Massachusetts Commission Against Discrimination

PARENTAL LEAVE

An Act Relative to Parental Leave expands the current maternity leave law, G.L. c. 149, § 105D, which is enforced by the Massachusetts Commission Against Discrimination (MCAD). Currently, Massachusetts law requires employers with six or more employees to provide eight weeks of unpaid maternity leave for the purpose of giving birth or for the placement of a child under the age of 18, or under the age of 23 if the child is mentally or physically disabled, for adoption. The new law goes into effect on April 7, 2015 and expands the current leave law in the following ways:

The parental leave law is now gender neutral. Both men and women are entitled to parental leave.

If the employer agrees to provide parental leave for longer than 8 weeks, the employer must reinstate the employee at the end of the extended leave unless it clearly informs the employee in writing before the leave and before any extension of that leave, that taking longer than 8 weeks of leave shall result in the denial of reinstatement or the loss of other rights and benefits.

The law clarifies that the right to leave applies to employees who have completed an initial probationary period set by the terms of employment, but which is not greater than 3 months.

The law provides that if two employees of the same employer give birth to or adopt the same child, the two employees are entitled to an aggregate of 8 weeks of leave.

The law clarifies that an employee seeking leave must provide at least 2 weeks' notice of the anticipated date of departure and the employee's intention to return, but also permits the employee to provide notice as soon as practicable if the delay is for reasons beyond the employee's control.

The law clarifies that an employee on parental leave for the adoption of a child shall be entitled to the same benefits offered to an employee on leave for the birth of a child.

The law expands the notice requirements, mandating that employers keep a posting in a conspicuous place describing the law's requirements and the employer's policies as to parental leave.

Boston: One Ashburton Place, Room 601, Boston, MA 02108; 617-994-6000
Springfield: 436 Dwight Street, Room 220, Springfield, MA 01103; 413-739-2145
Worcester: 484 Main Street, Room 320, Worcester, MA 01608; 508-453-9630
New Bedford: 800 Purchase, Room 501, New Bedford, MA 02740; 508-990-2390
Visit our website for more resources and instructions on filing a complaint: www.mass.gov/mcad

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Guidelines on M.G.L. c. 149, §105D:

Maternity Leave in the Workplace

Introduction

The Massachusetts Commission Against Discrimination ("MCAD" or "commission") is issuing these guidelines to provide guidance to practitioners, employers, individuals and MCAD staff about how to interpret, apply and enforce the Massachusetts Maternity Leave Act ("MMLA"), M.G.L. c. 149, §105D. The MCAD is responsible for enforcing the MMLA. The standards governing employment practices with regard to maternity leave and related issues are part of the statutory and regulatory framework governing fair employment practices under Massachusetts General Laws Chapter 151B, Chapter 149, §105D, and Code of Massachusetts Regulations, tit. 804, §3.01 and §8.00. These guidelines are issued pursuant to M.G.L. c. 151B, § 2. [1]

Definitions

For the purposes of these Guidelines, the following definitions shall apply:

A. The term "employer" means one or more individuals, governments, government agencies, political subdivisions, labor organizations, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, or receivers, having six or more employees. The term "employer" does not include a club exclusively social, or a fraternal association or corporation, if such club, association or corporation is not organized for private profit. Nonprofit clubs, associations, or corporations which are not exclusively social are not excluded.
B. In determining whether an employee is treated as a "full time" employee the commission considers such factors as hours worked, days worked, benefits received, other leave entitlement, the employer's policies and other factors tending to show whether the employee is treated as a full time employee.
C. The term "maternity leave" means a period of time, not exceeding eight weeks, that a female employee is absent from employment for the purpose of giving birth or adopting a child and subsequently caring for that newborn or adopted child.
D. The phrase "pregnancy related disability" means a physical or mental impairment, associated with an individual's pregnancy, miscarriage, abortion, childbirth, or recovery therefrom, which substantially limits one or more major life activities. [2]
E. The definitions of the terms "disability," "impairment," "substantially limits" and "major life activities" can be found in the MCAD's "Guidelines: Employment Discrimination on the Basis of Handicap - Chapter 151B."
F. Absence for "the purpose of giving birth" as used in the MMLA refers to absence from work for the purpose of preparing for or participating in the birth or adoption of a child, and caring for a newborn or newly adopted child.
G. The term "similar position" is defined in Section IV regarding job restoration after leave.
H. The term "initial probationary period" means a period of time, not exceeding six calendar months, set by an employer to establish initial suitability of an employee to perform a job

notwithstanding the fact that the actual period required to attain tenure or other employment benefits may be longer.

