designated by the executive office, shall issue employers a refundable tax credit, as set forth in paragraph (5) of this subsection from the COVID-19 Massachusetts Emergency Paid Sick Leave Fund, established in section 14, for some or all of the cost of providing COVID-19 Massachusetts emergency paid sick leave to an employee, or otherwise for the cost of administering sick leave policies during 2021; provided, however, that any employer that is eligible for the federal tax credit for qualified sick leave wages provided for paid sick and paid family and medical leave under the federal Families First Coronavirus Response Act, P.L. 116-127 or subsequent extensions, including the federal Consolidated Appropriations Act, 2021 and the federal American Rescue Plan Act of 2021, shall not be eligible for reimbursement from said COVID-19 Emergency Paid Sick Leave Fund.

(3) An employer who does not provide leave that would meet the requirements to be claimed as qualified sick leave wages under section 3131 of chapter 21 of the Internal Revenue Code shall provide the following amount of leave for an employee who takes COVID-19 Massachusetts emergency paid sick leave:

(i) an employee who works 40 hours or more per week shall be provided 40 hours of COVID-19 Massachusetts emergency paid sick leave;

(ii) an employee who works less than 40 hours a week, but maintains a regular schedule with consistent hours per week, shall be provided COVID-19 Massachusetts emergency paid sick leave that is equal to the number of hours that such employee works per week, on average over a 14-day period of such regular schedule; or

(iii) for an employee whose schedule and weekly hours worked vary from week to week, such employee shall be provided COVID-19 Massachusetts emergency paid sick leave that: (A) is equal to the average number of hours that the employee was scheduled to work per week over the 6-month period immediately preceding the date on which such employee takes the COVID-19 Massachusetts emergency paid sick leave, including hours for which such employee took leave of any type; or (B) if the employee did not work over such 6-month period, is equal to the reasonable expectation of the employee at the time of hiring of the average number of hours per week that the employee would normally be scheduled to work.

(4) An employee eligible for COVID-19 Massachusetts emergency paid sick leave shall be eligible for leave that is compensated by the employer, while maintaining the same employment benefits to which the employee is entitled as a term of employment by an employer to an employee; provided, however, that no employer shall be required to pay COVID-19 Massachusetts emergency paid sick leave in excess of \$850 per week.

(5)(i) An employer who is ineligible for the federal tax credit for qualified sick leave wages provided for paid sick and paid family and medical leave under the federal Families First Coronavirus Response Act, P.L. 116-127 or subsequent extensions, including the federal Consolidated Appropriations Act, 2021 and the federal American Rescue Plan Act of 2021, and who certifies compliance with this section shall be allowed a one-time refundable credit against amounts withheld from wages under chapter 62B of the General Laws equal to \$40 per employee eligible for federal emergency paid sick leave or COVID-19 Massachusetts emergency paid sick leave whose primary place of employment is in the commonwealth. Employers shall claim the credit by applying electronically in a form and manner determined by the commissioner of revenue. An employer shall file a single application claiming a credit with respect to all employees for which the employer is eligible. The credit application, and any amendment thereto, must be filed on or before December 31, 2021.

(ii) An employer granted a credit under this section shall maintain records sufficient to document the employees to whom it made qualifying leave available that generated the credit.

(iii) The commissioner of revenue shall prescribe regulations or other guidance necessary for the implementation and administration of the credit, including provisions establishing an application process for employers, the manner in which credit eligibility will be determined and credit amounts calculated and the process for the imposition of penalties for false or deliberately misleading statements respecting allowability of the credit pursuant to chapter 62C of the General Laws.

(iv) The commissioner of revenue may disclose information necessary for the administration of the credit to the executive office for administration and finance, or any department or agency thereof designated by the executive office. The disclosure of such information shall not be subject to the prohibition provided by subparagraph (a) of section 21 of chapter 62C of the General Laws, provided that any documents so disclosed shall remain confidential and not thereby become public record.

(6) An employee's COVID-19 Massachusetts emergency paid sick leave shall terminate at the beginning of the employee's next scheduled work shift immediately following the termination of the need for COVID-19 Massachusetts emergency paid sick leave under subsection (b).

