Medical Leave Acts & Regulations

REVIEWING FMLA, MMLA, ADA, SNLA, PATERNITY LEAVES, AND THE COLLECTIVE BARGAINING AGREEMENTS

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Massachusetts Maternity Leave Act (MMLA)

M.G.L. C. 149, §105D

MASSACHUSETTS COMMISSION AGAINST DISCRIMINATION ("MCAD" OR "COMMISSION") IS RESPONSIBLE FOR ENFORCING THE MMLA.

Massachusetts Maternity Leave Act

- MMLA is available to a female employee either "for the purpose of giving birth" or to adopt a child. Thus, it is available at the time of the birth or adoption, but not substantially earlier or substantially later.
- “Purpose of giving birth," means: leave taken for the purpose of preparing for or participating in the birth or adoption of a child, and for caring for the newborn or newly adopted child.
- Applies for both birth and adoptions.
- District must grant eight weeks of unpaid maternity leave under the MMLA.
- School District cannot refuse to grant MMLA leave on the grounds that doing so would constitute a hardship.
- The MMLA, by its terms, provides maternity leave to female employees only. However, in the purposes of adoption, MMLA applies to both male and female employees.

Massachusetts Maternity Leave Act

- MMLA does not require that leave be paid or that maternity leave be included in the computation of benefits, rights and advantages incident to employment, or that an employer pay for the costs of any benefits, plans or programs during the maternity leave.
- The employee must be permitted to use, concurrently with the maternity leave, accrued paid sick, vacation or personal time.
- An employee may voluntarily use any accrued vacation or personal time she has concurrently with all or part of her maternity leave. Employers cannot require an employee to use her accrued paid vacation or personal time concurrently with all or part of her maternity leave.
- If an employer provides paid sick leave, an employee may use such sick leave concurrently with any part of her maternity leave that satisfies the employer's sick leave policy. An employer may not require an employee to use her accrued sick leave for any part of her maternity leave that satisfies the employer's sick leave policy, even if the employer requires its employees to use accrued sick leave for other types of absences that satisfy the employer's policy.

Massachusetts Maternity Leave Act

- MMLA requires that an employee on leave be restored to her previous or a similar position upon her return to employment following leave. That position must have the same status, pay, length of service credit and seniority as the position the employee held prior to the leave.
- MMLA also requires that a maternity leave not affect an employee's right to receive vacation time, sick leave, bonuses, advancement, seniority, length of service credit, benefits, plans or programs for which she was eligible at the date of her leave, and any other advantages or rights of her employment incident to her position. Such maternity leave, however, need not be included in the computation of such benefits, rights and advantages.
- An employee returning from maternity leave has no greater right to reinstatement or to other benefits and conditions of employment than other employees who were continuously working during the leave period.
- An employer is not required to restore an employee on maternity leave to her previous or a similar position if other employees of equal length of service credit and status in the same or similar positions have been laid off due to economic conditions or due to other changes in operating conditions affecting employment during the period of such maternity leave.

Massachusetts Maternity Leave Act

- An employer may grant a longer maternity leave than required under the MMLA.
- If the employer does not intend for full MMLA rights to apply to the period beyond eight weeks, however, it must clearly so inform the employee in writing prior to the commencement of the leave.
- An employee seeking maternity leave must give two weeks notice of her anticipated date of departure and intent to return. "Anticipated" date of departure does not mean "exact" date.
- It is expected that employers and employees will communicate in good faith with regard to making arrangements for leave, taking into account the uncertainty inherent in delivery and adoption dates and the needs of the employer to plan in advance for an employee's absence.

Massachusetts Maternity Leave Act

- MMLA allows eight weeks of leave each time an employee gives birth or adopts a child.
- An employee who gives birth to twins has actually given birth two times and is entitled to eight weeks of leave for each child, which is 16 weeks.
- The Massachusetts Commission Against Discrimination treats multiple adoptions the same as multiple births.
- An employee is not eligible for maternity leave until she has completed the initial probationary period set by her employer.

Pregnancy Discrimination Act

THE PREGNANCY DISCRIMINATION ACT (PDA) IS AN AMENDMENT TO TITLE VII OF THE CIVIL RIGHTS ACT OF 1964.

Pregnancy Discrimination Act

- Discrimination on the basis of pregnancy, childbirth, or related medical conditions constitutes unlawful sex discrimination under Title VII. Women affected by pregnancy or related conditions must be treated in the same manner as other applicants or employees who are similar in their ability or inability to work.
- An employer cannot refuse to hire a woman because of her pregnancy related condition as long as she is able to perform the major functions of her job. An employer cannot refuse to hire her because of its prejudices against pregnant workers or because of the prejudices of co-workers, clients, or customers. The PDA also forbids discrimination based on pregnancy when it comes to any other aspect of employment, including pay, job assignments, promotions, layoffs, training, fringe benefits, firing, and any other term or condition of employment.

- Pregnant employees must be permitted to work as long as they are able to perform their jobs. If an employee has been absent from work as a result of a pregnancy related condition and recovers, her employer may not require her to remain on leave until the baby's birth. Nor may an employer have a rule that prohibits an employee from returning to work for a predetermined length of time after childbirth.

- Under the PDA, an employer that allows temporarily disabled employees to take disability leave or leave without pay must allow an employee who is temporarily disabled due to pregnancy to do the same. Employers must hold open a job for a pregnancy related absence the same length of time that jobs are held open for employees on sick or temporary disability leave.

- While this is a federal law, the state's anti- - discrimination statute (M.G.L. c. 151b) contains similar protection.

