

Employment Alert: MCAD Commissioner Announces That Male Employees Are Covered by the Massachusetts Maternity Leave Act

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Overview

In a surprise development last week, a Commissioner of the Massachusetts Commission Against Discrimination (MCAD), Martin E. Ebel, announced that the MCAD has changed its position on the Massachusetts Maternity Leave Act (MMLA), and has concluded that the statute applies to both women *and* men. Commissioner Ebel's announcement represents a sweeping departure from the MCAD's previous position on the MMLA, which expressly applies to only *female* employees. Despite the plain language of the statute, Commissioner Ebel stated that the MCAD will now enforce the statute in a gender-neutral manner.¹

The MMLA and Commissioner Ebel's Announcement

Under the plain language of the statute, the MMLA entitles female employees, who have completed at least three consecutive months of full-time employment, an unpaid personal leave of up to eight weeks for the birth or adoption of a child. Until Commissioner Ebel's announcement, the MCAD's interpretation of the MMLA was consistent with this statutory language and only recognized claims for MMLA violations made by female employees. Indeed, in published guidance provided by the MCAD on its website, the MCAD states that "[the] MMLA, by its terms, provides eight weeks of maternity leave to female employees only. An employer who complies with the MMLA by providing eight weeks of maternity leave to female employees only does not violate a male employee's right under Chapter 151B to be free from sex discrimination...."²

As such, Commissioner Ebel's announcement, which was made at a private event attended by attorneys and members of the business community, represents a significant change from the MCAD's previous position on the MMLA. As support for the MCAD's new position, Commissioner Ebel pointed to the Supreme Judicial Court's landmark ruling in *Goodridge v. Department of Public Health*, which legalized same-sex marriage in Massachusetts. Commissioner Ebel asserted that a strict reading of the MMLA raises constitutional concerns for same-sex married couples who adopt a child. Commissioner Ebel noted that two married women are entitled to leave under the MMLA if they adopt a child together, but two married men who adopt a child together receive no such leave under the MMLA. Commissioner Ebel further stated that the MCAD's new position on the MMLA is consistent with its mandate to eliminate discriminatory practices in the Commonwealth.

The MCAD's new position on the MMLA has encountered criticism both for its content and the way in which it was delivered. The MCAD has been criticized for exceeding its authority, usurping the Massachusetts legislature by implementing a position that, in essence, rewrites a statute, and for altering a long-standing position without providing notice to the public and giving affected parties an opportunity to provide feedback and comments. That said, Commissioner Ebel has remained firm in outlining the MCAD's new position and has provided no indication that it plans to reverse course (notably, Commissioner Ebel stated that the MCAD will review the guidelines on its website and revise them to support the new position).

Action Items for Employers

While the MCAD has not yet issued any formal written directive or guidance on its new position, and while the MCAD's authority to broadly alter the MMLA may be challenged eventually in court, it appears that the MCAD intends to recognize a male employee's claim of discrimination alleging that an employer failed to provide him with leave under the MMLA.

Unlike the federal Family and Medical Leave Act (FMLA), which entitles men to take up to 12 weeks of unpaid paternity leave (but applies only to entities with 50 or more employees, and to employees who have worked for at least 12 months and 1,250 hours), the MMLA covers entities with six or more employees in the Commonwealth and requires only that the employee complete her (or now his) initial probationary period (or three months, if no probationary period exists). Accordingly, Commissioner Ebel's announcement will not impact the manner in which FMLA-compliant employers provide leave to FMLA-eligible male employees, since such employers already are providing up to 12 weeks of paternity leave to male employees. The Commissioner's announcement, however, will impact the leave rights and obligations of entities or employees who are covered by the MMLA but not by the FMLA.

As such, employers with Massachusetts-based employees should consider revising their employee policies and employment practices in accordance with the MCAD's new position, *i.e.*, to provide similar MMLA leave rights to men and women. In addition, such employers should contact counsel immediately in the event that a male employee seeks such leave rights.

Endnotes

¹ As of the publication of this advisory, the MCAD's website still reflects its previous position that the MMLA only applies to women, but Commissioner Ebel has indicated that the website will be updated soon.

² The MCAD notes that, however, that an employer who provides leave to female employees only, and not to male employees, may violate the federal prohibitions against sex discrimination even though the employer has acted in compliance with the MMLA.

For assistance in this area, please contact one of the attorneys listed below or any member of your Mintz Levin client service team.

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