

New Parental Leave Act “Maternity” Leave Extended to Male Employees

Prepared for the 2015 Massachusetts Municipal Association Annual Meeting

On January 7, 2015, Governor Patrick signed into law Chapter 484 of the Acts of 2014, which amends G.L. 149 §105D, commonly referred to as the Massachusetts Maternity Leave Act. This statute had previously provided “maternity” leave to eligible female employees for the birth or adoption of a child. However, both the state and federal anti-discrimination agencies were of the view that providing such leave to female but not male employees might constitute gender discrimination. It was on that basis that some employers voluntarily chose to offer “maternity/paternity” leave to both female and male employees.

Chapter 484, An Act Relative to Parental Leave, revises G.L. c. 149, §105D to mandate the provision of so-called “parental leave” for all eligible employees, and replaces the gender-specific statutory references to “maternity leave” for female employees. Thus, municipalities with maternity leave policies specific to female employees only will need to amend them to conform to the statute’s new requirements.

Does the Parental Leave Law apply to municipalities and other public agencies?

Yes. The Law continues to apply to “the commonwealth and all political subdivisions, boards, departments and commissions thereof.”

When does the Parental Leave Law take effect?

The Law goes into effect on April 7, 2015.

Who is eligible for parental leave?

Under the newly-revised law, both male and female full-time employees will be eligible for parental leave if they have completed the initial probationary period set by the terms of their employment, which may **not exceed 3 months**. If no probationary period has been established, employees will become eligible for parental leave once they have been employed for **3 consecutive months** in a full-time capacity.

The prior version of the law did not limit the length of an employer-established initial probationary period to a maximum of three months, as the amended statute does. The impact of the statutory change is that even if the employer has established a longer initial probationary period, and regardless of whether that probationary period has been completed, an employee will be eligible to take parental leave after three consecutive months of employment.

Of course, this does not mean that the employer is limited to only three-month probationary periods; instead, it simply means that an employee need only have completed the first three months of the established probationary period before being eligible to take parental leave.

Like the former version of the Law, the new version of the statute does not define the term “full-time employee.” The Massachusetts Commission Against Discrimination (MCAD) has said that when determining whether an employee is treated as a “full time” employee, such factors as hours worked, benefits received, other leave entitlements, and the employer’s policies should be considered.

Are there any restrictions on an employee’s use of parental leave?

The Parental Leave Law states that employees are entitled to eight (8) weeks of job-protected parental leave for the following reasons:

- giving birth; or
- placement of a child under the age of 18 (or under the age of 23 if the child is mentally or physically disabled) with the employee adopting or intending to adopt the child [in other words, adoption of a child].

Notably, the revised statute also adopts the federal Family and Medical Leave Act’s (FMLA) limitation on the total amount of leave available where both parents work for the same employer. Like the FMLA, state law now provides that where both parents work for the same employer, parental leave is limited to 8 weeks in aggregate (and not 16 weeks) for the birth or adoption of the same child.

Are employees required to give notice concerning their use of parental leave?

Under the Parental Leave Law, employees are required to give at least two weeks’ notice to their employer of the anticipated date of departure, and intention to return. However, if the employee is unable to provide two weeks’ notice, **for reasons beyond the individual’s control**, the employee must provide the notice **as soon as practicable**. **The prior version of the statute did not include this language.**

What protections are afforded to employees on parental leave?

The Parental Leave Law does not change the protected nature of parental leave. Employers must still restore employees returning from parental leave to their previous, or similar, positions, with the same status, pay, length of service credit and seniority, wherever applicable, as of the date the leave commenced. Utilizing parental leave still shall not affect the employees’ entitlement to accrue vacation time, sick leave, bonuses, advancement, seniority, length of service credit, benefits, plans or programs for which the employees were eligible at the start of the leave, or any other advantages or rights of employment incidental to the employment position. However, parental leave shall not be included, when applicable, in the computation of those benefits, rights and advantages. Further, employers are not required to provide for the cost of any employer-sponsored benefits, plans, or programs during the parental leave unless the employers do so for all employees on leave of absence. Of course, if the leave is FMLA-qualifying, the employer is required to continue paying for its portion of employer-sponsored group health insurance during the entire FMLA-designated leave.

Must an employer provide paid parental leave?

The Parental Leave Law continues to provide that parental leave **may be with or without pay**, at the discretion of the employer.

May an employee concurrently use accrued paid leave while out on parental leave?