Federal Family Medical Leave Act (FMLA)

29 U.S.C. 2601, ET SEQ.

GOVERNED BY THE UNITED STATES DEPARTMENT OF LABOR

Family Medical Leave Act

- FMLA applies to all public agencies, all public and private elementary and secondary schools, and companies with 50 or more employees. These employers must provide an eligible employee with up to 12 weeks of unpaid leave each year for any of the following reasons:
  - **for the birth and care of the newborn child of an employee;**
  - **for placement with the employee of a child for adoption or foster care;**
  - **to care for an immediate family member (spouse, child, or parent) with a serious health condition; or**
  - **to take medical leave when the employee is unable to work because of a serious health condition.**
  - **For any qualifying exigency arising out of the fact that a spouse, son, daughter, or parent is a military member on covered active duty or call to covered active duty status.**

- Employees are eligible for leave if they have worked for their employer at least 12 months, at least 1,250 hours over the past 12 months, and work at a location where the company employs 50 or more employees within 75 miles.

- Whether an employee has worked the minimum 1,250 hours of service is determined according to FLSA principles for determining compensable hours or work.

Family Medical Leave Act

- The 12 months of employment do not have to be consecutive.
- Employees may take FMLA leave on an intermittent or reduced schedule basis.
- When leave is needed for planned medical treatment, the employee must make a reasonable effort to schedule treatment so as not to unduly disrupt the employer's operations.
- If FMLA leave is for the birth, adoption, or foster placement of a child, use of intermittent or reduced schedule leave requires the employer’s approval.

Family Medical Leave Act

- An employer is permitted to choose any one of the following methods for determining the 12-month period in which the 12 weeks of leave entitlement occur:
  - **(1) The calendar year;**
  - **(2) Any fixed 12-month leave year, such as a fiscal year, a year required by State law, or a year starting on an employee's anniversary date;**
  - **(3) The 12-month period measured forward from the date any employee's first FMLA leave under paragraph (a) begins; or,**
  - **(4) A "rolling" 12-month period measured backward from the date an employee uses any FMLA leave as described in paragraph (a).**
- The "rolling" 12-month period: each time an employee takes FMLA leave the remaining leave entitlement would be any balance of the 12 weeks which has not been used during the immediately preceding 12 months.
- The fact that a holiday may occur within the week taken as FMLA leave has no effect; the week is counted as a week of FMLA leave. However, if an employee is using FMLA leave in increments of less than one week, the holiday will not count against the employee's FMLA entitlement unless the employee was otherwise scheduled and expected to work during the holiday.

Family Medical Leave Act

- Similarly, if the employees generally are not expected to report for work for one or more weeks (*e.g.*, a school closing two weeks for the Christmas/New Year holiday or the summer vacation or an employer closing the plant for retooling or repairs), the days the employer's activities have ceased do not count against the employee's FMLA leave entitlement.
- When an employee takes leave on an intermittent or reduced leave schedule, only the amount of leave actually taken may be counted toward the employee's leave entitlement.
- On return from FMLA leave, an employee is entitled to be returned to the same position the employee held when leave commenced, or to an equivalent position with equivalent benefits, pay, and other terms and conditions of employment. An employee is entitled to such reinstatement even if the employee has been replaced or his or her position has been restructured to accommodate the employee's absence.

Family Medical Leave Act

- Under certain conditions, employees may choose, or employers may require employees, to "substitute" (run concurrently) accrued paid leave, such as sick or vacation leave, to cover some or all of the FMLA leave period.
- Employees must comply with their employer's usual and customary requirements for requesting leave and provide enough information for their employer to reasonably determine whether the FMLA may apply to the leave request.
- Employees generally must request leave 30 days in advance when the need for leave is foreseeable. When the need for leave is foreseeable less than 30 days in advance or is unforeseeable, employees must provide notice as soon as possible and practicable under the circumstances.

Family Medical Leave Act

- When an employee seeks leave for a FMLA-qualifying reason for the first time, the employee need not expressly assert FMLA rights or even mention the FMLA. If an employee later requests additional leave for the same qualifying condition, the employee must specifically reference either the qualifying reason for leave or the need for FMLA leave.
- When an employee requests FMLA leave due to his or her own serious health condition or a covered family member's serious health condition, the employer may require certification in support of the leave from a health care provider.
- An employer may also require second or third medical opinions (at the employer's expense) and periodic recertification of a serious health condition.

Family Medical Leave Act

- Upon return from FMLA leave, an employee must be restored to his or her original job or to an equivalent job with equivalent pay, benefits, and other terms and conditions of employment.
- Employers are also required to continue group health insurance coverage for an employee on FMLA leave under the same terms and conditions as if the employee had not taken leave.
- If an employee is on FMLA leave running concurrently with a workers' compensation absence, and the provisions of the workers' compensation statute permit the employer or the employer's representative to request additional information from the employee's workers' compensation health care provider, the FMLA does not prevent the employer from following the workers' compensation provisions and information received under those provisions may be considered in determining the employee's entitlement to FMLA-protected leave.

Family Medical Leave Act

- An employee generally has a right to return to the same position or an equivalent position with equivalent pay, benefits, and working conditions at the conclusion of the leave. The taking of FMLA leave cannot result in the loss of any benefit that accrued prior to the start of the leave.
- An employee has no greater right to reinstatement or to other benefits and conditions of employment than if the employee had been continuously employed during the FMLA leave period. An employer must be able to show that an employee would not otherwise have been employed at the time reinstatement is requested in order to deny restoration to employment.
- If the employee is unable to perform an essential function of the position because of a physical or mental condition, including the continuation of a serious health condition or an injury or illness also covered by workers' compensation, the employee has no right to restoration to another position under the FMLA.

