Massachusetts Commission Against Discrimination

Guidelines on the Massachusetts Parental Leave Act

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I. Introduction

The Massachusetts Parental Leave Act ("MPLA"), M.G.L. c. 149, § 105D, and M.G.L. c. 151B, § 4(11A), guarantees eight weeks of unpaid, job-protected leave from employment for any parent welcoming a new child to the family by birth or adoption who qualifies for leave under the Act. The purpose of the MPLA is clear—by giving parents the right to take job-protected leave from employment when a child first joins the family, the law gives parents time away from work for the purpose of caring for and bonding with their children. The MPLA thus provides crucial support for working parents, particularly as work and family structures continually evolve.

When it enacted the MPLA in 2015, the Massachusetts Legislature expanded the application of the parental leave law to cover all parents regardless of sex. Previously, the law provided eight weeks of unpaid leave for the purpose of birth or adoption to female employees only.[1] Three years after the Legislature expanded the application of the MPLA to all parents, regardless of sex, it promulgated the Paid Family Medical Leave law ("PFML"), M.G.L. c. 175M, added by St. 2018, c. 121, § 29, which is enforced and administered by the Massachusetts Department of Paid Family and Medical Leave: https://www.mass.gov/orgs/department-of-family-and-medical-leave. The PFML provides job-protected leave and partial wage replacement to eligible employees for the birth, adoption, or foster care placement of a child. While the PFML may often provide more protection for employees than the MPLA, the MPLA will in some instances provide protection where other laws, including the PFML, do not.

These Guidelines are intended to provide guidance to Massachusetts employees and employers with respect to the protections guaranteed by the MPLA, which is enforced and interpreted by the Massachusetts Commission Against Discrimination ("MCAD" or "Commission"): https://www.mass.gov/orgs/massachusetts-commission-against-discrimination. The MCAD issues these Guidelines pursuant to M.G.L. c. 151B, § 2 and § 3(5) to interpret, apply, and enforce the MPLA, to carry out its provisions, and explain the policies of the Commission in connection therewith. The standards governing employment practices with regard to parental leave and related issues are part of the statutory framework governing fair employment practices under M.G.L. c. 149, § 105D and M.G.L. c. 151B. Employees seeking protection under the MPLA may have additional protections available to them under other provisions of the law.[2]

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[1] Prior to the expansion of the law, the MPLA was called the Massachusetts Maternity Leave Act ("MMLA") as it only provided "maternity leave" for female employees.

[2] These provisions include the Pregnant Workers Fairness Act (M.G.L. c. 151B, § 4(1E), enforced by MCAD); Pregnancy Discrimination Act (42 U.S.C. §§ 2000e et seq., enforced by the Equal Employment Opportunity Commission ("EEOC")); Massachusetts Earned Sick Time (M.G.L. c. 149, § 148C, enforced by the Massachusetts Attorney General); Massachusetts Small Necessities Act (M.G.L. c. 149, § 52D(b), enforced by the Massachusetts Attorney General); Family and Medical Leave Act ("FMLA") (29 U.S.C. § 2601 et seq., enforced by the U.S. Department of Labor's Wage & Hour Division); Massachusetts Paid Family and Medical Leave ("PFML") (M.G.L. c. 175M, enforced by the Massachusetts Department of Paid Family and Medical Leave); and the broad protections of M.G.L. c. 151B, § 4 (enforced by the MCAD).

II. Definitions

For purposes of these Guidelines, the following definitions shall apply:

A. Adoption. Legally and permanently assuming the responsibility of raising a child as one's own. The source of an adopted child (i.e., whether from a licensed placement agency or otherwise) is not a factor in determining eligibility for leave.

B. Child. An individual under the age of eighteen, or under age twenty-three if the child is a person with a mental or physical disability.

C. Domestic worker. An individual or employee who is paid by an employer to perform work of a domestic nature within a household including, but not limited to: (i) housekeeping; (ii) house cleaning; (iii) home management; (iv) nanny services; (v) caretaking of individuals in the home, including sick, convalescing and elderly individuals; (vi) laundering; (vii) cooking; (viii) home companion services; and (ix) other household services for members of households or their guests in private homes; provided, however, that "domestic worker" shall not include a personal care attendant or an individual whose vocation is not childcare or an individual whose services for the employer primarily consist of childcare on a casual, intermittent, and irregular basis for one or more family or household members.[3]

D. Employee. An individual who is employed on a *full-time basis* who has completed the probationary period. The term "employee" does not include any individual employed by their parents, spouse, or child.

Notwithstanding the above, if the individual is employed as a domestic worker, the individual is an "employee" for purposes of the MPLA, *regardless of whether the individual is full time or part time, and regardless of whether they have completed a probationary period.*

Employees are covered by the statute regardless of sex or gender identity and regardless of the sex or gender identity of their spouse, partner, or other parent of the child.

E. Employer. One or more individuals, governments, government agencies, the Commonwealth and all political subdivisions, boards, departments, and commissions thereof, municipalities, labor organizations, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, or receivers, having six or more part-time or full-time employees.

"Employer" also includes those who employ "domestic workers," regardless of whether the employer has an ownership interest in the household, and *regardless of whether the employer employs six or more part-time or full-time employees.*

[3] M.G.L. c. 149, § 190.