Eligibility for Leave Under the MMLA

A female employee is eligible for maternity leave under the MMLA if:

A. She has completed the initial probationary period, if any, set by the terms of her employment; or, if there is no such probationary period, has been employed by the same employer for at least three consecutive months as a full-time employee; and
B. She is absent from such employment for a period not exceeding eight weeks for the purpose of:
    - giving birth; or
    - adopting a child under the age of 18; or
    - adopting a child under the age of 23, if the child is mentally or physically disabled; and

C. She gives her employer at least two weeks notice of her anticipated date of departure and intention to return.

If an employee meets these eligibility requirements, the employer must grant eight weeks of unpaid maternity leave under the MMLA. An employer cannot refuse to grant MMLA leave on the grounds that doing so would constitute a hardship.

The MMLA, by its terms, provides maternity leave to female employees only. This means that the MCAD is unable to take jurisdiction over claims in which male employees are seeking eight weeks of unpaid paternity leave. Providing maternity leave in excess of the eight weeks required by the MMLA to female employees only, and not to males, would in most circumstances constitute sex discrimination in violation of Chapter 151B.

An employer who provides leave to female employees only, and not to male employees, may also violate the federal prohibitions against sex discrimination even though the employer has acted in compliance with the MMLA. According to the EEOC, "[w]hen an employer does grant maternity leave, the employer may not deny paternity leave to a male employee for similar purposes, e.g., preparing for or participating in the birth of his child or caring for the newborn. Accommodating female but not male employees constitutes unlawful disparate treatment of males on the basis of sex." EEOC Compliance Manual, Section 626.6 on Paternity Leave.

The Massachusetts Supreme Judicial Court has not as of the date of these Guidelines considered whether the MMLA's requirement of leave for females only violates the Massachusetts Equal Rights Amendment, Article CVI of the Massachusetts Constitution. Given the possibility of a successful challenge to the constitutionality of the MMLA, employers should consider providing leave to all members of their workforce who otherwise meet the eligibility requirements of the MMLA.

When Leave May be Taken, and the Type of Leave Taken

A. When Maternity Leave May be Taken
Maternity leave under the MMLA is available to a female employee either "for the purpose of giving birth" or to adopt a child. Thus, it is available at the time of the birth or adoption, but not substantially earlier or substantially later.

B. Paid or Unpaid Leave and Entitlement to Benefits
The MMLA does not require that leave be paid or that maternity leave be included in the computation of benefits, rights and advantages incident to employment, or that an employer pay for the costs of any benefits, plans or programs during the maternity leave. [3]

An employee may, however, be entitled to receive pay or benefits during her maternity leave pursuant to a collective bargaining agreement, company policy, employment contract or other agreement with the employer. In addition, if an employer generally provides pay, benefits or the costs of such benefits to employees on non-MMLA leaves of absence, the employer must provide the same such pay, benefits or costs to employees on MMLA leave. For example, if an employer generally provides pay to employees who are on extended sick leave, the employer must provide pay to employees on maternity leave.

C. Use of Accrued Vacation, Personal and Sick Time During Maternity Leave
If maternity leave is unpaid, the employee must be permitted to use, concurrently with the maternity leave, accrued paid sick, vacation or personal time under the following circumstances.

1. Vacation or Personal Time
An employee may voluntarily use any accrued vacation or personal time she has concurrently with all or part of her maternity leave. Employers cannot require an employee to use her accrued paid vacation or personal time concurrently with all or part of her maternity leave, even if such requirement is imposed upon similarly situated persons who take leave for other reasons.