FMLA as it Applies to Educators

29 U.S.C. 2601 §825

Special Rules Applicable to Employees of Schools Under FMLA

- Certain special rules apply to employees of local educational agencies, including public school boards and elementary and secondary schools under their jurisdiction, and private elementary and secondary schools.
- The Act's 50-employee coverage test does not apply. The usual requirements for employees to be eligible do apply.
- The special rules affect the taking of intermittent leave or leave on a reduced leave schedule, or leave near the end of an academic term (semester), by instructional employees.
- *Instructional employees* are those whose principal function is to teach and instruct students in a class, a small group, or an individual setting. This term includes not only teachers, but also athletic coaches, driving instructors, and special education assistants such as signers for the hearing impaired.
- It does not include, and the special rules do not apply to, teacher assistants or aides who do not have as their principal job actual teaching or instructing, nor does it include auxiliary personnel such as counselors, psychologists, or curriculum specialists.
- It also does not include cafeteria workers, maintenance workers, or bus drivers.

Special Rules Applicable to Employees of Schools Under FMLA

- Leave taken for a period that ends with the school year and begins the next semester is leave taken consecutively rather than intermittently.
- The period during the summer vacation when the employee would not have been required to report for duty is not counted against the employee's FMLA leave entitlement.
- An instructional employee who is on FMLA leave at the end of the school year must be provided with any benefits over the summer vacation that employees would normally receive if they had been working at the end of the school year.

Special Rules Applicable to Employees of Schools Under FMLA

- If an eligible instructional employee needs intermittent leave or leave on a reduced leave schedule to care for a family member with a serious health condition, to care for a covered service member, or for the employee's own serious health condition, which is foreseeable based on planned medical treatment, and the employee would be on leave for more than 20 percent of the total number of working days over the period the leave would extend, the employer may require the employee to choose either to:
  - **(i) Take leave for a period or periods of a particular duration, not greater than the duration of the planned treatment; or**
  - **(ii) Transfer temporarily to an available alternative position for which the employee is qualified, which has equivalent pay and benefits and which better accommodates recurring periods of leave than does the employee's regular position.**
- If an instructional employee does not give required notice of foreseeable FMLA leave (*see* §825.302) to be taken intermittently or on a reduced leave schedule, the employer may require the employee to take leave of a particular duration, or to transfer temporarily to an alternative position. Alternatively, the employer may require the employee to delay the taking of leave until the notice provision is met.

Special Rules Applicable to Employees of Schools Under FMLA

- An instructional employee begins leave more than five weeks before the end of a term. The employer may require the employee to continue taking leave until the end of the term if —
  - **(i) The leave will last at least three weeks, and**
  - **(ii) The employee would return to work during the three-week period before the end of the term.**
- The employee begins leave during the five-week period before the end of a term because of the birth of a son or daughter; the placement of a son or daughter for adoption or foster care; to care for a spouse, son, daughter, or parent with a serious health condition; or to care for a covered service member. The employer may require the employee to continue taking leave until the end of the term if—
  - **(i) The leave will last more than two weeks, and**
  - **(ii) The employee would return to work during the two-week period before the end of the term.**

Special Rules Applicable to Employees of Schools Under FMLA

- The employee begins leave during the three-week period before the end of a term because of the birth of a son or daughter; the placement of a son or daughter for adoption or foster care; to care for a spouse, son, daughter, or parent with a serious health condition; or to care for a covered service member: The employer may require the employee to continue taking leave until the end of the term if the leave will last more than five working days.
- For purposes of these provisions, *academic term* means the school semester, which typically ends near the end of the calendar year and the end of spring each school year. In no case may a school have more than two academic terms or semesters each year for purposes of FMLA.
- An example of leave falling within these provisions would be where an employee plans two weeks of leave to care for a family member which will begin three weeks before the end of the term. In that situation, the employer could require the employee to stay out on leave until the end of the term.

Special Rules Applicable to Employees of Schools Under FMLA

- If an employee chooses to take leave for periods of a particular duration in the case of intermittent or reduced schedule leave, the entire period of leave taken will count as FMLA leave.
- In the case of an employee who is required to take leave until the end of an academic term, only the period of leave until the employee is ready and able to return to work shall be charged against the employee's FMLA leave entitlement.
- The employer has the option not to require the employee to stay on leave until the end of the school term. Therefore, any additional leave required by the employer to the end of the school term is not counted as FMLA leave; however, the employer shall be required to maintain the employee's group health insurance and restore the employee to the same or equivalent job including other benefits at the conclusion of the leave.
- The determination of how an employee is to be restored to an equivalent position upon return from FMLA leave will be made on the basis of "established school board policies and practices, private school policies and practices, and collective bargaining agreements." The "established policies" and collective bargaining agreements used as a basis for restoration must be in writing, must be made known to the employee prior to the taking of FMLA leave, and must clearly explain the employee's restoration rights upon return from leave.

Collective Bargaining Agreements on Employee Rights Under FMLA

29 U.S.C. 2601 §825.700

Collective Bargaining Agreements on Employee Rights Under FMLA

- An employer must observe any employment benefit program or plan that provides greater family or medical leave rights to employees than the rights established by the FMLA. Conversely, the rights established by the Act may not be diminished by any employment benefit program or plan.
- Nothing in this Act prevents an employer from amending existing leave and employee benefit programs, provided they comply with FMLA. However, nothing in the Act is intended to discourage employers from adopting or retaining more generous leave policies.

MMLA versus FMLA

MMLA versus FMLA

- Where leave is taken for a reason specified in both the FMLA and MMLA, the leave may be counted simultaneously against the employee's entitlement under both laws.
- MMLA may entitle an employee to leave in addition to leave taken under the FMLA. The FMLA provides that nothing in the law supersedes any provision of state law that provides greater family or medical leave rights. If an employee takes 12 weeks of FMLA leave for a purpose other than birth or adoption of a child, she will still have the right to take eight weeks of maternity leave under the MMLA.
- Unlike the FMLA, the MMLA does not require an employer to specifically designate leave as MMLA leave.