"Employer," however, does not include a club which is exclusively social, or a fraternal association or corporation, if such club, association, or corporation is not organized for private profit. Those nonprofit clubs, associations, or corporations which are not exclusively social are employers.

F. For the placement of a child refers to job protected absences by a covered employee who is preparing to adopt, the adoption itself, participating in the adoption of a child, and/or caring for a newly adopted child.

G. For the purpose of giving birth refers to job protected absences by a covered employee for the purpose of preparing for childbirth, childbirth itself, participating in childbirth, and/or caring for a newborn.

H. Full-time employee. When determining whether an employee is full time, the Commission will consider a non-exclusive list of factors such as the number of hours worked by the employee, the days worked by the employee, other employees' work schedules, the employers' characterization of their status, benefits received, other leave entitlement, the employer's policies, the terms of an applicable collective bargaining agreement, the nature of the industry, and other factors tending to show the employer treats the employee as a full-time employee.

I. Initial probationary period. (a) Three consecutive months as a full-time employee if the employer has not set an initial probationary period by the terms of employment, and (b) up to three months where the employer has set an initial probationary period by the terms of employment.

J. Intending to adopt a child. An individual may be found to "intend to adopt" even where the adoption process has not been completed. Indicia of an individual intending to adopt a child may include where the individual has taken steps reflecting a plan to adopt, such as making inquiries regarding adoption, receiving training to adopt, engaging in an evaluation process for adoption, submitting an application for adoption, and/or pre-placement for adoption.

K. Parental leave. Parental leave is a period of time, not exceeding eight weeks, which an employer must provide to an eligible employee to take a job protected leave of absence for the purpose of giving birth, for the placement of a child or for an employee who is intending to adopt a child. Parental leave may be taken in a continuous block of time or, with the employer's agreement, on an intermittent or reduced schedule basis.

L. Same Employer. Determining whether two business entities are the same employer for purposes of M.G.L. c. 149, § 105D requires a review of the relationship between the business entities in their totality. Factors include whether the separate entities have common management, interrelated operations, centralized control of labor and personnel operations, and the degree of common ownership and/or financial control.

III. Eligibility for Leave Under the MPLA

A. Non-Domestic Workers

An employee who is not a domestic worker is eligible for parental leave under the MPLA if:

1. The employee is employed full time;[4]

2. The employee has completed the initial probationary period; and

3. The employee gives the employer at least two weeks' notice of the anticipated date of departure and intention to return to work, or the employee gives notice as soon as practicable if the delay is for reasons beyond the employee's control.

B. Domestic Workers

An employee who is a domestic worker is eligible for parental leave under the MPLA if:

1. The employee gives the employer at least two weeks' notice of the anticipated date of departure and intention to return to work, or the employee gives notice as soon as practicable if the delay is for reasons beyond the employee's control.

IV. When Leave May be Taken, and the Type of Leave Taken

A. When Parental Leave May be Taken

If an employee meets these eligibility requirements, the employer must grant eight weeks of unpaid parental leave under the MPLA. Parental leave under the MPLA is available to an employee for the purpose of:

- giving birth and/or caring for a newborn;
- intending to or adopting a child under the age of twenty-three, if the child has a mental or physical disability; or
- intending to or adopting a child under the age of eighteen.

[4] Legislative history illustrates the intent to limit application of the MPLA to full-time employees. Compare 2014 Senate Doc. No. 865 (enacted) ("full-time employee shall be entitled to… leave") with 2011 House Doc. No. 1409 and 2011 Senate Doc. No. 1863 (unenacted versions of the MPLA) ("Any full-time or part-time employee… shall be entitled to… leave."). See also Dietz v. Beverly Hospital, 31 MDLR 116 (2009) (recognizing MMLA does not apply to part-time or per diem schedules).

B. Types of Leave

Eligible employees may take parental leave in a continuous block of time, on an intermittent basis, or on a reduced schedule basis, as follows:

1. Continuous Leave. Employees may take parental leave for eight continuous weeks.

2. Intermittent Basis. Employees may take parental leave on an intermittent basis only with the employer's agreement, which shall not be unreasonably denied. It is within the purpose of the MPLA to grant flexible leave to allow parents a chance to care for and bond with a new member of their family during a critical time. Intermittent basis means that the employee may take up to eight weeks of leave in separate blocks of time rather than on a continuous basis. For instance, the employee may use parental leave on an intermittent basis to provide care for and bond with the child consistent with their partner or other caregivers' schedules or, in the case of an adoption, to attend to the adoption including but not limited to counseling sessions, appearing in court, or traveling to complete the adoption. Employers may count leave taken on an intermittent basis towards the employee's eight-week entitlement. Further, intermittent leave is taken in increments of time consistent with the established policy the employer uses to account for use of other forms of leave. Only the amount of leave actually taken may be counted toward the employee's parental leave entitlement.

3. Reduced Schedule Basis. Employees may take parental leave on a reduced schedule basis only with the employer's agreement, which shall not be unreasonably denied. It is within the purpose of the MPLA to grant flexible leave to allow parents a chance to care for and bond with a new member of their family during a critical time. Parental leave taken on a reduced schedule occurs when an employer agrees to reduce an employee's usual number of working hours per work week, or hours per workday. A reduced leave schedule is a change in the employee's schedule for a period of time, normally from full time to part time. An employer who agrees to provide parental leave on a reduced schedule basis, would do so for a period of time which amounts in total to eight weeks. For example, an employer may agree to permit an employee who previously worked five days a week, and who after giving birth, has taken four weeks of continuous leave, to return to work on a reduced schedule basis. In this example, the employee would be entitled to four weeks, or twenty days, of remaining leave. The employer could agree to allow the employee to return to work three days a week for ten weeks, permitting a cumulative amount of leave of eight weeks.