If the employer opts not to pay employees on parental leave, an employee must be permitted to use accrued paid leave, including sick leave, vacation and personal leave, in the following circumstances:

Vacation or Personal Time

An **employee** may **voluntarily** use any vacation or personal time accrued, concurrently with all or part of the parental leave. Employers **cannot require** an employee to use accrued paid vacation or personal time concurrently with all or part of the parental leave, even if such requirement is imposed upon similarly-situated persons who take leave for other reasons. There is an **exception to this prohibition, however, if the leave is also FMLA-qualifying**. In such instances, the **employer** may **require** the employee to use any and all accrued vacation and personal leave during the course of unpaid parental leave, if it is the employer's policy to do so for FMLA leaves.

Sick Leave

If an employer provides paid sick leave, an **employee** may **voluntarily** use such accrued sick leave concurrently with any part of the parental leave that satisfies the employer's sick leave policy.

Employers **cannot** require an employee to use accrued sick leave for any portion of the parental leave that satisfies the employer's sick leave policy, even if such requirement is imposed upon similarly-situated persons who take sick leave for other permitted reasons. As with vacation and personal leave, however, an exception to this prohibition exists with respect to FMLA-qualifying leave. The **employer** may **require** an employee on parental/FMLA leave to concurrently use any and all sick leave, if the reason for the FMLA leave is one where the employer normally permits the use of sick leave.

Will the new Parental Leave Law have any impact on an employer's collective bargaining obligations?

As long as the collective bargaining agreement provides for **greater** or **additional benefits** to employees than those provided for in the new Law, these statutory revisions should have no impact on the parties' collective bargaining agreement. However, should an employer change or enact new personnel policies that provide for parental leave benefits, there may still be certain impact bargaining obligations with respect to represented employees. If a collective bargaining agreement or personnel policy relating to maternity leave limits such leave to females, a municipality will need to amend amend such agreement or policy to eliminate that restriction in order to comply with the Parental Leave Law. Where bargaining implications can be significant, it is highly advisable that consultation with counsel occur prior to taking any action with respect to these new parental leave requirements.

Can an employer choose to extend parental leave beyond 8 weeks?

Employers may agree to provide parental leave for **more** than 8 weeks. However, an employer who does so shall not deny an employee the rights and protections afforded under the Parental Leave Law, G.L. 149 §105D, **unless** the employer clearly informs the employee, **in writing, prior to the commencement of the parental leave, and prior to any subsequent extension of that leave**, that the employee will lose the protections guaranteed by the parental leave statute for any period of leave beyond 8 weeks. If an employer does not take these affirmative steps and nonetheless agrees to extend an employee's parental leave beyond 8 weeks, **the entire period of permitted leave will be covered by the parental leave statute**. Thus, if employers do chose to extend parental leave, they should ensure that there is a written communication with the employee specifying that the employee will lose the protection of the Parental Leave Law after 8 weeks of leave.

Importantly, as a practical matter, since the FMLA provides similar job protections to those afforded under the state's Parental Leave Law, and the reasons for taking parental leave are also covered by the FMLA (i.e., birth or adoption of a child), eligible employees will have some measure of job protection for the full 12 weeks of leave allowed under the FMLA, even if the notice described above is in fact provided by the employer.

Does the Parental Leave Law contain a notice requirement for employers?

Employers still must post (and keep posted), in a **conspicuous location** accessible to all employees (e.g., break room), a notice informing employees of their rights and obligations under the law. **In addition, employers are now required to also post any parental leave policy(ies) in a similar location.**

Enforcement of the Parental Leave Law

Refusal to restore an employee to employment after taking parental leave as permitted under G.L. c. 149, §105D, or "imposing any other penalty" against an employee as a result of that employee taking parental leave, may violate the state's anti-discrimination law (G.L. c. 151B, §4(11A)), and may give rise to a complaint filed with the MCAD or in court.

In anticipation of the April 7, 2015 effective date of the Parental Leave Law, municipalities should review their policies and existing notice. While we expect the MCAD to issue an updated sample policy and notice of rights under the new Parental Leave law in the future, attached for consideration are copies of our sample "parental leave" policy and notice.

If you have further questions on this issue, please contact Attorney Michele E. Randazzo at 617.556.0007 or at mrandazzo@k-plaw.com.