MMLA versus FMLA

- If an employee takes leave for an MMLA purpose, such as giving birth, that leave will count towards that employee's MMLA entitlement whether or not the employer designates it as such. FMLA leave, by contrast, must be specifically designated as such, in writing, in order for that leave to be counted toward that employee's twelve-week entitlement
- Under the MMLA, an employee may take a maternity leave each time she gives birth or adopts a child.
- If an employee gives birth in January and adopts a second child in March, she would be entitled to two separate eight-week maternity leaves under the MMLA for a total of 16 weeks.
- By contrast, under the FMLA, leave is limited to a maximum of 12 weeks in a 12-month period.

How Is Seniority Affected?

- Under MMLA - If the employee has accrued 7.5 years of seniority as of the commencement of her leave, she must be returned to work following her leave with the same 7.5 years of seniority.
- Under FMLA - An employee may, but is not entitled to, accrue any additional benefits or seniority during unpaid FMLA leave. Pay increases conditioned upon seniority, length of service, or work performed must be granted in accordance with the employer's policy or practice with respect to other employees on an equivalent leave status for a reason that does not qualify as FMLA leave. They are entitled to changes in benefits plans, except those which may be dependent upon seniority or accrual during the leave period, immediately upon return from leave or to the same extent they would have qualified if no leave had been taken.

Americans With Disabilities Act (ADA)

THE DEPARTMENT OF LABOR AND FOUR FEDERAL AGENCIES ENFORCE THE ADA:

- THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (EEOC)
- THE DEPARTMENT OF TRANSPORTATION
- THE FEDERAL COMMUNICATIONS COMMISSION (FCC)
- THE DEPARTMENT OF JUSTICE

TWO AGENCIES WITHIN THE DEPARTMENT OF LABOR ENFORCE PORTIONS OF THE ADA:

- THE OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS (OFCCP)
- THE CIVIL RIGHTS CENTER

ADA

- The Americans with Disabilities Act of 1990 (ADA) prohibits discrimination and ensures equal opportunity for persons with disabilities in employment, State and local government services, public accommodations, commercial facilities, and transportation.
- Employers with 15 or more employees are prohibited from discriminating against people with disabilities by Title I of the Americans with Disabilities Act (ADA). In general, the employment provisions of the ADA require:
  - **equal opportunity in selecting, testing, and hiring qualified applicants with disabilities;**
  - **job accommodation for applicants and workers with disabilities when such accommodations would not impose "undue hardship;" and**
  - **equal opportunity in promotion and benefits.**

ADA

- *Disability* means, with respect to an individual, a physical or mental impairment that substantially limits one or more of the major life activities of such individual; a record of such an impairment; or being regarded as having such an impairment.
  - (i) The phrase *physical or mental impairment* means—
    - (A) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin, and endocrine;
    - (B) Any mental or psychological disorder such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.
  - (ii) The phrase *physical or mental impairment* includes, but is not limited to, such contagious and noncontagious diseases and conditions as orthopedic, visual, speech and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, specific learning disabilities, HIV disease (whether symptomatic or asymptomatic), tuberculosis, drug addiction, and alcoholism.
  - (iii) The phrase *physical or mental impairment* does not include homosexuality or bisexuality.

- The phrase *major life activities* means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.
- The phrase *has a record of such an impairment* means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.
- The phrase *is regarded as having an impairment* means—
  - (i) Has a physical or mental impairment that does not substantially limit major life activities but that is treated by a public entity as constituting such a limitation;
  - (ii) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or
  - (iii) Has none of the impairments defined in paragraph (1) of this definition but is treated by a public entity as having such an impairment.

- The term *disability* does not include—
  - (i) Transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders;
  - (ii) Compulsive gambling, kleptomania, or pyromania; or
  - (iii) Psychoactive substance use disorders resulting from current illegal use of drugs.

ADA

- Job Accommodations: is a reasonable adjustment to a job or work environment that makes it possible for an individual with a disability to perform job duties.
- Determining whether to provide accommodations involves considering the required job tasks, the functional limitations of the person doing the job, the level of hardship to the employer, and other issues.
- Accommodations may include specialized equipment, facility modifications, adjustments to work schedules or job duties, as well as a whole range of other creative solutions.

ADA

- If you have a disability and are qualified to do a job, the ADA protects you from job discrimination on the basis of your disability.
- Under the ADA, you have a disability if you have a physical or mental impairment that substantially limits a major life activity. The ADA also protects you if you have a history of such a disability, or if an employer believes that you have such a disability, even if you don't.
- To be protected under the ADA, you must have, have a record of, or be regarded as having a substantial, as opposed to a minor, impairment.
- A substantial impairment is one that significantly limits or restricts a major life activity such as hearing, seeing, speaking, walking, breathing, performing manual tasks, caring for oneself, learning or working.
- Just because someone has a "serious health condition" also does not mean that the employer regards him/her as having an ADA disability. To satisfy this prong of the ADA definition of "disability," the employer must treat the individual as having an impairment that substantially limits one or more major life activities.
- If you have a disability, you must also be qualified to perform the essential functions or duties of a job, with or without reasonable accommodation, in order to be protected from job discrimination by the ADA. This means two things.
  - **First, you must satisfy the employer's requirements for the job, such as education, employment experience, skills or licenses.**
  - **Second, you must be able to perform the essential functions of the job with or without reasonable accommodation.**
  - **Essential functions are the fundamental job duties that you must be able to perform on your own or with the help of a reasonable accommodation. An employer cannot refuse to hire you because your disability prevents you from performing duties that are not essential to the job.**