C. Commencement of Leave and Leave Deadline

An employee is entitled to a parental leave only in a manner consistent with the language and purpose of the MPLA. Under the MPLA, employers must provide employees with parental leave "for the purpose of giving birth," or "for the placement of a child for adoption with the employee" who "is adopting" or "is intending to adopt." Accordingly, the MPLA is not necessarily triggered at birth and can be started before birth or adoption. While MPLA leave does not have to be taken immediately upon the birth or adoption of a child, MPLA leave must

be taken within a reasonable timeframe consistent with the purpose of the act, which is to allow parents time off of work to care for and bond with children being welcomed into their family. Accordingly, the Commission will generally consider one year from the date of the child's birth or adoption to be a reasonable timeframe in which to take the eight weeks of parental leave guaranteed by the MPLA. This interpretation is consistent with explicit provisions in both the FMLA and the PFML.[5]

D. Notice by Employees

An employee seeking parental leave must give two weeks' notice of the anticipated date of departure and intent to return, or as soon as practicable, if the delay is beyond the individual's control. There is no statutory requirement that an employee notify the employer in writing of the anticipated date of departure and intent to return. However, an employer may require written notice consistent with its customary notice and procedural requirements.

The notice shall be provided to the employer within two weeks of the anticipated date of departure and include intent to return. Notice of the intent to return may be implicit, i.e., if an employee notifies their employer that they intend to take eight weeks of parental leave beginning with an anticipated date of departure, the employee has provided notice of their intent to return at the end of the eight weeks. Notice provided less than two weeks prior to the anticipated date of departure shall constitute adequate notice only if the delay is beyond the individual's control, and under these circumstances the statute requires the employee to provide the employer with notice as soon as practicable.[6] For example, where a pregnant employee intends to provide notice within two weeks of the anticipated date of departure, but has an emergency delivery when the employee is eight months pregnant, the delay in the provision of notice is likely to be considered "beyond the individual's control."

The notice should contain the anticipated date of departure and an intent to return. However, "anticipated" date of departure does not mean an "exact" date. Thus, for example, an employee who gives birth prior to an anticipated departure date is entitled to start the parental leave earlier. Likewise, an employee may desire to start leave later or return from leave earlier than anticipated. It is expected that employers and employees will communicate in good faith with regard to making arrangements for leave, taking into account both the uncertainty inherent in delivery and adoption dates and the needs of the employer to plan in advance for an employee's absence.

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[5] 29 C.F.R. § 825.120 (2010) ("Parents are entitled to FMLA leave… during the 12-month period beginning on the date of the birth… Circumstances may require FMLA leave begin before the actual birth date of a child."); 458 CMR 2.02 (PFML can be taken "for a parent to bond with the parent's child during the first 12 months after the child's birth, adoption, or foster care placement").

[6] Jaramillo-Duque v. Concord Valley Counseling, 36 MDLR 73 (2014) (finding employee gave de facto notice when she left work in an ambulance to have an emergency delivery and gave timely notice of her intent to return under MMLA when she called employer the day she left the hospital).

E. Both Parents Work for the Same Employer

If two employees who work for the same employer want parental leave for the birth or adoption of the same child, those two employees are only entitled to eight weeks of leave in the aggregate for that particular child. Evaluating whether the parents work for the "same employer" includes factors such as whether the separate entities have common management, interrelated operations, centralized control of labor and personnel operations, and the degree of common ownership and/or financial control.

F. Employers Who Provide More Generous Leave than the MPLA Requires

If an employer agrees to provide more than eight weeks of parental leave, the employer must reinstate the employee at the end of the extended leave unless the employer clearly informed the employee, in writing, before the leave and before any extension of the leave, that taking more than eight weeks of leave shall result in the denial of reinstatement or the loss of other rights or benefits. For example, if an employer agrees on January 1 to permit an employee to take six months of unpaid leave from February 1 to August 1, the employer must reinstate the employee on August 1 unless the employer issued a written statement to the employee before February 1 stating that taking more than eight weeks of leave shall result in the denial of reinstatement or the loss of other rights or benefits.

An employee may not have the right to reinstatement if they choose to unilaterally extend their leave. If an employee wants to extend their leave and receive MPLA protections until the end of their extension, they must have the agreement of their employer. To continue the above example with the employee who went out on leave from February 1 to August 1 (without receiving notice before February 1 that their MPLA rights would terminate at eight weeks), if on July 31, the employee requests an extension until September 1, which the employer denies, the employee's right of reinstatement will end on August 1. If the employee still chooses to stay out until September 1 without the employer's agreement, the employer does not have to reinstate them on September 1, even if the employer did not provide a written statement on July 31 that an extension would result in the denial of reinstatement.

