

Expecting Mom? Expecting Dad?

How Much Leave Should You Expect?

By *KEVIN V. MALTBY, Esq.*

Many expectant parents have questions about how much leave they are entitled to after the arrival of a new child. The laws are different for expectant mothers and fathers. Depending on the employer, some expectant fathers may be unable to take paternity leave when their child is born. Conversely, depending on the employer, expectant mothers may be able to take up to 20 weeks of leave under state and federal law.

Over the past three decades, there has been a growing trend transforming the traditional household from one income to two. In the two-income household, it is becoming more common that the male is not the primary breadwinner. Therefore, when it comes time for the household to decide who stays home with the newborn child, the answer is not always as easy as who earns more money.

Here are some things to know, as well as some frequently asked questions and answers.

The Family and Medical Leave Act

The Family and Medical Leave Act (FMLA) provides for 12 weeks of leave, regardless of the gender of the employee, for the birth and care of a newborn child, care for a newly adopted or foster child, or leave for a serious illness to the employee. Leave can either be for paternity, maternity, or specific personal health reasons, depending on the needs of the employee.

The FMLA applies to employers who have more than 50

employees working for at least 20 weeks in the current or preceding year. Employees of such companies are eligible for FMLA benefits if they have worked for the employer for at least 12 months and at least 1,250 hours during the 12 months immediately preceding the leave, and they work within 75 miles of the location of the business.

The Massachusetts Maternity Leave Act

The Mass. Maternity Leave Act (MMLA) provides for eight weeks of leave to a female employee for purposes of giving birth, adopting a child under the age of 18, or adopting a child under the age of 23 who is mentally or physically disabled. The MMLA applies to all employers in the Commonwealth of Massachusetts who employ six or more individuals.

The MMLA runs concurrently with the FMLA when the employer employs more than 50 individuals. The MMLA requires the employee to give her employer at least two weeks notice of her anticipated date of departure and intention to return. It should be noted that an employer cannot refuse to grant MMLA leave on the grounds that doing so would constitute a hardship.

Are Female Employees Entitled to Both FMLA and MMLA?

There are some circumstances where a female employee may be entitled to 20 weeks leave. These circumstances include a pregnant

employee who experiences complications and is on bed rest. During this pre-birth period of time, the employee can use her FMLA leave because she is experiencing a serious illness. Once the employee gives birth, she may then use her MMLA because it only applies for purposes of "giving birth." Under these circumstances, the employer must fall under the FMLA and the MMLA.

Are Fathers Entitled to MMLA?

The text of the MMLA does not provide any leave for male employees. Therefore, if a male is working for an employer who falls only under the MMLA, then the law, as written, does not provide for any paternity leave. However, the Massachusetts Commission Against Discrimination (MCAD), that is responsible for enforcing the MMLA, has advised otherwise.

The MCAD issued an advisory stating that 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. The MCAD supported this statement, by citing the Equal Employment Opportunity Commission (EEOC) Compliance Manual, which provides that, when an employer does grant maternity leave, he or she 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.

Given the possibility of a discrimination claim by a male employee seeking paternity leave under the MMLA, employers should consider providing leave to all members of their workforce who otherwise meet the eligibility requirements of the MMLA. While this may require the employer to be flexible in interpreting the MMLA, the flexibility will be beneficial to both the employer and the employee.

Since the FMLA and MMLA are only applicable under certain circumstances, it is important for employers and employees to discuss their options. This will avoid any potential discriminatory or legal exposure for the employer while allowing the expecting employee to focus on other matters. ♦

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