Employment Law Advisor: Massachusetts Maternity Leave Act

Employer Obligations Under The Massachusetts Maternity Leave Act

November 14, 2011

As many employers struggle to understand the nuances of the federal Family and Medical Leave Act (the "FMLA"), it is sometimes easy for employers to forget their obligations under the Massachusetts Maternity Leave Act (the "MMLA"), M.G.L. c. 149, §105D. Though much shorter, simpler and limited in scope than its federal counterpart, the MMLA has a few nuances of its own and creates some traps for the unwary. This edition of the Employment Law Advisor focuses on employer obligations under the MMLA and highlights some of the risks and confusion it creates.

In Summary

- The MMLA applies to employers with six or more employees.
- By its terms, the MMLA requires leaves be provided only to female employees.
- Eligible employees are entitled to eight weeks unpaid leave for giving birth or adopting a child.
- An employee must give at least two weeks' notice of her expected departure date and her intention to return.
- Employers cannot require employees to use accrued paid vacation, personal or sick time concurrently with their MMLA leave.
- Employees returning from MMLA leave must be restored to their previous or similar positions.
- Employers administering maternity leaves face potential sex discrimination claims from both males and females.
- The overlap of the MMLA and the FMLA can create confusion and some unexpected results.

Eligibility, Notice and Leave Entitlement

To be eligible for MMLA leave, an employee must have completed "the initial probationary period set by the terms of her employment" (of no more than six months) or, if there is no such probationary period, she must have been employed full-time for at least three consecutive months. She also must give her employer at least two weeks' notice of her expected departure date and her intention to return.

Eligible employees are entitled to up to eight full weeks of unpaid leave for giving birth or for adopting a child under age 18 (under age 23 if the child is mentally or physically disabled). The MMLA entitles an employee to eight weeks of leave each time she gives birth or adopts a child. According to the Massachusetts Commission Against Discrimination (the "MCAD"), an employee who gives birth to twins is entitled to 16 weeks, and multiple adoptions should be treated the same as multiple births. MMLA leave may be with or without pay at the discretion of the employer.

Employers cannot allow an MMLA leave to 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

employment. On the other hand, the leave period itself need not be counted for purposes of calculating benefits.

Employers also are not required to pay for any benefits during MMLA leave. However, if an employer generally provides pay, benefits or the costs of such benefits to employees on non-MMLA leaves, the employer must provide the same such pay, benefits or costs to employees on MMLA leave. Thus, for example, if an employer generally provides pay to employees who are on extended sick leave, the employer must provide pay to employees on MMLA leave.

Use of Vacation, Personal and Sick Time

An employee may *voluntarily* use any accrued vacation or personal time she has concurrently with all or part of her MMLA leave. However, according to the MCAD, employers cannot require an employee to use her accrued paid vacation or personal time concurrently with all or part of her MMLA leave, even if employees who take leaves for other reasons would be required to do so.

Thus, if an employee has three weeks of accrued, unused vacation time, the employee can use the vacation time before and/or after her MMLA leave to extend her time away from work to eleven weeks, but her employer cannot require her to use the paid vacation time during her MMLA leave. Similarly, 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 MMLA, even if the employer requires its employees to use accrued sick leave for other types of absences that satisfy the employer's policy. (Note that under the FMLA employers can require employees to use their vacation, personal and sick time concurrently with their FMLA leave.)

Job Restoration

Upon return from an MMLA leave, the employee must be "restored to her previous, or a similar, position with the same status, pay, length of service credit and seniority, wherever applicable, as of the date of her leave." According to the MCAD, the employer has the burden of proving that the position to which an employee returned after leave is similar to her previous position.

However, the MMLA states that an employer is not required to restore an employee to her previous or a similar position if "other employees of equal length of service credit and status in the same or similar position have been laid off due to economic conditions or other changes in operating conditions affecting employment during the period of such maternity leave."

