

Massachusetts Affords Parental Leave To Men

On January 7, Governor Deval Patrick, in one of his final acts, signed into law ["An Act Relative to Parental Leave."](#) The new statute replaces the now-defunct Massachusetts Maternity Leave Act (the "MMLA"), and for the first time in Massachusetts, extends to men the right to take 8 weeks of parental leave for the birth or adoption of a child.

The problem:

Before last week's enactment, the Massachusetts Maternity Leave Act, [M.G.L. c. 149, § 105D](#), applied exclusively to female employees, such that smaller employers who were not covered by the Family and Medical Leave Act (the "FMLA") were not required to offer parental leave to men. Since 2008, however, the Massachusetts Commission Against Discrimination (the "MCAD") has taken the contrary position, that an employer's failure to provide such leave to men violates the Commonwealth's anti-discrimination laws. Under the new Parental Leave law, employers now have certainty: they must provide such leave to men on the same terms and conditions as leave is provided to women.

What are the [new statute's](#) substantive changes?

- The new statute amends the Commonwealth's maternity leave law, [M.G.L. c. 149, § 105D](#), and its antidiscrimination law, [M.G.L. c. 151B, § 4\(11A\)](#), by making both statutes gender neutral.
- If an employer provides parental leave for longer than 8 weeks and does not intend to honor the job protections built into the Act, it must provide written notification to employees taking leave.
- This new provision addresses the issue raised in the 2010 Supreme Judicial Court case - [Global Naps](#) - that held that employees who take a leave under the MMLA are only entitled to the statute's protections for eight weeks, regardless of any promises an employer made about extending the leave. This new provision also adopts what the MCAD Guidelines previously had required.

Who is covered?

Any employee who:

- Works for employers with 6 or more employees; and,
- Has completed their employer's initial probationary period (which is not to exceed three months), or, has been employed by the same employer for at least 3 consecutive months as a full-time employee (whichever is shorter).

What is the length of the leave?

8 weeks. However, employers also subject to the FMLA have additional obligations (see below).

Must the leave be paid?

No. It is at the discretion of the employer to provide paid or unpaid leave.

What is protected, and when are the protections afforded?

Job protection and restoration are afforded for the:

- Purpose of giving birth;
- Placement of a child under the age of 18 (i.e. fostering a child);
- Placement of a child under the age of 23, if the child is mentally or physically disabled; and,
- Adoption - or intention to adopt - a child.

What does job protection and restoration mean?

Employees shall be restored to their previous, or a similar, position with the same status, pay, length of service credit and seniority as of the date of the leave.

Are there any limitations or employee requirements?

Yes.

- Any two employees of the same employer shall only be entitled to 8 weeks of parental leave in the aggregate;
- Employers are not required to restore an employee on leave if similarly situated employees (i.e. employees with similar length of service, credit and status, who are in the same or similar positions) have been laid off due to economic conditions or other changes in operating conditions;
- Employees must provide two-weeks' notice before the date they intend to take leave; if two weeks' notice is not possible for reasons beyond the employee's control, the employee must provide notice as soon as practicable;
- Employees must indicate to the employer their intention to return to work;
- Employers need not provide the cost of any benefits, plans or programs during leave unless the employer provides for such benefits to all employees who are on a leave of absence. That is, if an employer continues its contribution to benefits for an employee on a medical or personal leave of absence, it must provide the same contribution to employees taking parental leave.

Interaction between the Massachusetts Parental Leave Act and the FMLA:

The amended law does not change any obligation for employers that also are subject to the Family and Medical Leave Act. In addition:

- All employers subject to the FMLA (that is, employers with at least 50 employees within a 75 mile radius, and the employee seeking leave has worked at least 1,250 hours over the prior year) also are subject to the Massachusetts parental leave statute;
- Under the Massachusetts law, employers cannot require employees to exhaust PTO during their parental leave; under the FMLA, employers may make such a requirement;
- The two laws may, but do not necessarily, run concurrently. That is, an employee may take 12 weeks of FMLA leave *prior* to giving birth, *and then*, take 8 weeks of leave under the Massachusetts leave law. However, if an employee does not take leave prior to giving birth, she is entitled to a maximum of 12 weeks leave after giving birth. *Caveat*: an employee may be entitled to additional leave as a reasonable accommodation under the disability laws.

Tips and take-aways:

- Employers may need to revise their maternity/parental leave policy to ensure that the policy is gender-neutral;
- Employers should determine how they will notify employees of their rights to parental leave; and,
- If employers provide leave in addition to the 8 weeks, they must provide the same amount of leave to men as they provide to women, and on the same terms (i.e. paid vs. unpaid).

For assistance with leave laws or policies, or for other legal advice, contact Allyson Kurker and Margaret Paget at Kurker Paget LLC.

In the News:

The Commonwealth of Massachusetts recently certified Kurker Paget as a Women-Owned Business Enterprise (WBE). Employers may now utilize Kurker Paget to satisfy their diversity needs.