G. Employee's Right to Choose Whether to Take a Leave

An employer may not require an employee to take a leave of absence because the employee is expecting the birth of a child or intending to adopt. An employer may not force an employee to take leave prior to giving birth if they are willing to continue working.[7]

[7] See also M.G.L. c. 151B, § 4(1E)(a)(iv). An employer also cannot prevent the employee from returning to work after they recover from any temporary disability associated with their pregnancy or a related condition. However, an employer may request proof of ability to work consistent with its customary requirements.

V. Paid or Unpaid Leave and Entitlement to Benefits

The MPLA protects employees by guaranteeing job restoration after an unpaid eight-week leave of absence. Paid parental leave may be available through a number of sources. Employers have the discretion to provide paid parental leave through a company policy, a collective bargaining agreement, an employment contract, or other employer program.[8] In addition, many employees may qualify for partial wage replacement and parental leave pursuant to the Paid Family Medical Leave law ("PFML"). Where paid leave or PFML partial wage replacement program is not available to an employee, the MPLA guarantees employees the right to take an unpaid eight-week parental leave.

The MPLA requires that a parental leave not affect an employee's right to vacation time, sick time, 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 incident to the employee's position.

A. Vacation Time

Individuals **who are not employees of the Commonwealth, its boards, departments and commissions**, and who take a parental leave and return from such leave, are entitled to be returned to work with all vacation time they accrued as of the commencement of their leave. For example, if an employee has forty hours of vacation time accrued at the time of the commencement of their parental leave and they do not use these hours while on parental leave, they are entitled to forty hours of vacation time upon their return from parental leave. The employee is not entitled to accrue additional vacation time while they are on parental leave, unless employees who are on other types of comparable leave (e.g., disability leave, extended unpaid leave) accrue additional vacation time while they are on such a leave. Parental leave shall not be included in the computation of vacation accruals and status unless the employer does so for employees on other comparable types of leave.

Individuals **who are employees of the Commonwealth, its boards, departments and commissions**, and who take a parental leave and return from such leave, will accrue vacation credits for the fiscal year during which the employee is absent due to a parental leave. M.G.L. c. 151B, § 4(11A). This rule applies to MPLA leave and may not be applicable if the individual receives benefits pursuant to the PFML.

B. Sick Time, Benefits, and Other Rights of Employment Incident to the Employee's Position

Employees who take a parental leave and return from such leave are entitled to return to work with all sick time, 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 incident to the employee's position. The period of the parental leave need not be included in the computation of such benefits, rights, and advantages unless such time is included

[8] Employers are cautioned that if they do provide additional paid or unpaid leave, they must do so regardless of the employee's sex or gender identity, or any other protected class status.

in computation of such benefits for employees on leave other than parental leave. For example, if the employee has accrued 7.5 years of seniority as of the commencement of the leave, the employee retains the 7.5 years of seniority upon returning to work. However, if employees on other types of leaves of absence are allowed to accrue seniority while away from work on other types of leave, then an employee also must be allowed to accrue additional seniority during an MPLA leave.

Another example relates to an employer who regularly provides end-of-year bonuses. Parental leave does not affect the employee's entitlement to receive bonuses for which they were eligible as the date of their leave. This means that if the employee is eligible to receive a bonus as of the date of their leave, then the employer may not deny payment because the employee is taking the parental leave.

However, the employer is not required to count the parental leave in the computation of the bonus, unless the employer provides bonuses to all employees who are on a leave of absence. If the employee is taking an MPLA parental leave during the time period that the employer regularly provides bonuses, the question of whether the employee is entitled to a bonus depends on the employer's treatment of other employees who were on leave at the end of the year. If the employer provides bonuses to employees regardless of whether they were on leave for disability, workers compensation, or personal leave, the employer is obligated to provide a bonus to an employee on parental leave. If, on the other hand, the employer does not provide a bonus if an employee is on leave, regardless of the type of leave the employee is taking, then the employer is not obligated to provide a bonus to an employee who is on parental leave when bonuses are distributed.

C. Continuity of Service and Public School Employees

Certain public school employees are entitled to professional teacher status after three consecutive years of service which provides these employees with a degree of job protection. M.G.L. c. 71, § 41. Taking parental leave under the MPLA does not terminate the continuity of a teacher's service toward professional teacher status. However, the employer is not required to credit the employee's time spent on parental leave towards the amount of time for tenure. Solomon v. School Comm. of Boston, 395 Mass. 12 (1985). If a public school employee has completed 2.5 years of service for the purposes of M.G.L. c. 71, § 41, and then commences an eight-week parental leave, the employee does not lose the 2.5 years of service because of the leave. However, the employer is not required to count the employee's eight weeks of parental leave toward the years of service, giving the employee 2.65 years of service, unless the employer does so for employees on other types of leave.

D. Costs of Any Benefits, Plans or Programs Incident to Employment

Under the MPLA, an employer is not required to pay for the costs of any benefits, plans, or programs incident to employment during the parental leave. M.G.L. c. 149, § 105D(d). Many employers will choose to continue to pay for the costs of benefits, plans, or programs during a parental leave because of other legal obligations to do so. The federal Family and Medical Leave Act ("FMLA") requires employers to maintain group health plans during an FMLA leave. 29 U.S.C.A. § 2614(c)(1); 29 C.F.R. § 825.209(a) (employers are required to maintain an

employee's coverage under group health plans on the same conditions as coverage would have been provided if the employee had been continuously employed during the entire leave period). The PFML requires employers to provide for, contribute to, or otherwise maintain the employee's employment-related health insurance benefits, if any, at the level and under the conditions that coverage would have been provided if the employee had continued to work through the duration of the family or medical leave. M.G.L. c. 175M, § 2(f). Moreover, under the MPLA, if an employer pays the costs of benefits to employees on non-MPLA leaves of absence, the employer must provide the same such benefits to employees on MPLA leave.