Potential Discrimination Claims

Massachusetts and federal law prohibit discrimination based on an employee's (or job-applicant's) pregnancy. While most pregnancies result only in a temporary disability not generally covered by the federal Americans with Disabilities Act, Massachusetts' anti-discrimination statute, M.G.L C. 151B, provides more protection against pregnancy discrimination to an employee, since the MCAD is more receptive than the EEOC is to treating temporary disabilities, including pregnancies, as statutorily protected disabilities.

In addition to pregnancy discrimination claims made by female employees, employers could also face discrimination claims by male employees seeking access to paternity leave. Thus, employers should ensure that their treatment of male employees and paternity leave does not constitute discrimination. On the federal side, the EEOC has stated that "when 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."

The MCAD has stated that it would be discriminatory under M.G.L. c. 151B for an employer to provide a female employee with a maternity leave of longer than eight weeks, but not offer the

same benefit to male employees. Because MMLA leave is only required for female employees, a policy which gave eight weeks of maternity leave and no paternity leave would not be discriminatory under the MMLA or M.G.L. c. 151B. However, if an employer grants leave which is related to the care or welcoming of a child,—that is, for longer than reasonably required to recover from the "disability" of childbirth— to female employees only, the employer runs some risk of a discrimination claim by male employees who are denied similar leave.

For Massachusetts employers not covered by the FMLA who limit the leave given to female employees to the eight weeks required by the MMLA, the risk is limited to federal discrimination law claims and is, practically speaking, relatively slight. Moreover, the FMLA, which makes parenting leave available to eligible employees without regard to gender, has reduced the potential for claims. Still, where the FMLA does not apply or where employers extend leaves beyond the FMLA's twelve-week period, employers must recognize the potential for sex discrimination claims if female employees are treated more favorably than male employees.

Practical Tip

Although the MMLA only provides rights to female employees, the MCAD suggests that employers consider providing at least eight weeks of leave to all members of their workforce who otherwise meet the eligibility requirements of the MMLA. While employers may choose not to follow this suggestion, when employers extend leaves (and/or related benefits) beyond what is required by law we urge employers to do so without regard to gender.

Relationship Between the MMLA and the FMLA

For businesses that employ fifty or more employees (within 75 miles), the FMLA provides eligible employees up to twelve weeks per year of unpaid leave for childbirth, adoption, or a serious health condition of the employee or the employee's spouse, child, or parent. It is important to know that the FMLA does not supersede any state law that provides greater family or medical leave rights. Thus, a female employee in Massachusetts giving birth or adopting a child may be entitled to leave under the MMLA, the FMLA, both, or neither.

Although the FMLA is not the focus of this Employment Law Advisor, it is useful here to highlight some of the differences between the FMLA and the MMLA. Under the FMLA, employees are eligible for leave only after working for the employer for twelve months and 1,250 hours; female employees are eligible for MMLA leave after working for three months or after finishing a probation period not to exceed six months. Under the FMLA, employees are entitled to no more than twelve weeks of leave per twelve month period; a female employee is entitled to eight weeks of MMLA leave each time she gives birth or adopts a child, regardless of the time period. Under the FMLA, an employer may require an employee to use paid leave during his or her FMLA leave; an employer cannot do so for an MMLA leave. Under the FMLA, an employer must continue to make its usual contribution towards an employee's health insurance premium; under the MMLA an employer "need not provide for the cost of any benefits, plans, or programs" during a leave unless the employer does so for employees on non-MMLA leaves.

Practical Tip

While FMLA and MMLA leaves frequently run concurrently, they sometimes do not. Since the FMLA also entitles eligible employees to twelve weeks of leave for serious health conditions (conditions both related and unrelated to childbirth), the FMLA and the MMLA can give an employee a total of twenty weeks of leave, or even more, in a twelve month period. For example, a pregnant employee might be entitled to twelve weeks of FMLA leave due to pregnancy-related complications and still be entitled to eight additional weeks of leave under the MMLA after giving birth.

For more information on this topic, please contact a member of the Employment Law Group.