ADA

- Reasonable accommodation is any change or adjustment to a job or work environment that permits a qualified applicant or employee with a disability to participate in the job application process, to perform the essential functions of a job, or to enjoy benefits and privileges of employment equal to those enjoyed by employees without disabilities. For example, reasonable accommodation may include:
  - **providing or modifying equipment or devices,**
  - **job restructuring,**
  - **part-time or modified work schedules,**
  - **reassignment to a vacant position,**
  - **adjusting or modifying examinations, training materials, or policies,**
  - **providing readers and interpreters, and**
  - **making the workplace readily accessible to and usable by people with disabilities.**
- An employer is required to provide a reasonable accommodation to a qualified applicant or employee with a disability unless the employer can show that the accommodation would be an undue hardship -- that is, that it would require significant difficulty or expense.
- The ADA permits an employer to refuse to hire an individual if she poses a direct threat to the health or safety of herself or others.
- A direct threat means a significant risk of substantial harm. The determination that there is a direct threat must be based on objective, factual evidence regarding an individual's present ability to perform essential functions of a job.
- An employer cannot refuse to hire you because of a slightly increased risk or because of fears that there might be a significant risk sometime in the future. The employer must also consider whether a risk can be eliminated or reduced to an acceptable level with a reasonable accommodation.

ADA

- If you are applying for a job, an employer cannot ask you if you are disabled or ask about the nature or severity of your disability.
- An employer can ask if you can perform the duties of the job with or without reasonable accommodation.
- An employer can also ask you to describe or to demonstrate how, with or without reasonable accommodation, you will perform the duties of the job.
- An employer cannot require you to take a medical examination before you are offered a job.
- Following a job offer, an employer can condition the offer on your passing a required medical examination, but only if all entering employees for that job category have to take the examination.
- However, an employer cannot reject you because of information about your disability revealed by the medical examination, unless the reasons for rejection are job-related and necessary for the conduct of the employer's business. The employer cannot refuse to hire you because of your disability if you can perform the essential functions of the job with an accommodation.
- Once you have been hired and started work, your employer cannot require that you take a medical examination or ask questions about your disability unless they are related to your job and necessary for the conduct of your employer's business.
- Your employer may conduct voluntary medical examinations that are part of an employee health program, and may provide medical information required by State workers' compensation laws to the agencies that administer such laws.
- The results of all medical examinations must be kept confidential, and maintained in separate medical files.
- Anyone who is currently using drugs illegally is not protected by the ADA and may be denied employment or fired on the basis of such use. The ADA does not prevent employers from testing applicants or employees for current illegal drug use.

ADA
Relationship to FMLA & MMLA

ADA ‘s Relationship to FMLA

- The FMLA and the ADA both require a covered employer to grant medical leave to an employee in certain circumstances.
- An FMLA "serious health condition" is not necessarily an ADA "disability." An ADA "disability" is an impairment that substantially limits one or more major life activities, a record of such an impairment, or being regarded as having such an impairment.
- Some FMLA "serious health conditions" may be ADA disabilities, for example, most cancers and serious strokes. Other "serious health conditions" may not be ADA disabilities, for example, pregnancy or a routine broken leg or hernia. This is because the condition is not an impairment (e.g., pregnancy), or because the impairment is not substantially limiting (e.g., a routine broken leg or hernia).
- When an employee requests leave under the FMLA for a serious health condition, employers will not violate the ADA by asking for the information specified in the FMLA certification form. The FMLA form only requests information relating to the particular serious health condition, as defined in the FMLA, for which the employee is seeking leave.
- An employer is entitled to know why an employee, who otherwise should be at work, is requesting time off under the FMLA. If the inquiries are strictly limited in this fashion, they would be "job-related and consistent with business necessity" under the ADA.

ADA ‘s Relationship to FMLA

- If an employee requests time off for a reason related or possibly related to a disability (e.g., "I need six weeks off to get treatment for a back problem"), the employer should consider this a request for ADA reasonable accommodation as well as FMLA leave. However, if the employee states that s/he only wants to invoke rights under the FMLA, the employer should not make additional inquiries related to ADA coverage
- Under the ADA, unpaid medical leave is a reasonable accommodation and must be provided to an otherwise qualified individual with a disability unless (or until) it imposes an undue hardship on the operation of the employer's business.
- Under the ADA, an employer may offer an employee a reasonable accommodation other than the leave that has been requested, as long as it is effective. For example, an employer may offer special equipment, an opportunity to work reduced hours in the employee’s current job, or a temporary assignment to another job, if these are effective accommodations.
- An employer has no obligation to provide an indefinite leave.

ADA ‘s Relationship to FMLA

- Employees protected by Title VII or the ADA must be independently "eligible" for FMLA leave.
- The FMLA does not mean that more than 12 weeks of unpaid leave automatically imposes an undue hardship for purposes of the ADA. An otherwise qualified individual with a disability is entitled to more than 12 weeks of unpaid leave as a reasonable accommodation if the additional leave would not impose an undue hardship on the operation of the employer's business.
- To evaluate whether additional leave would impose an undue hardship, the employer may consider the impact on its operations caused by the employee's initial 12-week absence, along with the undue hardship factors specified in the ADA.
- The ADA's reasonable accommodation obligation does not require a covered employer to give an employee time off to care for a spouse, son, daughter, parent or other individual with a disability with whom the employee has a relationship.
- A reasonable accommodation may include providing for more time off beyond what is required under the FMLA.