VI. Use of Accrued Vacation, Personal, and Sick Time During Parental Leave

The purpose of the MPLA is to allow parents time to bond with a new member of their family. For employees who qualify for parental leave under the MPLA, the ability to use paid time off at a time that meets their needs, consistent with their employers' policies, can be critical to their health and well-being. The statutory and regulatory framework in Massachusetts encourages, and in many instances, requires employers to support the health and well-being of working families. In addition to expanding the reach of the unpaid parental leave to include all parents, regardless of gender identity, the Massachusetts Legislature has ensured that Massachusetts employees have a minimum number of sick leave hours and that parents have unpaid leave to attend to their child's educational advancement and routine mental or dental appointments.[9]

An employee may voluntarily use any accrued vacation or personal time the employee has, concurrently with all or part of a parental leave taken pursuant to the MPLA. Moreover, employers cannot require an employee to use the 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.

If an employer provides paid sick time, an employee may use such sick time concurrently with any part of the parental leave that satisfies the employer's sick time policy. Previous MCAD guidance has prohibited employers from requiring employees to use sick time during an MPLA leave, and the Commission continues to prohibit employers from requiring employees to use accrued leave during an MPLA leave, with one exception designed to create consistency under state law.

Effective July 1, 2015, the Massachusetts Legislature passed the Massachusetts Earned Sick Time Statute ("EST statute"), M.G.L. c. 149, § 148C, which requires certain Massachusetts employers to provide employees with a minimum of forty hours of paid sick leave hours a year. The regulations interpreting the EST statute allow employees to choose to use, *or employers to require employees to use*, concurrent earned paid sick time, as provided under the EST statute, to receive pay when taking other statutorily-authorized leave that would otherwise be unpaid. 940 CMR 33.01(3). Therefore, the Commission continues to prohibit employers from requiring

[9] Massachusetts Earned Sick Time Law, M.G.L. c. 149, § 148C, inserted by St. 2014, c. 505, § 1, eff. July 1, 2015; Small Necessities Leave Act, M.G.L. c. 149, § 52D, inserted by St. 1998, c. 109, as amended by St. 2008, c. 215, §§ 74, 75, eff. July 31, 2008.

the use of any paid time off during a leave taken pursuant to the MPLA, except for the paid sick leave accrued pursuant to the EST statute.

In addition, the MPLA does not in any way limit the right of an employee to use accrued vacation, sick time, or personal time before the employee's statutory parental leave begins, or after the leave ends, in accordance with the employer's policies and applicable law.[10]

VII. Job Restoration After Leave

The MPLA requires that an employee on leave be restored to the employee's previous or a similar position upon the employee's 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. If an employee's job was changed temporarily because of pregnancy prior to leave (e.g., the employee's hours were reduced or duties were changed as an accommodation) the employee should be restored to the same or similar position held prior to such temporary change.

previous, or a similar, position with the same status, pay, length of service credit and seniority,

In determining whether a position's "status" is the same or similar, the Commission considers such factors as:

- title;
- duties and responsibilities;
- reporting relationships;
- whether the position would be considered a demotion; and
- other evidence tending to illustrate the employee's status.

In determining whether "pay" is the same or similar, the Commission considers all compensation, including, but not limited to:

- salary;
- wages;
- bonuses;
- commissions;
- equity, including stock and company ownership;
- vacations; and
- benefits.

In determining whether a position offered to an employee returning from leave is similar to the employee's prior position, the Commission considers, in addition to the factors listed above, such factors as:

- duties, functions and responsibilities;
- location or distance of commute;
- facilities;
- resources or support;

[10] The Massachusetts Department of Family and Medical Leave has different rules and regulations regarding the use of paid time off during a parental leave in which PFML benefits are received. M.G.L. c. 121, § 3(a); 458 CMR 2.12(8)(a).

- hours of work;[11]
- remote work;
- schedules / shifts;
- training opportunities; and
- opportunities for advancement.

An employee returning from parental 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 parental leave to the employee's 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 parental leave; provided, however, that such 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.

In the event the employer experiences a reduction in force while the employee is on an MPLA leave, the employee will have no greater rights to remain employed, or to be reinstated, on account of having exercised the employee's rights under the MPLA, than other employees who were employed during the leave period.

Nothing in the MPLA shall be construed to affect any bargaining agreement, employment agreement, or company policy providing benefits that are greater than, or in addition to, those required under the statute. An employer may grant a longer parental leave than required under the MPLA.

VIII. Interrelationship of the MPLA and Massachusetts Paid Family and Medical Leave

As described above, the partial wage replacement and job restoration rights available under the Massachusetts Paid Family and Medical Leave law, M.G.L. c. 175M ("PFML") may, in many instances, be greater than those provided under the MPLA. There are some cases, however, in which the MPLA applies and the PFML does not, or where the MPLA provides additional weeks of job protection to parents after their PFML leave has run out.