2. Sick Leave
If an employer provides paid sick leave, an employee may use such sick leave concurrently with any part of her maternity leave that satisfies the employer's sick leave policy. An employer may not require an employee to use her accrued sick leave for any part of her maternity leave that satisfies the employer's sick leave policy, even if the employer requires its employees to use accrued sick leave for other types of absences that satisfy the employer's policy.
The MMLA does not in any way limit the right of an employee to use accrued vacation, sick leave or personal time before her statutory maternity leave begins, or after her leave ends, in accordance with her employer's policies and applicable law.

Job Restoration After Leave

The MMLA requires that an employee on leave be restored to her previous or a similar position upon her return to employment following leave. That position must have the same status, pay, length of service credit and seniority as the position the employee held prior to the leave. If an employee's job was changed temporarily because of her pregnancy prior to leave (e.g., her hours were reduced or her duties

were changed as an accommodation) she should be restored to the same or similar position held prior to such temporary change.
In determining whether a position's "status" is the same or similar, the commission considers such factors as:

- reporting relationships;
- whether the position would be considered a demotion;
- title;
- responsibilities; and
- other evidence tending to illustrate the employee's status.

In determining whether "pay" is the same or similar, the commission considers all compensation, including, but not limited to:

- salary;
- wages;
- bonuses;
- commissions;
- vacations; and
- benefits.

In determining whether a position offered to an employee returning from leave is similar to her prior position, the commission considers, in addition to the factors listed above, such factors as:

- duties, functions and responsibilities;
- location or distance of commute;
- facilities;
- resources or support;
- hours of work;
- training opportunities; and
- opportunities for advancement.

The MMLA also requires that a maternity leave not affect an employee's right to receive vacation time, sick leave, bonuses, advancement, seniority, length of service credit, benefits, plans or programs for which she was eligible at the date of her leave, and any other advantages or rights of her employment incident to her position. Such maternity leave, however, need not be included in the computation of such benefits, rights and advantages. [4] For example, if the employee has accrued 7.5 years of seniority as of the commencement of her leave, she must be returned to work following her leave with the same 7.5 years of seniority.

An employee returning from maternity leave has no greater right to reinstatement or to other benefits and conditions of employment than other employees who were continuously working during the leave period. An employer is not required to restore an employee on maternity leave to her previous or a similar position if other employees of equal length of service credit and status in the same or similar positions have been laid off due to economic conditions or due to other changes in operating conditions affecting employment during the period of such maternity leave; provided, however, that such employee on maternity leave shall retain any preferential consideration for another position to which she may be entitled as of the date of her leave.

Nothing in the MMLA shall be construed to affect any bargaining agreement, employment agreement or company policy providing benefits that are greater than, or in addition to, those required under the statute. An employer may grant a longer maternity leave than required under the MMLA. If the employer does not intend for full MMLA rights to apply to the period beyond eight weeks, however, it must clearly so inform the employee in writing prior to the commencement of the leave. [5]

Sex Discrimination Issues Arising Under M.G.L. c. 151B

Pregnancy and childbirth are sex-linked characteristics, and any actions of an employer that adversely affect an employee because of her pregnancy, childbirth or the requirement of a maternity leave may also amount to sex discrimination under M.G.L. c. 151B. [6] Employers may not treat employees and applicants who are affected by pregnancy or related conditions less favorably than employees who are affected by other conditions but who are similarly able or unable to work. [7] Such disparate treatment may constitute sex discrimination.
An employer may not deny a woman the right to work or restrict her job functions, such as heavy lifting or travel, during or after pregnancy or childbirth when the employee is physically able to perform the necessary functions of her job. The mere fact of pregnancy does not automatically establish a disqualifying disability. An employer may not, therefore, use a woman's pregnancy, childbirth or potential or actual use of MMLA leave as a reason for an adverse job action, such as refusing to hire or promote a woman or for discharging her, laying her off, failing to reinstate her or restricting her duties. An employer may not, moreover, force a pregnant woman to take leave prior to giving birth if she is willing to continue working, nor can an employer prevent her from returning to work after she recovers from any temporary disability associated with her pregnancy or a related condition. [8] Similarly, an employer may not treat an employee returning from maternity leave less favorably than it treats other employees seeking to return to work after comparable absences for non-pregnancy reasons.