ADA ‘s Relationship to MMLA

- Pregnancy is not considered a disability for purposes of the Americans with Disabilities Act (ADA). To be considered a disability under the ADA, covered persons must actually have physical or mental impairments that substantially limit one or more major life activities. Because pregnancy is not the result of a physiological disorder, it is not considered an impairment under the law. However, complications resulting from pregnancy may be impairments that the employer will need to consider on a case-by-case basis.
- Title VII in itself does not require employers to give employees leave to care for an ill child or family member. However, Title VII prohibits covered employers from discriminating on the basis of race, color, religion, sex, or national origin when they administer family leave. For example, if an employer allowed a woman but not a man to take 12 weeks of leave to care for a newly-adopted or placed child, the man would have a Title VII cause of action because the employer administered family leave in a discriminatory way based on gender.
- As another example, if an employer allowed a woman to take 3 weeks of childcare leave in addition to leave necessary to recuperate from childbirth, but declined to permit a man to take 3 weeks of childcare leave, the man would have a Title VII cause of action because the employer administered family leave in a discriminatory way based on gender.
- The ADA's reasonable accommodation requirement does not require an employer to give an employee time off to care for a family member with a disability. Of course, when an employer opts to offer family leave as an employee benefit, the employer must provide the leave in a non-discriminatory manner.

ADA ‘s Relationship to MMLA

- An employee may develop a disability as a result of pregnancy or childbirth, which could affect her return to her job, for which s/he might require a reasonable accommodation.
- In addition, an employer should treat an employee who cannot work because of a disability related to pregnancy or childbirth the same way it treats other disabled or handicapped employees.
- The MMLA covers only the birth or adoption of a child or children, not pre-birth pregnancy-related disabilities. Therefore, the MMLA does not cover any of her pre-birth time off. ADA would provide the protection needed for pre-birth pregnancy-related disabilities.
- Complications prior to childbirth may be eligible as a protected status under ADA. For example, a woman who suffers from hypertension while expecting may qualify for protected status. It must be shown that her hypertension limits, or is regarded as limiting a major life activity, which is often defined as a task that most people are able to perform adequately with very little difficulty.
- If a pregnancy-related condition makes it difficult to perform one or more of these activities, then ADA provisions may apply, and the employer must make compliant accommodations.

ADA ‘s Relationship to MMLA

- What is most interesting to note is that if you are experiencing a normal and health pregnancy you are not protected under the law – you do not meet the criteria for disability under the law. Only women experiencing pregnancy complications have these protections.
- Depending on the types of complications caused by the pregnancy and the extent of the bed rest restriction, an employee may also be disabled under the ADA. She will qualify as disabled if the unusual physical impairments caused by her pregnancy affect a major life activity and that major life activity is substantially limited by the impairment.
- Once it is determined that an employee is disabled, and she has asked for an accommodation, then it is the employer’s obligation to engage in the interactive process with the employee to determine whether there is a reasonable accommodation available

Small Necessities Leave Act

M.G.L. C. 149, S. 52D

THE MASSACHUSETTS OFFICE OF THE ATTORNEY GENERAL HAS BEEN ENTRUSTED WITH THE ENFORCEMENT OF THE ACT.

Small Necessities Leave Act

- The SNLA is a state law that allows eligible employees up to 24 hours of leave every year, in addition to the 12 weeks allowed under the FMLA. for the following purposes:
  - **(1) accompany their child to routine medical or dental appointments. such as check-ups or vaccinations:(2) participate in school activities directly related to the educational advancement of their child, such as parent-teacher conferences; or**
  - **(3) to accompany an elderly relative to routine medical or dental appointments or for other professional services related to the elder's care.**
- To be eligible for SNLA leave, you must meet the same criteria as for FMLA leave.
- Employers may require that a request for leave be supported by a certification.
- The SNLA does not mandate that the employer post the employee's rights at the workplace.

Small Necessities Leave Act

- The employee need not use the phrase “Small Necessities Leave Act” when requesting a leave of absence. Therefore, the employer must use its best judgment when categorizing leave requests, and be certain to document, in the employee’s personnel record, all leave taken within the determined 12-month period.
- Employers are given the option to require certification (from a doctor, a school, a nursing home, or other appropriate facility) for leave requests. If the employer uses this procedure, the employer must place all such certificates, along with any written requests, in the employee’s personnel record.
- Employees are asked to give at least one week notice if the need for this leave is foreseeable. If leave is unforeseeable, the employee must give as much notice as is practical under the circumstances.

Paternity Leaves

PATERNITY LEAVES AS IT APPLIES TOWARDS MMLA, FMLA, SNLA, AND THE COLLECTIVE BARGAINING AGREEMENTS

Paternity Leaves

- Men are now entitled to paternity leave under the Massachusetts Maternity Leave Act ("MMLA") to the same extent that women are entitled to maternity leave under this law, announced Martin B. Ebel, Commissioner of the Massachusetts Commission Against Discrimination ("MCAD"). The MCAD's new interpretation of the MMLA as covering men as well as women is effective June, 2008.
- An employer may not lawfully reduce or eliminate a male employee's employment rights or benefits (e.g., vacation time, sick leave, bonuses) because he has taken paternity leave. However, the employer may exclude the duration of the paternity leave from the calculation of such employment rights and benefits. Similarly, the employer does not have to provide pay, benefits, or the cost of benefits to an employee on paternity leave unless the employer generally does so in connection with other leaves of absence.
- When the paternity leave ends, the employer must restore the employee to his previous position, or a similar one, with the same status, pay, length of service credit and seniority, wherever applicable, as of the date of his leave. An exception may exist if similarly situated employees have been laid off during the paternity leave due to economic conditions or operational changes. When this occurs, the employee retains any rights to preferential consideration for another position that he may have had when his leave began.