A. Municipalities

The PFML does not by its application, cover employees of municipalities, districts, political subdivisions or authorities unless they opt in. M.G.L. c. 175M, § 10. This includes regional school

[11] The parental leave law does not require an employer to return an employee to a part-time, reduced, or per diem schedule; only to return the employee to the same or similar position. See Dietz, 31 MDLR 116; Holdsworth v. Adcare Educational Inst., 21 MDLR 178 (1999). However, an employee returning to work may need a reduced, part time, or per diem schedule as a matter of a reasonable accommodation of pregnancy or a pregnancy-related condition under M.G.L. c. 151B, § 4(1E).

districts, regional housing authorities and planning committees. Employees of these entities are entitled to rights, including unpaid parental leave and job restoration, under the MPLA.

B. Employment Excluded from PFML

The PFML does not cover certain types of employment under M.G.L. c. 151A, § 6. For example, work provided by real estate brokers and insurance agencies in commission only jobs are excluded from PFML coverage. M.G.L. c. 151A, § 6. Real estate brokers and insurance agents are not explicitly excluded from coverage under M.G.L. c. 151B, and therefore, are entitled to MPLA protection. There are additional instances of employment relationships which are excluded from the PFML, and in some cases, the MPLA will apply. https://www.mass.gov/info-details/employers-and-employment-excluded-from-paid-family-and-medical-leave.

C. Parent Runs Out of PFML

Parental leave under the MPLA and the Massachusetts PFML run concurrently.[12] There are limited circumstances, however, where an employee uses all the PFML available in a benefit year and will be entitled to additional leave under the MPLA. For example, in certain circumstances, an employee is entitled under the PFML to take twenty-six weeks of leave.[13] If an employee takes twenty-six weeks of PFML leave in a benefit year for a reason such as caring for a family member who was injured serving in the armed forces, and then seeks parental leave for the purpose of giving birth or for placement of a child the employee is adopting or intending to adopt, the employee is not entitled to any further paid leave under the PFML.[14] In this case, an employee who qualifies for MPLA leave would be entitled to an additional eight weeks of unpaid leave under the MPLA.

D. Earnings Requirements

The PFML has an earnings requirement that the MPLA does not. If an employee does not meet the PFML earnings requirement, which can change from year to year, the employee may be entitled to rights under the MPLA.

E. Parents with Multiple Births or Adoptions

The purpose of the MPLA is to allow parents a chance to care for and bond with each new member of the family, even when multiple children join the family at the same time. For parents who need

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[12] See 458 CMR 2.01(3) (leave taken under M.G.L. c. 175M shall run concurrently with leave taken under other applicable state and federal leave laws, including MPLA when the leave is for a qualified reason under those acts).

[13] M.G.L. c. 175M, § 2(c)(1).

[14] Id. ("A covered individual shall not take more than 26 weeks, in the aggregate, of family and medical leave under this chapter in the same benefit year.").

leave due to multiple births or adoptions, rights under the MPLA may provide additional leave not available under the PFML. Under the PFML, no more than twelve weeks of leave benefits are available in a benefit year in the case of multiple births. 458 CMR 2.08(5)(c). Thus, a parent of twins or triplets may receive partial wage replacement through the Massachusetts PFML of up to twelve weeks. The MPLA provides eight weeks of unpaid leave for each birth, and therefore may provide additional weeks of unpaid leave. In the case of twins, the MPLA would provide an additional four weeks of unpaid leave after the exhaustion of PFML. In the case of triplets, the MPLA would provide an additional twelve weeks of unpaid leave after the exhaustion of PFML. These principles would apply equally to parents who adopt multiple children.

For more information about the PFML, see M.G.L. c. 175M and 458 CMR 2.00 et seq. Inquiries regarding rights and obligations under the PFML should be directed to the Massachusetts Department of Family and Medical Leave: https://www.mass.gov/orgs/department-of-family-and-medical-leave.

IX. Interrelationship of the MPLA and the Family and Medical Leave Act

In addition to leave protection under the MPLA, employees also may be entitled to leave under the Family and Medical Leave Act ("FMLA"), a federal law enforced by the United States Department of Labor's Wage and Hour Division that applies to employers with fifty or more employees located within seventy-five miles of each other. The FMLA requires covered employers to provide up to twelve weeks of unpaid leave during a twelve-month period to an eligible employee who needs leave for several reasons, including to care for a newborn, adopted or foster child, or for a child to whom the employee stands *in loco parentis*.

An employee who takes a leave for the purpose of caring for a newborn or adopted child may be covered both by the FMLA and MPLA. In such an instance, provided that all FMLA requirements are met, the employee's leave may count simultaneously against that employee's twelve-week entitlement under FMLA and the eight-week entitlement under the MPLA.

In other instances, however, the MPLA may entitle an employee to leave in addition to the twelve weeks of 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.[15] Thus, for example, if an employee takes twelve weeks of FMLA leave for a purpose other than birth or adoption of a child (such as a pregnancy related disability leave), the employee will still have the right to take eight weeks of parental leave under the MPLA.

Unlike the FMLA, the MPLA does not require an employer to specifically designate leave as MPLA leave. Thus, if an employee takes leave for an MPLA purpose, such as giving birth, that leave will count towards that employee's MPLA 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.[16]

[15] 29 C.F.R. § 825.701(a).

[16] 29 C.F.R. § 825.300 (Employer notice requirements).