Normal pregnancy and related short-term medical conditions may, at some point, incapacitat a woman from performing her usual work for a short period of time. In some circumstances these short-term conditions may rise to the level of a disability under Chapter 151B. [9] Whether or not an employee's short-term condition rises to the level of a disability, an employer must treat such employee in the same manner as it treats employees who are temporarily incapacitated or disabled for other medical reasons. When an employee is unable to perform some or all of the functions of her job, such as heavy lifting, because of pregnancy or a related condition, an employer must offer her the opportunity to perform modified tasks, alternative assignments or a transfer to another available position if the employer offers such opportunities to employees who are temporarily disabled for other reasons. Failure to do so may constitute sex discrimination. It may also constitute sex discrimination for an employer to base employment decisions on a woman's reproductive capacity. For this reason, employers may not adopt policies that limit or preclude women from performing specific jobs or tasks, such as performing physical labor or working with hazardous substances. [10]

Providing maternity leave to female employees and not to males may, in some circumstances, constitute sex discrimination under Chapter 151B, §4(1). See Part III, Eligibility for Leave Under the MMLA.

Pregnancy-Related Medical Conditions as a Disability

Chapter 151B's prohibitions against disability discrimination protect employees who have a pregnancy-related disability. Generally, a normal, uncomplicated pregnancy will not be considered a disability even

if the employee is unable to work for a period of time as a result of the pregnancy or childbirth. A female employee will be considered a "handicapped person", however, if she can show that she has a pregnancy-related physical or mental impairment that substantially limits a major life activity, or that she is regarded as having or has a history of such an impairment. [11]In such a case, the employee is entitled to the same protections under Chapter 151B as are other disabled employees.

Under the MMLA an employer must grant eight weeks of maternity leave to an eligible female employee regardless of whether the employee is incapacitated from working or is a "handicapped person" as defined by Chapter 151B, § 1 during such period. If the employee is disabled at the expiration of her maternity leave, however, the employer may have an obligation, pursuant to Chapter 151B, to provide a reasonable accommodation to her disability. In some circumstances additional leave may constitute such reasonable accommodation. [12];

An employer may not require a pregnant employee to take maternity leave based on the fact that the employee is pregnant, nor may an employer require an employee to remain out of work for a fixed period of time before or after the birth of her child. To the extent that an employee is unable to perform the essential functions of her position, however, the employer should treat the employee as it would treat any other disabled employee, being mindful of obligations of nondiscrimination and reasonable accommodation.

Interrelationship of the MMLA and the FMLA

As described above, the MMLA requires covered Massachusetts employers to provide no fewer than eight weeks of unpaid leave to eligible female employees for the purpose of giving birth or for adopting a child under the age of 18 (or under the age of 23 if the child is disabled).
Employees also may be entitled to leave under the Family and Medical Leave Act ("FMLA"), a federal law enforced by the United States Department of Labor, Wage and Hour Division, that applies to employers with 50 or more employees. The FMLA requires covered employers to provide up to 12 weeks of unpaid leave during a 12-month period to an eligible female or male employee who needs leave: (1) for a serious health condition of the employee which renders him/her unable to perform the functions of his/her job; (2) to care for certain family members who have a serious health condition; or (3) to care for a newborn, adopted or foster child.
In certain instances, the MMLA and FMLA will overlap. Where leave is taken for a reason specified in both the FMLA and MMLA, the leave may be counted simultaneously against the employee's entitlement under both laws. [13] For example, a female employee who takes a leave for the purpose of caring for a newborn or adopted child may be covered both by the FMLA and MMLA. In such an instance, provided that all FMLA requirements are met, the employee's leave may count simultaneously against her 12-week entitlement under FMLA and her 8-week entitlement under the MMLA.

In other instances, however, the MMLA may entitle an employee to leave in addition to leave taken under the FMLA. The FMLA provides that nothing in the law supersedes any provision of state law that provides greater family or medical leave rights. [14] Thus, for example, if an employee takes 12 weeks of FMLA leave for a purpose other than birth or adoption of a child, she will still have the right to take eight weeks of maternity leave under the MMLA.