Paternity Leaves

- The MMLA, by its terms, provides maternity leave to female employees only. This means that the MCAD is unable to take jurisdiction over claims in which male employees are seeking eight weeks of unpaid paternity leave. Providing maternity leave in excess of the eight weeks required by the MMLA to female employees only, and not to males, would in most circumstances constitute sex discrimination in violation of Chapter 151B.
- An employer who provides leave to female employees only, and not to male employees, may also violate the federal prohibitions against sex discrimination even though the employer has acted in compliance with the MMLA. According to the EEOC, "[w]hen an employer does grant maternity leave, the employer 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." EEOC Compliance Manual, Section 626.6 on Paternity Leave.
- The Massachusetts Supreme Judicial Court has not as of the date of these Guidelines considered whether the MMLA's requirement of leave for females only violates the Massachusetts Equal Rights Amendment, Article CVI of the Massachusetts Constitution. Given the possibility of a successful challenge to the constitutionality of the MMLA, employers should consider providing leave to all members of their workforce who otherwise meet the eligibility requirements of the MMLA.
- Based upon the Commissioner's statements, male employees are now eligible for up to eight weeks of unpaid parental leave so long as the employee (1) has completed an initial probationary period or has been employed for three consecutive months as a full-time employee; (2) requests parental leave in connection with the birth or adoption of a child; and (3) gives two weeks notice of the date of his departure and indicates an intent to return. Massachusetts employers covered by the MMLA (those with six or more employees) should review their policies and practices to ensure compliance with the MCAD's new interpretation of the statute.

Maternity, Paternity, and Medical Leave Options Under Contract

WFT COLLECTIVE BARGAINING AGREEMENT LEAVE OPTIONS

AFSCME COLLECTIVE BARGAINING AGREEMENT LEAVE OPTIONS

EXEMPT STAFF & PERSONAL CONTRACT LEAVE OPTIONS

Westport Federation of Teachers

- Article IX Leaves of Absence, F. Maternity and Parental Leaves
  - **Non-paid leave**
  - **Must select option A or B**
  - **Payment shall be in the same manner as payment for any other illness or injury (if sick days are available they must provide a note to be paid)**
  - **All benefits to which the teacher was entitled at the time of the leave shall be restored upon return, including any unused sick time.**
  - **Must notify the Superintendent through the building principal as soon as the teacher determines she is pregnant.**
  - **Must select on of two options in writing for type of maternity or parental leave (A or B).**

Westport Federation of Teachers

- Article IX Leaves of Absence, F. Maternity and Parental Leaves
  - **Parental leave is for the purpose of adoption or the birth of a child.**
  - **Per the collective bargaining agreement only one parent may be granted leave if both are in the union.**
  - **For parental leaves notice must provided with as much advance notice as possible, with a minimum of two weeks.**
  - **All leaves are subject to the provisions of FMLA and other federal, local, and state laws.**
- Option A
  - **Seniority shall accrue**
  - **8 to 12 weeks of leave (as provided by FMLA & MMLA)**
  - **Must state anticipated date of departure and date of anticipated return**

Westport Federation of Teachers

- Option B
  - **Leave may be from 30 to 180 days in length.**
  - **Must notify 30 days prior to anticipated starting date of leave and shall specify the length of leave.**
  - **Must notify Superintendent by April 15th or three months after the date of giving birth (which ever date is later) the intention to return.**
  - **Shall only be reinstated as soon as a vacancy for which the employee is qualified occurs.**
  - **Upon return, shall be placed on salary schedule at the step s/he held prior to the leave, unless s/he taught for more than 50% of the school days when the leave commenced.**
  - **Seniority will only accrue for the first 8 weeks.**
  - **Additional leave beyond the one year will be at the discretion of the Superintendent.**

American Federation of State, County, and Municipal Employees – Unit C

- Article XV – Maternity Leave – Family Medical Leave
  - Leave in accordance with MMLA and/or FMLA
  - Required to use all available paid leave time concurrent with FMLA and MMLA leave.
- Article XIV – Unpaid Leave Days
  - **Unpaid leave days may only be used after all vacation and personal days are utilized**
- Article XXI – Leaves of Absence
  - **A leave of absence of up to two weeks without pay may be granted at the discretion of the Superintendent for the purpose of extending vacation or other personal leave of an employee. Such leave shall not have any effect on seniority.**
- Article XII – Sick Leave
  - **Superintendent reserves the right to require an employee exercising sick leave benefits to submit a medical report from his/her physician on absences of three days or more.**

American Federation of State, County, and Municipal Employees – Unit A (Nurses)

- Article XVI – Maternity Leave
  - **Leave in accordance with MMLA and/or FMLA**
  - **Required to use all available paid leave time concurrent with FMLA and MMLA leave.**
- Article XII – Sick Leave
  - **School Committee reserves the right to require an employee exercising sick leave benefits to submit a medical report from his/her physician.**
  - **Allowed a total of 15 school days of absence, without loss of pay per school year for personal illness and family emergency.**
- Article XXII – Leave of Absence
  - **Available for up to 2 weeks without pay may be granted upon receipt of a request in writing at the discretion of the Superintendent.**
- Article X – Seniority
  - Unpaid leaves will not count towards seniority accrual.