Under the MPLA, an employee may take a parental leave each time the employee has a child through birth, adoption, or placement in the home for the purposes of adoption. Thus, for example, if an employee's child is born in January and they adopt a second child in March, the employee would be entitled to two separate eight-week parental leaves under the MPLA for a total of sixteen weeks. By contrast, under the FMLA, leave is limited to a maximum of twelve weeks in a twelve-month period.

As discussed above in Section IV.E, the MPLA includes a limitation on parental leave when two employees of the same employer take leave for the birth or adoption of the same child; in that instance, those two employees are only entitled to eight weeks of leave in the aggregate. The FMLA contains a similar restriction; when two parents work for the same employer, they are limited to an aggregate of twelve weeks of leave for the birth or adoption of a child.

For more information about the FMLA, see 29 U.S.C. § 2601 et seq. and 29 CFR Part 825. Inquiries regarding rights and obligations under the FMLA should be directed to the United States Department of Labor's Wage & Hour Division.

X. Establishing a Violation of the MPLA

A. Denial of Leave Claim

Where an employer refuses to grant the parental leave entitlement to an eligible employee under M.G.L. c. 149, § 105D(b), it has violated M.G.L. c. 151B, § 4(11A). To prove a violation of M.G.L. c. 151B, § 4(11A) under these circumstances, the employee must show that:

(a) the employee was eligible for MPLA leave;

(b) the employee gave proper notice under MPLA; and

(c) the employer refused to grant the MPLA leave.

This formulation under the MPLA is similar to its Family and Medical Leave Act ("FMLA") counterpart. "To establish an interference claim under the FMLA, an employee need establish that (1) s/he was eligible for the FMLA's protections; (2) the employer was covered by the FMLA; (3) s/he was entitled to leave under the FMLA; (4) s/he gave the employer notice of her / his intention to take leave; and (5) the employer denied the employee FMLA benefits to which s/he was entitled." Chacon v. Brigham & Women's Hosp., 99 F. Supp. 3d 207, 214 (D. Mass. 2015) (quoting Carrero-Ojeda v. Autoridad de Energía Eléctrica, 755 F.3d 711, 728 n.8 (1st Cir. 2014)).

Importantly, to establish a denial of leave claim under the MPLA, there is no requirement for an employee to prove discriminatory animus. This is analogous to a denial of leave claim under FMLA which also does not require proof of the employer's discriminatory animus. Federal courts

have held that when FMLA leave is denied, the employer's subjective intent in denying the leave is irrelevant. The only issue is whether the employee was eligible and if the leave was denied.[17]

By adopting the federal reasoning in FMLA denial of leave cases, the Commission acknowledges the departure from past MCAD decisions.[18] These previous decisions relied heavily on the fact that MG.L. c. 149, § 105D, at that time, applied only to females.[19] The Commission does not require a showing of bias in claims brought pursuant to M.G.L. c. 151B, § 4(11A) (except with respect to "penalty" claims, explained below) given that: the MPLA now applies to all employees, regardless of sex; the absence of any statutory requirement of a showing of discriminatory intent in either M.G.L. c. 151B, § 4(11A) or M.G.L. c. 149, § 105D; and the analogous reasoning from federal courts. An employer, or its agent, is statutorily prohibited from refusing to grant MPLA leave to an eligible employee (or restore employment and benefits after an MPLA leave), and no showing of discriminatory intent is required.

An employer may defend an action brought pursuant to M.G.L. c. 151B, § 4(11A) by showing the employee was not eligible. An employer cannot refuse to grant MPLA leave on the grounds that doing so would constitute an alleged undue hardship or that granting such a leave would cause economic injury to an employer's operations.

B. Refusal to Reinstate Claim

Where an employer refuses to reinstate an eligible employee under M.G.L. c. 149, § 105D(b) after their MPLA leave, the employer has violated M.G.L. c. 151B, § 4(11A). At the time of reinstatement, as required by M.G.L. c. 149, § 105D(d), the employer must reinstate the employee with all of their vacation time, sick leave, bonuses, advancement, seniority status, length of service credit, benefits, plans or programs that the employee was eligible for at the date they took leave. If the employer fails to do so, it has violated M.G.L. c. 151B, § 4(11A). To prove a violation of M.G.L. c. 151B, § 4(11A) under these circumstances, the employee must show that:

(a) the employee was eligible for MPLA leave;

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[17] See Hodgens v. Gen. Dynamics Corp., 144 F.3d 151, 159 (1st Cir. 1998) ("In such cases, the employer's subjective intent is not relevant. The issue is simply whether the employer provided its employee the entitlements set forth in the FMLA—for example, a twelve-week leave or reinstatement after taking a medical leave. Because the issue is the right to an entitlement, the employee is due the benefit if the statutory requirements are satisfied, regardless of the intent of the employer.").

[18] See Palmer v. J.M. Davis Design Assoc., 24 MDLR 243 (2002) (analysis of a claim under M.G.L. c. 149, § 105D requires the utilization of the three-stage, burden-shifting framework); see also Croteau v. Salvation Army, 21 MDLR 111, 113 (1999).

[19] Palmer, 24 MDLR at 243 (holding that because pregnancy and childbirth are sex-linked characteristics, any employment action based on a need for a maternity leave is therefore unlawful sex discrimination, requiring the three-stage burden-shifting framework).