Unlike the FMLA, the MMLA does not require an employer to specifically designate leave as MMLA leave. Thus, if an employee takes leave for an MMLA purpose, such as giving birth, that leave will count towards that employee's MMLA entitlement whether or not the employer designates it as such. FMLA leave, by contrast, must be specifically designated as such, in writing, in order for that leave to be counted toward that employee's twelve-week entitlement. [15]

Under the MMLA, an employee may take a maternity leave each time she gives birth or adopts a child. Thus, for example, if an employee gives birth in January and adopts a second child in March, she would be entitled to two separate eight-week maternity leaves under the MMLA for a total of 16 weeks. By contrast, under the FMLA, leave is limited to a maximum of 12 weeks in a 12-month period.

Inquiries regarding rights and obligations under the FMLA should be directed to the United States Department of Labor's Wage & Hour Division.

MMLA Notice and Posting Requirements

A. Posting Requirements

All employers must post a notice in a conspicuous place that contains at least the following information: PURSUANT TO M.G.L. C. 151B, §4(1) AND C. 149, §105D EVERY FULL-TIME FEMALE EMPLOYEE IS ENTITLED AS A MATTER OF LAW TO AT LEAST EIGHT WEEKS MATERNITY LEAVE IF SHE COMPLIES WITH THE FOLLOWING CONDITIONS:

1. SHE HAS COMPLETED AN INITIAL PROBATIONARY PERIOD SET BY HER EMPLOYER WHICH DOES NOT EXCEED SIX MONTHS OR, IN THE EVENT THE EMPLOYER DOES NOT UTILIZE A PROBATIONARY PERIOD FOR THE POSITION IN QUESTION, HAS BEEN EMPLOYED FOR AT LEAST THREE CONSECUTIVE MONTHS; AND,
2. SHE GIVES TWO WEEKS' NOTICE OF HER EXPECTED DEPARTURE DATE AND NOTICE THAT SHE INTENDS TO RETURN TO HER JOB.

   SHE IS ENTITLED TO RETURN TO THE SAME OR A SIMILAR POSITION WITHOUT LOSS OF EMPLOYMENT BENEFITS FOR WHICH SHE WAS ELIGIBLE ON THE DATE HER LEAVE COMMENCED, IF SHE TERMINATES HER MATERNITY LEAVE WITHIN EIGHT WEEKS. (THE GUARANTEE OF A SAME OR SIMILAR POSITION IS SUBJECT TO CERTAIN EXCEPTIONS SPECIFIED IN M.G.L. C. 149, § 105D.). ACCRUED SICK LEAVE BENEFITS SHALL BE PROVIDED FOR MATERNITY LEAVE PURPOSES UNDER THE SAME TERMS AND CONDITIONS WHICH APPLY TO OTHER TEMPORARY MEDICAL DISABILITIES. ANY EMPLOYER POLICY OR COLLECTIVE BARGAINING AGREEMENT WHICH PROVIDES FOR GREATER OR ADDITIONAL BENEFITS THAN THOSE OUTLINED IN THIS NOTICE SHALL CONTINUE TO APPLY.

B. Notice by Employees

An employee seeking maternity leave must give two weeks notice of her anticipated date of departure and intent to return. "Anticipated" date of departure does not mean "exact" date. Thus, for example, an employee who gives birth prior to her anticipated departure date is entitled to start her maternity leave earlier. Likewise, an employee may desire to start her leave later or return from leave earlier than anticipated. It is expected that employers and employees will communicate in good faith with regard to making arrangements for leave, taking into account the uncertainty inherent in delivery and adoption dates and the needs of the employer to plan in advance for an employee's absence.

Enforcing Rights Under the MMLA

The MCAD enforces the MMLA. An employee, to initiate a formal action, must file a complaint with the MCAD. The complaint must be filed within 300 days of the alleged violation of the MMLA, subject only to very limited exceptions. A violation of the MMLA constitutes a violation of M.G.L. c. 151B, §4(11A). An aggrieved employee is therefore entitled to the same remedies under the MMLA as are available pursuant to M.G.L. c. 151B.

Hypothetical Questions and Answers Under the MMLA

Question 1: Employee develops a medical condition in the seventh month of her pregnancy. Her doctor hospitalizes her for three weeks until her condition stabilizes, and then she is able to return to work. Would her three-week leave come under the MMLA?