Exempt Staff

- Subject to personal contract agreements, in absence of a personal contract employee is deemed at will.
- At will employees are guided by the employee handbook and school committee policies as well as federal, state, and local laws.
- An employer must assess a request for a medical leave under all of the applicable statutes, determining which statutes cover the employee and the benefits to which he is entitled.
- The employer must provide the employee with the greater protections of each applicable statute.
- Under limited circumstances where restoration to employment will cause "substantial and grievous economic injury" to its operations, an employer may refuse to reinstate certain highly-paid, salaried "key" employees. In order to do so, the employer must notify the employee in writing of his/her status as a "key" employee (as defined by FMLA), the reasons for denying job restoration, and provide the employee a reasonable opportunity to return to work after so notifying the employee.
- Certain key employees may not be guaranteed reinstatement to their positions following FMLA leave. A key employee is defined as a salaried, FMLA-eligible employee who is among the highest paid 10 percent of all the employees working for the employer within 75 miles of the employee's worksite.
  - **After identifying an employee as a "key employee," the employer must determine whether reinstatement would cause "substantial and grievous economic injury" to the operation of the employer. The regulatory language of "substantial and grievous economic injury" is difficult to satisfy. It is more stringent than the "undue hardship" test under the ADA.**

Short Term Disability Insurance

SHORT TERM DISABILITY INSURANCE THROUGH WESTPORT COMMUNITY SCHOOLS

Short Term Disability Insurance

- Companion Life Voluntary Short Term Disability is offered through the Town of Westport. – Westport currently does not have Long Term Disability Insurance.
- Current employees must complete a health questionaire when enrolling.
- Open enrollment starts May 2nd and ends June 1st.
- Short Term Disability will become effective 30 days after first payment.
- Cannot have a preexisting condition, i.e. cannot be pregnant when signing up.
- Pays for non-occupational injuries and illnesses.
  - **Maternity, alcoholism, drug addition, mental or nervous conditions are all covered the same as any other illness.**
- Employees with STDI can continue to be paid and collect disability.
- Employees must have had least 90 days of continuous service with Westport Community Schools.

Questions?

Questions

- Will my leave count as “creditable service” for retirement?
  - **No. Under the retirement statute and the regulations of the Teachers’ Retirement Board as presently written, you will not receive service credit for any month in which you are on an unpaid leave of absence for any reason. If you normally work a 10-month school year, you will lose 1/10 of a year of creditable service for each month during some portion of which you are on an unpaid leave.**
  - **However, your membership in the Teachers’ Retirement System (or other public employee retirement system) will not be affected by your authorized leave of absence. You will also retain the service credit or other rights that you have earned at the time you begin your leave.**
- If I am laid off while on parental leave, may I collect unemployment compensation?
  - **Yes, provided you meet the general requirements for unemployment compensation. Among those requirements are that you are able and available for work and that you have been unsuccessfully sought work.**
  - **Please note this must be from the date of lay off NOT from date you went out on leave.**

Questions

- Can I be laid off or dismissed during my FMLA, MMLL, or other contractual parental leave?
  - **The leave laws are designed to place you in the same position that you would have been in had you not taken the leave. You cannot be laid off or dismissed because you took your lawfully entitled leave.**
  - **However, if your employer can prove that you would have been laid off or dismissed even if you had not taken leave, you can be laid off or dismissed during your l eave. You retain the same bumping, transfer and recall rights that you would have had if you had not taken leave.**
- Will MMLL or FMLA leave affect my PTS?
  - **If you have PTS at the time you take MMLL or FMLA leave, the leave will not affect your status.**
  - **If you do not have PTS, it is uncertain whether MMLL or FMLA leave will affect you. The law provides that you acquire PTS after you have worked three consecutive school years for the same school district. The courts have interpreted this requirement to mean three "complete" school years. It is likely that leave time for which you are paid would not make the school year "incomplete." However, it is possible that a significant period of unpaid leave would make a school year incomplete and therefore not count toward PTS.**
  - **Even if a school year is deemed incomplete because you have taken significant unpaid parental leave, you will not have to start over again in order to meet the "three consecutive years" requirement. For example, if you have two years of service and then take unpaid maternity leave during your third year, you should have to work only one additional complete school year after you return in order to acquire PTS.**

Questions

- What effect will parental leave have on my seniority?
  - **Your seniority cannot be broken during a period of lawfully required leave. This means that, if you have seven years of seniority at the time you begin your leave, you will return to work with a minimum of seven years of seniority when you return. Neither the FMLA nor the MMLL entitle you to accrue additional seniority during your leave. That is, if you take a one-year parental leave, the law does not require your employer to give you seniority credit for that year. However, your contract may allow such accrual, especially for those portions of your leave that are taken with pay.**
- If vacation weeks (such as the summer) occur during my leave, do those weeks count against my MMLL, FMLA, or contractual entitlements? What about paid sick leave?
  - **Under the FMLA, vacation weeks do not count against your 12 week entitlement. If you use three weeks of FMLA leave at the end of one school year, you will have nine weeks left at the beginning of the next school year. In fact, if your employer uses the academic year rather than the calendar year as the 12-month period, you may be entitled to an additional 12 weeks at the beginning of the following school year.**
  - **Under the MMLL the issue is not settled. An argument can be made that vacation weeks also should not count against the eight weeks of MMLL maternity leave.**
- May I use the sick leave bank for pregnancy and childbirth-related illnesses?
  - **Under the PDA, the criteria for access to the sick leave bank cannot discriminate against pregnancy or childbirth-related illnesses.**

Where to Go for Help!

HELP!

US Dept. of Labor
Wage & Hour Division
104 Dean Street, Room 201
Taunton, MA 02780
Phone: (508) 821-9106 or 1-866-4-USWAGE
Monday-Friday 8 a.m. to 8 p.m. Eastern Time

Massachusetts Commission Against Discrimination
800 Purchase St., Rm 501
New Bedford, MA 02740
(508) 990-2390
Complaints can be filed Monday through Friday from 9:00 am to 4:00 pm

Massachusetts Attorney Generals Office
105 William Street, First Floor
New Bedford, MA 02740-6257
Telephone: (508) 990-9700

US Equal Employment Opportunity Commission
475 Government Center
Boston, MA 02203
Phone:1-800-669-4000
Monday-Friday from 8:30 a.m. - 5:00 p.m. Intake hours are Monday – Friday, from 8:30am to 3:00 pm