(b) An employer who does not provide leave that would meet the requirements to be claimed as qualified sick leave wages under section 3131 of chapter 21 of the Internal Revenue Code shall provide COVID-19 Massachusetts emergency paid sick leave to an employee for the following reasons related to the outbreak of the 2019 novel coronavirus, also known as COVID-19:

(1) An employee's need to: (i) self-isolate and care for oneself because of the employee's COVID-19 diagnosis; (ii) seek or obtain medical diagnosis, care or treatment for COVID-19 symptoms; or (iii) obtain immunization related to COVID-19 or the employee is recovering from an injury, disability, illness or condition related to such immunization;

(2) An employee's need to care for a family member who: (i) is self-isolating due to a COVID-19 diagnosis; or (ii) needs medical diagnosis, care or treatment for COVID-19 symptoms;

(3) A quarantine order, or other determination by a local, state or federal public official, a health authority having jurisdiction, the employee's employer or a health care provider that the employee's presence on the job or in the community would jeopardize the health of others because of the employee's exposure to COVID-19 or exhibiting of symptoms, regardless of whether the employee has been diagnosed with COVID-19;

(4) An employee's need to care for a family member due to a quarantine order, or other determination by a local, state or federal public official, a health authority having jurisdiction, the family member's employer or a health care provider that the family member's presence on

the job or in the community would jeopardize the health of others because of the family member's exposure to COVID-19, regardless of whether the family member has been diagnosed with COVID-19; or

(5) An employee's inability to telework because the employee has been diagnosed with COVID-19 and the symptoms inhibit the ability of the employee to telework.

(c)(1) COVID-19 Massachusetts emergency paid sick leave provided by an employer may be reduced by the amount of wages or wage replacement that an employee receives for that period under any government program or law. COVID-19 Massachusetts emergency paid sick leave shall not be reduced by and shall be in addition to all job protected time off, paid and unpaid, that the employer is required provide to employees: (i) under section 148C of chapter 149 of the General Laws; (ii) under any existing policy or program of the employer other than policies adopted in compliance with section 5101 et. seq. of the Families First Coronavirus Response Act, known as the federal Emergency Paid Sick Leave Act, section 286 of the Consolidated Appropriations Act, 2021, or section 9641 of the American Rescue Plan Act; (iii) pursuant to a collectively bargained agreement between the employer and a collective bargaining representative of an employee; or (iv) under federal law, to the extent permitted by that federal law; provided, however, said COVID-19 Massachusetts emergency paid sick leave may be reduced if the aggregate amount an employee would receive would exceed the employee's average weekly wage. An employer shall not require an employee to use other paid leave provided by the employer to the employee before the employee uses the COVID-19 Massachusetts emergency paid sick leave, unless federal law requires otherwise. An employer who provides leave that would meet the requirements to be claimed as qualified sick leave wages under section 3131 of chapter 21 of the Internal Revenue Code shall be deemed compliant with all requirements under this section.

(2) An employee may use COVID-19 Massachusetts emergency paid sick leave on an intermittent basis and in hourly increments.

(d) The employee shall provide notice to the employer of the need for COVID-19 Massachusetts emergency paid sick leave as soon as practicable or foreseeable. After the first workday an employee receives COVID-19 Massachusetts emergency paid sick leave, an employer may require the employee to follow reasonable notice procedures in order to continue receiving COVID-19 Massachusetts emergency paid sick leave. An employer shall not require, as a condition of an employee's taking COVID-19 Massachusetts emergency paid sick leave, that the employee search for or find a replacement worker to cover the hours during which the employee is using COVID-19 Massachusetts emergency paid sick leave.

(e)(1) Health information related to COVID-19 Massachusetts emergency paid sick leave possessed by an employer regarding an employee or employee's family member shall: (i) be treated as confidential medical records; (ii) not be disclosed except to the affected employee or

with the express permission of the affected employee; and (iii) be kept confidential in accordance with any other state or federal law.

(f) It shall be unlawful for any employer to interfere with, restrain or deny an eligible employee's ability to take COVID-19 Massachusetts emergency paid sick leave, including, but not limited to, using an employee's taking of COVID-19 Massachusetts emergency paid sick leave as a negative factor in any employment action, such as an evaluation, promotion, disciplinary action or termination, or otherwise subjecting an employee to discipline or taking any other adverse action against an employee for the use of COVID-19 Massachusetts emergency paid sick leave.

(g) It shall be unlawful for any employer to take any adverse action against an employee because the employee opposes practices believed to be in violation of this section, or because the employee supports the exercise of rights of another employee under this section, including, but not limited to: (i) filing an action, or instituting or causing to be instituted any proceeding under or related to this section; (ii) providing or intending to provide any information in connection with any inquiry or proceeding related to this section; or (iii) testifying or intending to testify in any inquiry or proceeding related to this section.

