

Client Alert

A report
for clients
and friends
of the Firm June 2008

The Massachusetts Maternity Leave Act

The Massachusetts Maternity Leave Act (“MMLA”), G.L. c. 149, §105D, requires employers with six or more employees to grant eligible female employees up to eight weeks of job-protected maternity leave to give birth, or to adopt a child under eighteen (or twenty-three if the child is disabled). Although the statute is explicit that it applies only to “female employee[s],” the Massachusetts Commission Against Discrimination recently has announced that it intends to disregard that statutory limitation and apply the maternity leave requirement to employees of both sexes.

MCAD Commissioner Martin B. Ebel announced at a recent event that his office plans to prosecute MMLA cases in a gender-neutral fashion to allow men to apply for MMLA maternity leave benefits. Ebel attributes the decision to change the MCAD policy to the decision to extend MMLA to parents who adopt, and to *Goodridge v. Dept. of Public Health*, the decision legalizing same-sex marriages in Massachusetts.

This announcement is contrary to both the plain language of the statute and the previous policy of the MCAD, the agency responsible for enforcing the MMLA, as published in the most recent MCAD guidelines adopted in 2000. These guidelines interpreted the MMLA to provide “maternity leave to female employees only ... [construing the MCAD to have no] jurisdiction over claims in which male employees [were] seeking ... paternity leave.” MCAD *Guidelines and Policies, Guidelines on the Massachusetts Maternity Leave Act, Massachusetts General Laws*, c. 149, §105D, III (April 10, 2000).

Although the MCAD’s announcement is contrary to its own guidelines, the guidelines do caution employers to consider providing leave to all members of their workforce regardless of sex to avoid the possibility of a constitutional challenge under Massachusetts Equal Rights Amendment, Article CVI of the Massachusetts Constitution, and to conform to similar federal statutes which require a gender-neutral result. MCAD *Guidelines and Policies, Guidelines on the Massachusetts Maternity Leave Act, Massachusetts General Laws*, c. 149, §105D, III (April 10, 2000); see EEOC Compliance Manual, Section 626.6 on Paternity Leave (requiring that “when an employer does grant maternity leave, the employer may not deny paternity leave to a male employee for similar purposes ... [Accommodating] female but not male employees constitutes unlawful disparate treatment of males on the basis of sex.”); Family and Medical Leave Act, 29 U.S.C.A. §§ 2601-2654 (1993) (requiring covered employers to provide up to 12 weeks of unpaid leave during a 12-month period to an eligible female or male employee).

There is some prospect that the MCAD will not carry through on this announcement, made only informally at an unofficial event. And such a blatant rejection of clear statutory language also would be vulnerable to judicial review. If this new policy survives, however, all employers will need to reconsider their existing policies. Employers large enough to be covered by the FMLA already are required to provide parenting leave to both sexes; but there are situations, such as where FMLA leave has already been exhausted in the same 12-month period as childbirth, where MMLA may afford additional leave, and employers that currently extend such additional leave only to female employees may have to revisit those policies.

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