Answer 1: No. The three weeks would not count as MMLA leave because it is not "for the purpose of giving birth." Employee may be entitled, however, to this three weeks of leave under the employer's sick leave or disability policy, under the FMLA, or as reasonable accommodation if the condition constitutes a disability under Chapter 151B. Employee would still be entitled to eight weeks of maternity leave under the MMLA at the time her child is born.

Question 2 Employee schedules her maternity leave to begin before her expected due date. Does the period before the due date count as maternity leave under the MMLA?

Answer 2: Yes. Maternity leave may be taken "for the purpose of giving birth," which is defined as leave taken for the purpose of preparing for or participating in the birth or adoption of a child, and for caring for the newborn or newly adopted child.

Question 3: Employee has a knee operation in January. She takes 12 weeks of leave, which is designated by her employer as FMLA leave. Employee has a baby in June of that year, and requests an additional leave of absence as maternity leave. Employer denies her request for leave, on the grounds that she has used up her total family and/or medical leave entitlement for the year. Has Employer done anything wrong?

Answer 3: Yes. Employee is entitled to an additional eight weeks of leave under the MMLA. The first 12 weeks did not count as MMLA leave, since it was not for the purpose of giving birth or adopting a child.

Question 4: Employee has a baby in January. She takes 12 weeks of leave, which is designated by Employer as FMLA leave. At the expiration of the 12 weeks, she asks for an additional 8 weeks of maternity leave in connection with the same child. Does Employer have to grant her request?

Answer 4: No. Employer has already complied with the MMLA's requirement that Employee receive up to 8 weeks of leave for the purpose of giving birth to a child. In this instance, the MMLA leave runs concurrently with the FMLA leave.

Question 5: Employee has a child in January, and takes eight weeks of leave. In June, she adopts a second child. Is she entitled to eight more weeks of leave?

Answer 5: Yes. The MMLA allows eight weeks of leave each time Employee gives birth or adopts a child.

Question 6: Employee gives birth to twins. She demands 16 weeks of leave, on the grounds that she has given birth twice. Must Employer give her the 16 weeks?

Answer 6: Yes. An employee who gives birth to twins has given birth two times and is entitled to eight weeks of leave for each child.

Question 7: Employee adopts two babies at the same time. How many weeks of leave is she entitled to?

Answer 7: Sixteen weeks. The MCAD treats multiple adoptions the same as multiple births.

Question 8: Employee informs Employer that she is pregnant, that she expects to deliver the baby in June, and that she plans to return to work following her leave. The baby is delivered prematurely, in May. Is Employee entitled to take her maternity leave early?

Answer 8: Yes. The MMLA requires Employee to give two weeks' notice of her "anticipated date of departure and intention to return." Employee has satisfied this requirement; therefore, she is entitled to the leave.

Question 9: At the time her leave begins, Employee has five weeks of accrued vacation time. In the past, employees who have taken disability or sick leave have not been required to use their accrued vacation time concurrently with such leave. Employee informs Employer that she wishes to take a total of 13 weeks of leave, eight weeks of unpaid maternity leave followed by five weeks of paid vacation time. Is she entitled to the 13 weeks?

Answer 9: Yes. Employer must treat Employee consistently with how Employer has treated other employees on a leave of absence. In addition, Employer may not require Employee to use accrued sick or vacation time during her maternity leave.

Question 10: At the time her leave begins, Employee has five weeks of accrued vacation time. In the past, employees who have taken disability or sick leave have been required by Employer to use their accrued vacation time concurrently with such leave. Employee informs Employer that she wishes to take a total of 13 weeks of leave, eight weeks of unpaid maternity leave followed by five weeks of paid vacation time. Is she entitled to the 13 weeks?

Answer 10: Yes. Under the MMLA, Employer may not require Employee to use up her five weeks of accrued vacation time during her eight week MMLA leave, even though Employer has imposed a similar requirement with respect to other types of leave.

Question 11: Employer's maternity leave policy provides eight weeks of leave to female employees only. Does a male employee have a right to leave upon the birth or adoption of his child?

Answer 11: No. 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. However, 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.

Question 12: Employer's maternity leave policy provides sixteen weeks of leave to female employees only. Does a male employee have a right to leave upon the birth or adoption of his child?