(h) Nothing in this section shall be construed to: (i) discourage employers, including the commonwealth, its departments, sub-divisions or quasi-public agencies or a municipality, district, political subdivision or its instrumentalities from adopting or retaining job-protected paid time off policies that are more generous than policies set out in this section; (ii) diminish or impair the obligation of an employer to comply with any contract, collective bargaining agreement or any employment benefit program or plan in effect on the effective date of this section that provides to employees greater job-protected paid time off rights than the rights established under this section; or (iii) pre-empt the power of a municipality, district, political subdivision or its instrumentalities from adopting or retaining job-protected paid time off policies consistent with or more generous than policies that comply with the requirements of this section.

(i) Not later than 7 days after the effective date of this section, the executive office of labor and workforce development, in consultation with the executive office for administration and finance, shall prepare and provide to employers notice of this section in English and in other languages required under clause (iii) of subsection (d) of section 62A of chapter 151A of the General Laws. Employers shall post this notice in a conspicuous location accessible to employees in every establishment where employees with rights under this section work and shall provide a copy to their employees; provided, however, that in cases where the employer does not maintain a physical workplace, or an employee teleworks or performs work through a web-based platform, notification shall be sent via electronic communication or a conspicuous posting in the web-based platform.

(j) The executive office of labor and workforce development, in consultation with the executive office for administration and finance and the executive office of health and human services, shall develop and implement a multilingual outreach program to inform employers, employees and health care providers about the availability of COVID-19 Massachusetts emergency paid sick leave.

(k) The executive office for administration and finance, or any department or agency thereof designated by the executive office, shall issue a report on the COVID-19 Massachusetts emergency paid sick leave program. The report shall include, but not be limited to: (i) aggregate information on the number of employees who were provided access to COVID-19 Massachusetts emergency paid sick leave; (ii) the number of employers who claimed credits for COVID-19 Massachusetts emergency paid sick leave established in section 14; (iii) the average amount of credit claimed by employers for COVID-19 Massachusetts emergency paid sick leave; and (iv) a histogram showing the range of credits claimed by employers. The report shall not include any identifying information of an individual employee. The report shall be filed with the clerks of the house of representatives and the senate and the joint committee on labor and workforce development not later than January 1, 2022.

SECTION 16. COVID-19 Massachusetts emergency paid sick leave shall be available to an employee under section 15 until September 30, 2021.

SECTION 17. The secretary of administration and finance and the commissioner of revenue may promulgate regulations necessary for the implementation of sections 13 to 16, inclusive.

And be further amended by striking out Section 22 in its entirety and inserting in place thereof the following section:-

SECTION 22. (a) Not later than 10 days after the effective date of this act, and thereafter as needed up to an aggregate total of \$75,000,000, the secretary of administration and finance shall direct the comptroller to transfer amounts to the COVID-19 Massachusetts Emergency Paid Sick Leave Fund established in section 14. At the discretion of the secretary of administration and finance, such amounts may be designated from amongst federal funds received by the commonwealth in response to the public health emergency caused by COVID-19, to the extent such funds are available for the uses allowed by said COVID-19 Massachusetts Emergency Paid Sick Leave Fund under relevant federal requirements; provided, however, the secretary of administration and finance may designate other funding sources, including the General Fund, provided that the aggregate total funds transferred does not exceed \$75,000,000.

(b) Upon review of returns filed for tax year 2021, and not later than January 1, 2023, the commissioner of revenue shall estimate the value of tax credits claimed against state taxes in connection with COVID-19 Massachusetts emergency paid sick leave, and shall certify that amount to the comptroller alongside the fund into which tax revenue would otherwise have been

deposited. Following the commissioner's certification, the comptroller shall transfer the amount certified, but not more than \$75,000,000, from the COVID-19 Massachusetts Emergency Paid Sick Leave Fund to the funds into which tax revenue would have otherwise been deposited. The secretary of administration and finance may direct the comptroller to transfer any unspent funds as necessary due to federal requirements for tracking and monitoring federal funds. The comptroller shall transfer any funds remaining in the COVID-19 Emergency Paid Sick Leave Fund as of June 30, 2022 to the General Fund.

And be further amended by striking out Section 29 in its entirety and inserting in place thereof the following section:-

SECTION 29. Sections 13 to 17, inclusive, and section 22 shall take effect 10 days after the effective date of this act.

The remainder of this bill I approve.

Respectfully submitted,

Charles D. Baker,
Governor