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CITY/TOWN OF _____
PARENTAL LEAVE POLICY

I. PURPOSE

This Policy describes the eligibility, duration and procedural requirements relating to the administration of parental leave, in accordance with the provisions of G.L. c. 149, § 105D.

II. APPLICATION

This Policy shall apply to all full-time employees of the City/Town of _____ who have completed an initial probationary period not to exceed three (3) months [and if no defined probationary period, three (3) consecutive months].

III. POLICY

It is the policy of the City/Town to fully comply with the provisions of G.L. c. 149, § 105D.

IV. PROCEDURES

A. Eligible employees shall be entitled to up to eight (8) weeks of unpaid leave for the following purposes:

1. the birth of a child; or
2. placement of a child under the age of 18 (or under the age of 23 if the child is mentally or physically disabled) with the employee adopting or intending to adopt the child [in other words, adoption of a child].

Note that if both parents work for the City/Town, they will be entitled to eight (8) weeks of parental leave in the aggregate, for the same child.

B. To be eligible for leave under this Policy, an employee is required to provide two weeks' notice in advance of his or her anticipated date of departure, stating his or her intention to return and the anticipated date of return, or as soon as practicable, if the delay in notification is due to reasons beyond the employee's control. Upon return to work, the employee is entitled to be restored to his or her previous position, or to a similar position which has the same status and pay as his or her previous position, and to the length of service credit and seniority as of the date of leave.

C. Leave taken pursuant to this Policy will be counted against an employee's annual FMLA leave allowance.

D. Leave taken pursuant to this Policy shall be unpaid; however, an employee may elect to use any amount of accrued paid leave while on parental leave.

E. Option 1 - An employee out on unpaid parental leave pursuant to this Policy who has

exhausted his or her FMLA leave shall be responsible for assuming the full cost of premiums for health insurance coverage (employee and employer share). *[This is not an option if the employee has not exhausted his or her annual FMLA leave. Under the FMLA, an employer must continue to pay its share of premiums during an FMLA leave of absence. Once FMLA leave has been exhausted, the employer can require that the employee pay for the full cost of the premium].*

F. Option 2 – The City/Town will continue to pay the employer’s share of premiums for health insurance coverage while an employee is out on parental leave. An employee on parental leave under this Policy shall make arrangements to pay his or her share of the premium.

G. The City/Town shall post a notice of employees’ rights, together with a copy of this Policy, in a conspicuous place.

PARENTAL LEAVE POLICY

This acknowledges that I have received and reviewed the City/Town of _____ Parental Leave Policy (“Policy”). By signing this form, I agree to abide by the Policy and any Guidelines promulgated thereunder, and I agree to review periodically any changes or modifications. I recognize that the law and associated Policy regarding use of leave are continually evolving. Therefore, I understand that my regular review of this Policy, as it may be amended, is required.

Print Name: _____

Signature: _____

Date: _____

To be included in employee’s personnel file.

MASSACHUSETTS PARENTAL LEAVE NOTICE

PURSUANT TO M.G.L. C. 151B, §4(11A) AND C. 149, §105D, EVERY FULL-TIME EMPLOYEE IS ENTITLED AS A MATTER OF LAW TO AT LEAST EIGHT WEEKS (8) OF PARENTAL LEAVE IF S/HE COMPLIES WITH THE FOLLOWING CONDITIONS:

1. S/HE HAS COMPLETED AN INITIAL PROBATIONARY PERIOD SET BY THE EMPLOYER, NOT TO EXCEED THREE 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. S/HE GIVES TWO WEEKS' NOTICE OF HIS/HER EXPECTED DEPARTURE DATE AND NOTICE THAT S/HE INTENDS TO RETURN TO HIS/HER JOB, OR NOTICE AS SOON AS PRACTICABLE WHEN THE DELAY IN PROVIDING NOTICE IS FOR REASONS BEYOND THE EMPLOYEE'S CONTROL.

S/HE IS ENTITLED TO RETURN TO THE SAME OR A SIMILAR POSITION WITHOUT LOSS OF EMPLOYMENT BENEFITS FOR WHICH S/HE WAS ELIGIBLE ON THE DATE THE LEAVE COMMENCED, IF S/HE TERMINATES THE PARENTAL 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 PARENTAL 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.

WHERE BOTH PARENTS WORK FOR THE SAME EMPLOYER, THEY WILL BE ENTITLED TO EIGHT WEEKS PARENTAL LEAVE IN THE AGGREGATE, FOR THE SAME CHILD.