Answer 12: Yes. Providing maternity leave in excess of the eight weeks required by the MMLA to female employees only, and not to males, would in most circumstances constitute sex discrimination in violation of Chapter 151B.

Question 13: Prior to her maternity leave, Employee received dental insurance through Employer, as did all other employees. During the leave, Employer eliminated dental insurance for all employees. Is the employee entitled to dental insurance upon her return from leave?

Answer 13: No, because Employee would have lost the dental insurance even if she had remained at work during her leave.

Question 14: Prior to her leave, Employee was a Vice-president. Upon return from her leave, she was transferred to a position with the same pay, but which was not considered an officer-level position, and which had a lower grade level. No other officer-level employees were similarly transferred. Has Employer complied with the MMLA?

Answer 14: No, because the new position does not have the same status as the prior position.

Question 15: Prior to her leave, Employee was a secretary, working the day shift, at a location 15 minutes from her home. Upon return from leave, she was reinstated as a clerk, working the night shift, but she was transferred to a location one and one-half hours from her home. No other employees were similarly transferred. Has the Employer complied with the MMLA?

Answer 15: No. The two positions are not "similar", because the duties, schedule and commute have changed significantly.

Question 16: While Employee is on leave, Employer decides to eliminate her position for operational reasons. Employer's decision is not in any way linked to Employee's pregnancy or need for maternity leave. Is Employee entitled to reinstatement?

Answer 16: No, because Employee's pregnancy, need for maternity leave and fact that she has taken MMLA leave was not a factor in the decision, and because Employee's position would have been eliminated even if she had remained at work.

Question 17: Employee requests maternity leave. Employer denies the leave, on the grounds that Employee's absence would cause undue hardship to the business. Has Employer complied with the MMLA?

Answer 17: No. If Employee meets the eligibility requirements for the MMLA, she is entitled to take maternity leave, even if granting leave would cause hardship to Employer.

Question 18: During a job interview, an applicant informs Employer that she is pregnant. Employer chooses not to hire her, on the grounds that Employer does not want to have to grant maternity leave. Has Employer done anything wrong?

Answer 18: Yes. Employer may not consider Employee's pregnancy, or potential need for leave, in hiring decisions since doing so would constitute gender discrimination under M.G.L. c. 151B.

Question 19: Employer's Collective Bargaining Agreement provides for six weeks of maternity leave only. Is Employee entitled to a full eight weeks of MMLA leave, even if granting such leave would violate the terms of the Collective Bargaining Agreement?

Answer 19: Yes. Employer may not avoid the requirements of the MMLA by a Collective Bargaining Agreement or other contract.

Question 20: Employer grants a bonus to all employees who have worked for one year. At the time her MMLA leave commences, Employee has worked 10 months. Must Employer grant her the bonus upon her return from leave?

Answer 20: No. Employer need not count the two months of maternity leave in computation of months of service for the purposes of the bonus. Employee may be eligible for the bonus, however, upon completion of two months of service following her return from leave, if similarly situated employees are also deemed eligible for the bonus.

Question 21: Employer's Handbook provides that employees are not eligible for any benefits prior to completing a six-month probationary period. Employee requests to begin maternity leave four months after the start of her employment. Is she entitled to the leave?

Answer 21: No. An employee is not eligible for maternity leave until she has completed the initial probationary period set by her employer which may be as long as six months.

Question 22: Employee who works 25 hours per week is considered a part-time employee under Employer's Handbook, and is not eligible for the benefits given to full-time employees. Is Employee eligible for MMLA leave?

Answer 22: No. Absent other factors tending to show full-time status, Employee would be considered a "part-time" employee, and therefore would not be eligible for MMLA leave. Employee may be entitled to leave under the FMLA, however, or if Employer provides leaves to part-time employees for other reasons.

Question 23: Employee adopts an adult of 21 years of age who has a mental disability. Is Employee entitled to MMLA leave?

Answer 23: Yes. The MMLA applies to adoption of a "child under the age of twenty three if the child is physically or mentally disabled" The MMLA applies to female employees only.

Question 24: Prior to her leave, Employee is eligible for participation in the Company 401K Plan. Upon return from her leave, Employer no longer permits her to participate in the Plan, on the grounds that there has been a break in her service. Has Employer violated the MMLA?

