

The Parental Leave Act: what employers need to know

By David C. Henderson



On his last day in office, Massachusetts Gov. Deval L. Patrick signed into law Senate Bill 865, setting in motion a process by which the Massachusetts Parental Leave Act — or MPLA — will replace the Massachusetts Maternity Leave Act — or MMLA — effective April 7.

Most significantly, the new MPLA will expand the categories of workers entitled to parental leave. It also will modify certain notification provisions to the benefit of employees and include one new protection for employers, while generally leaving most of the employee rights and employer obligations unchanged from

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the MMLA.

Massachusetts employers who are going to be covered by the new parental leave law in April should start preparing for it now. The following analysis provides 10 key points for employers to consider.

1. The new parental leave rights under the MPLA, like the old maternity leave rights under the MMLA, generally will apply only when the employer has six or more employees.

The MPLA will follow the precedent set by the MMLA and take its definition of “employer” from the Fair Employment Practices Act, G.L.c. 151B, §1(5).

The FEPA definition states that it does not include certain social or fraternal organizations or “any employer with fewer than six persons in his employ.”

As a result, the new parental leave rights, like the old maternity leave rights, will be limited, at least in general, to situations in which the employer has six or more employees.

The FEPA definition of “employer” recently was amended, however. And even though it continues to say that it does not include an employer with five or fewer employees, it also says now that it “include[s] an employer of domestic workers including those covered under [the newly enacted — but not yet fully effective — Domestic Worker Bill of Rights Act, G.L.c. 149, §190].”

There thus is an issue about which of the two FEPA provisions will be dominant. Two state agencies have been directed by the Domestic Worker Bill of Rights Act to issue clarifying outreach materials and regulations no later than April 1. One of the points that should be clarified is whether the FEPA and MPLA definitions

of “employer” will extend MPLA rights to domestic workers when the employer has five or fewer employees.

2. The new parental leave rights and responsibilities will be gender-neutral. The MMLA purports to limit its parental leave to “female employees.” The MPLA will not mention gender. Instead, the MPLA will convey its parental leave rights simply to “employees.”

3. Only certain employees will qualify for leave under the MPLA.

As currently is the case under the MMLA, the only employees who will be eligible for parental leave under the MPLA will be those who have “completed the initial probationary period set by the terms of employment, not to exceed 3 months, or, if there is no such probationary period, [have] been employed by the same employer for at least 3 consecutive months as a full-time employee.”

4. With one key employer-friendly qualification, the eight-week entitlement to unpaid parental leave will not change under the MPLA.

As currently is the case under the MMLA, the basic leave entitlement under the MPLA will be for eight weeks of unpaid leave. An eligible employee will be able to use such leave “for ... giving birth or for the placement of a child under the age of 18, or under the age of 23 if the child is mentally or physically disabled, for adoption with the employee adopting or intending to adopt or for the placement of a child with an employee pursuant to a court order.”

But under the MPLA, there will not be a separate eight-week entitlement for each parent when they give birth to, adopt or

place a child, if both of them work for the same employer.

The MPLA, unlike the MMLA, explicitly will provide that “any 2 employees of the same employer shall only be entitled to 8 weeks of parental leave in aggregate for the birth or adoption of the same child.”

5. There will be no substantial change in the employee’s obligation to provide “notice of leave and intention to return.”

Under the MPLA, an employee desiring parental leave still will be required in general to give at least two weeks’ notice to the employer of the anticipated date of departure and intention to return to work.

The MPLA also will provide a loophole, however. An employee will be allowed to provide less than two weeks of notice as long as he or she provides notice “as soon as practicable [and] the delay is for reasons beyond the individual’s control.”

6. There will be no essential change in the employer’s “job restoration” responsibility.

As is the case under the MMLA, the MPLA will require generally that, after the leave, the employee be restored to the “previous, or a similar, position with the same status, pay, length of service credit and seniority, wherever applicable, as of the date of the leave.”

And like the MMLA, the MPLA also will acknowledge as follows exceptional circumstances in which the employee will not have a right to return to work:

“The employer shall not be required to restore an employee on parental leave to the 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 parental leave; provided, however, that the employee on parental leave shall retain any preferential consideration for another position to which the employee may be entitled as of the date of the leave.”

7. There will be no essential change in the employer’s obligations as they relate to employee benefits during parental leave.

In fashion similar to the MMLA, the MPLA will provide as follows:

“The parental leave shall not affect the employee’s right to receive vacation time, sick leave, bonuses, advancement, seniority, length of service credit, benefits, plans or programs for which the employee was eligible at the date of the leave, and any other advantages or rights of employment incidental to the employment position; provided, however, that the parental leave shall not be included, when applicable, in the computation of the benefits, rights and advantages; and provided, further, that the employer need not provide for the cost of any benefits, plans, or programs during the parental leave unless such employer so provides for all employees who are on leave of absence.”

8. An employer will need to address (and document) in advance any special conditions under which more than eight weeks of parental leave will be allowed.

The MPLA will add the following rule concerning whether the employee will continue to have MPLA rights when more than eight weeks of parental leave is allowed:

“If the employer agrees to provide parental leave for longer than 8 weeks, the employer shall not deny the employee the rights under this section 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 taking longer than 8 weeks of leave will result in the denial of reinstatement or loss of other rights and benefits.”

9. An employer’s failure to provide parental leave rights under the MPLA will be an unlawful employment practice within the meaning of the FEPA.

Section 2 of the enactment that created the MPLA will amend the FEPA definition of “unlawful practice” so that, effective April 7, it will cover failing to provide parental leave rights. As a result, the Massachusetts Commission Against Discrimination will have jurisdiction whenever an employer refuses to restore an employee to employment after parental leave or otherwise fails to comply with MPLA obligations.

10. An expanded “posting” re-requirement in the MPLA expressly mentions posting related policies.

Under the MMLA, an employer is required merely to post “a notice of this provision ... in every establishment in which females are employed.” The MMLA says nothing about posting a policy.

The MPLA, however, provides that “every employer shall post and keep posted in a conspicuous place or places upon its premises a notice describing [the MPLA] and the employer’s policies related to [the MPLA].” **NEM**

