

A GUIDE FOR MASSACHUSETTS EMPLOYERS: WHEN EMPLOYEES REQUEST TIME OFF OTHER THAN SICK OR VACATION TIME

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We are often asked to advise clients on issues arising from employee requests for time off from work. For Massachusetts employers, questions frequently arise regarding an employer's obligations when employees request small amounts of time, often a few hours or less, for small tasks or so-called small necessities. Questions also arise regarding an employer's obligation to grant leave to pregnant employees. Massachusetts has a statute covering each of these situations. Here is a brief overview of each.

SMALL NECESSITIES LEAVE ACT

Under the *Massachusetts Small Necessities Act, M.G.L. c. 149, §52D*, an employee who meets the eligibility criteria for leave under the federal *Family and Medical Leave Act*, is also entitled to an additional twenty-four (24) hours of unpaid leave during any twelve (12) month period, in addition to the leave available under the *Family and Medical Leave Act*. This small necessities leave can be to:

- (i) Participate in school activities directly related to the educational advancement of a son or daughter of the employee, such as parent-teacher conferences or interviewing for a new school;
- (ii) Accompanying the son or daughter of the employee to routine medical or dental appointments, such as checkups or vaccinations; and
- (iii) Accompanying an elderly—defined as being 60 years of age or over—relative of the employee to routine medical or dental appointments or appointments for other professional services related to the elder's care, such as interviewing at nursing or group homes.

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Any eligible employee may elect, or the employer may require the employee, to substitute any accrued paid vacation leave, personal leave, or medical sick leave of the employee for any of the leave provided under the *Small Necessities Act*. Leave under the *Small Necessities Act* may be taken intermittently or on a reduced leave schedule. If the necessity for any such leave is foreseeable, the employee shall provide the employer with not less than seven (7) days notice before the date that the leave is to begin. If the necessity for leave is not foreseeable, the employee shall provide such notice as is practicable. The employer may require that a request for leave under this section be supported by a certification.

It is important to note that violation of the *Small Necessities Act* can be enforced by the Massachusetts Attorney General by either fines or penalties or both. An aggrieved party may also be granted leave to pursue a private action by the Attorney General. Most important is that the same penalty provisions applicable to the *Wage Act*—mandatory treble damages, mandatory attorney’s fees and costs—also applies to an action against an employer who is found to have violated the *Small Necessities Act*.

MATERNITY LEAVE UNDER STATE LAW

Massachusetts has enacted the *Massachusetts Maternity Leave Act*, M.G.L. c.149, §105D. Unlike the *Small Necessities Act* that is enforced by the Attorney General, the *Maternity Leave Act* is enforced by the Massachusetts Commission Against Discrimination (MCAD). The *Maternity Leave Act* applies to any employer, including governments, agencies, labor organizations, and political associations, having six or more employees. Under its terms, a female full-time employee, who has completed either a probationary period established by the employer of no more than six (6) months, or if no such period, at least three (3) consecutive months of full-time employment is entitled to take a material leave of up to eight (8) weeks for the purpose of giving birth to a child, adopting a child who is under 18 years of age, or adopting a person under the age of 23 who is mentally or physically disabled. It is at the employer’s discretion whether such leave is with or without pay. In this regard, the Massachusetts law differs significantly from the New Hampshire pregnancy law, which requires employers to provide a leave of absence for the period of temporary physical disability resulting from childbirth and related medical conditions. Unlike Massachusetts, the New Hampshire law does not place a limit on the amount of leave that must be granted, but instead leaves this to the discretion of the employee’s health care provider. The New Hampshire pregnancy law cannot be used for adoption.

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To be eligible for the leave available under Massachusetts law, the employee must provide in writing (a) at least two (2) weeks' notice of anticipated departure date and (b) a statement of intention to return to work. At the end of the leave period, the employee will be entitled to return to the same or a comparable job at her last rate of pay and benefits (except where certain legally recognized circumstances apply).

Although a maternity leave is otherwise unpaid, an employee on maternity leave may be required by the employer to use her accumulated sick/personal days and unused vacation days during the leave. Unpaid maternity leave will be provided only after accrued vacation and sick/personal days have been exhausted, provided, however, that sick/personal days may be used only on days of pregnancy-related disability. Eligible employees may also apply for short-term disability benefits, if available. There is no hardship exception under the MMLA.

An employee may continue to work before the leave and return to work after the leave as long as she is able to perform the essential functions of the position. If, after the 8 week period, she does not return to work and does not apply for and receive an additional leave under the terms of any other leave of absence policy, she will be considered to have resigned her position.

The MCAD used to take the position that it did not have jurisdiction to enforce the MMLA as to male employees seeking to take up to 8 weeks leave for paternity leave, but that changed when Martin Ebel, a Commissioner for the MCAD, announced the MCAD would now prosecute MMLA cases in a gender neutral fashion. There was always the avenue of a private right of action for males seeking to assert a claim under the *Maternity Leave Act*, but now the MCAD will treat these claims no differently than claims brought by women. Also, if an employer voluntarily offers females maternity leave in excess of 8 weeks but not males corresponding paternity leave, the MCAD has stated that such disparity would likely constitute sex discrimination under M.G.L. c.151B. In addition to these policies under Massachusetts law, it is likely that a paternity leave claim under the *Maternity Leave Act* would also be a violation of federal law according to the EEOC. See *EEOC Compliance Manual*, §626.6 on Paternity Leave.

Employers subject to the federal FMLA are reminded that FMLA leave can run concurrent with leave granted under a state maternity leave law. Employers are reminded to review their Employee Handbooks to assure that employees are on notice that FMLA leave and maternity leave will run concurrently and that the employee will be provided



with the benefits available under both laws. Please contact us if you have any questions regarding how to harmonize your FMLA, maternity or other leave of absence policies.

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