Answer 24: Yes. Maternity leave may not affect Employee's right to participate in programs for which Employee was eligible at the date of her leave.

Question 25: Employer's maternity leave policy provides ten weeks of maternity leave. Employee takes ten weeks of leave. May the Employer deny job restoration on the grounds that Employee has taken more than eight weeks of leave?

Answer 25: The MCAD takes the position that job restoration should not be denied unless the Employer clearly informs the employee in writing prior to the commencement of her leave that taking more than eight weeks of leave will result in the denial of reinstatement.

Footnotes

[1] These guidelines will not answer every question concerning application of the laws regarding maternity leave. The MCAD exists to enforce Mass. Gen. ch. 151B and ch. 149, §105D, and is not bound by federal law. However, "the Federal guidelines can be used to guide Massachusetts in interpreting G.L. c. 151B." Labonte v. Hutchins & Wheeler, 424 Mass. 813, 823 n. 13 (1997). Sources of guidance under analogous federal law include: the Pregnancy Discrimination Act, 42 U.S.C §2000e, §701(k); EEOC Compliance Manual on the Pregnancy Discrimination Act, §626; The Family Medical Leave Act of 1993 ("FMLA"), 29 U.S.C. §12101 et. seq. ; U.S. Department of Labor Regulations: The Family and Medical Leave Act of 1993, 29 C.F.R §825.100 et. seq.

[2] The commission understands that the words "disabled" and "disability" are the more accepted parlance than the words "handicapped" and "handicap" and therefore utilizes the former terms in these guidelines. Those utilizing these Guidelines should note that the words "handicap" and "handicapped" are utilized in the statutes and regulations governing disability discrimination in employment.

[3] Additional protections apply for employees of the Commonwealth. It is unlawful practice "for the commonwealth and any of its boards, departments and commissions to deny vacation credit to any female employee for the fiscal year during which she is absent due to a maternity leave taken in accordance with [the MMLA] or to impose any other penalty as a result of a maternity leave of absence." G.L.c.151B, §4(11A).

[4] As to certain additional protections applicable to employees of the Commonwealth, see footnote 3.

[5] Employers covered by the Family and Medical Leave Act of 1993 ("FMLA") are required to provide and employee with up to twelve weeks of leave. Such employers must, upon an employee's return from FMLA leave, restore the employee to the same or an equivalent position. 29 CFR 825.214

[6] See School Committee of Braintree v. MCAD, 377 Mass. 424, 386 N.E.2d 1251 (1979); White v. Michaud Bus Lines, Inc., 19 MDLR 18, 20 (1997), quoting Lane v. Laminated Papers, Inc., 16 MDLR 1001, 1013 (1994).

[7] See Id.

[8] An employer may, however, make inquiries into the ability of an employee to perform any job-related function, provided that the inquiry is consistent with business necessity and limited to job-related functions. See MCAD Guidelines: Employment Discrimination on the Basis of Handicap, p. 20 (1998).

[9] See Part VII, Pregnancy-Related Medical Conditions as a Disability .

[10] For example, in International Union, UAW v. Johnson Controls, Inc., 499 U.S. 187, 111 S. Ct. 1196 (1991), the Supreme Court struck down an employer's fetal protection policy as a violation of Title VII as amended by the Pregnancy Discrimination Act. The Court found that a policy that prohibits women of childbearing capacity to work in a job that exposes them to certain lead levels was facially discriminatory, and that employing sterile women in these jobs was not a bona fide occupational qualification (BFOQ). Recognizing that the BFOQ test is very narrow, the Court found that fertile women participate in the manufacture of batteries as efficiently as others, and that the concerns about the welfare of future generations cannot be considered the "essence" of the employer's business. "Decisions about the welfare of future children must be left to the parents who conceive, bear, support, and raise them, rather than to the employers who hire those parents." Id. At 206, 111, S.Ct. at 1207.

[11] M.G.L. c. 151B, § 1(17)(definition of "handicapped" person)

[12] For further guidance, see MCAD Guidelines: "Employment Discrimination on the Basis of Handicap- Chapter 151B"

[13] 29 C.F.R. §825.701(a)

[14] 29 C.F.R. §825.701(a)

[15] 29. C.F.R. §825.208