(b) the employee gave proper notice under MPLA;

(c) the employee was ready, willing, and able to return to work; and

(d) the employer refused to reinstate the employee to their previous or similar position, including all benefits they were eligible for at the date of leave.

Similar to a denial of leave claim, the employee need not prove a discriminatory animus to establish a refusal claim under the MPLA.[20]

An employer may defend an action brought pursuant to M.G.L. c. 151B, § 4(11A) by showing the employee was not eligible, that the employee was restored to the same or similar position after an MPLA leave, that there was a reduction in force which resulted in the employee's position being eliminated, or that the employee would have been terminated even if they had not taken leave.[21] An employer may also defend such action by showing that a plan, program, or other benefit was eliminated for all similarly situated employees during the period the employee took leave. An employer cannot refuse to reinstate the employee on the grounds that doing so would constitute an alleged undue hardship or that granting such a leave would cause economic injury to an employer's operations.

As stated earlier in Part VII, an employee returning from parental 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 parental leave to the employee's 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 parental leave; provided, however, that such 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. As stated in Part V, an employer does not have to include time taken

[20] This is also how similar claims are treated under FMLA. Discriminatory animus is not necessary to prove substantive claims under FMLA where the employer interferes with a prescriptive right under FMLA, such as the right to leave or be restored after leave. Hodgens, 144 F.3d at 159. An employer can defend against such a claim under FMLA by presenting evidence that the employee was discharged for independent reasons. See Carrero-Ojeda v. Autoridad de Energia Electrica, 870 F. Supp. 2d 313, 320 (D.P.R. 2012), aff'd, 755 F.3d 711 (1st Cir. 2014), quoting Nagle v. Acton–Boxborough Reg'l. School Dist., 576 F.3d 1, 3 (1st Cir.2009) ("[w]here an employee properly takes FMLA leave, the employee cannot be discharged for exercising a right provided by the statute but can still be discharged for independent reasons.").

[21] See, by analogy, Colburn v. Parker Hannifin/Nichols Portland Div., 429 F.3d 325 (1st Cir. 2005) (affirming employer's decision to terminate an employee due to his serious misconduct discovered during his FMLA leave).

during parental leave in the computation of benefits, rights, and advantages; nor does the employer have to provide for the cost of any benefits, plans or programs during the parental leave unless the employer provides for such benefits, plans, or programs to all employees who are on a leave of absence.

In the event the employer experiences a reduction in force while the employee is on an MPLA leave, the employee will have no greater rights to remain employed, or to be reinstated, on account of having exercised the employee's rights under the MPLA, than other employees who were employed during the leave period.

C. Penalty Claim

It is unlawful for an employer to penalize an employee for exercising their rights under the MPLA. The MPLA protects an employee from such penalties from their employer before, during, and after their MPLA leave. Such a penalty might be a termination soon after reinstatement, or more onerous job duties soon after the employee's return.

Where an employer imposes a penalty on the employee related to leave under M.G.L. c. 149, § 105D, it has violated M.G.L. c. 151B, § 4(11A). To prove a violation of M.G.L. c. 151B, § 4(11A) under these circumstances, the employee must show that:

(a) the employee requested or took MPLA leave;

(b) the employer penalized the employee; and

(c) there was a causal connection between the MPLA leave and the penalty.

The employee does not have to prove that the penalty was imposed because of protected class. Instead, the employee has the burden to prove that the penalty was imposed because they requested or took MPLA leave. Penalties could include targeting the employee with more onerous work assignments, restricting the employee's duties such as heavy lifting or travel, denying the employee promotions to which the employee would have been entitled prior to the parental leave, or treating an employee returning from parental leave less favorably than it treats other employees seeking to return to work after comparable absences for non-parental leave related reasons. Examples of evidence of a causal connection between the MPLA leave (or request) and the penalty might include: temporal proximity between the request for leave or leave taken and the penalty; disparate treatment with regard to employees who did not request or take leave; or comments by a supervisor reflecting animus as a result of leave or an intent to penalize. The MPLA does not define "penalty" and the Commission interprets this term liberally to effectuate the broad remedial purpose of M.G.L. c. 151B, § 4(11A).[22]

[22] See Psy-Ed Corp. v. Klein, 459 Mass. 697, 708 (2011) (noting Chapter 151B's "broad remedial purpose" when finding that the statute's antiretaliation provision goes beyond current employees to cover former employees too). See also, M.G.L. c. 151B, §9 (Chapter 151B to be "construed liberally for the accomplishment of its purposes").

D. Discrimination, Harassment, or Retaliation Claims

In some instances, actions by an employer taken because of the employee's use of MPLA leave that adversely affect an employee's terms and conditions of employment may also amount to sex, pregnancy, and other types of unlawful discrimination, or retaliation under M.G.L. c. 151B. Actions amounting to illegal penalties could also be motivated by animus towards an employee based on other protected characteristics.

Since the passage of the MPLA and Paid Family Medical Leave, parents of all sexes, gender identities, and sexual orientations have exercised their rights to parental leave. Sex discrimination can include refusing to reinstate a male employee after he has taken an MPLA leave or discriminating against a male employee who has taken an MPLA leave by denying him a promotion that he would have been otherwise entitled to prior to leave, when similarly-situated female employees were treated differently after returning from leave. Such actions may constitute penalties under M.G.L. c. 151B, § 4(11A) as well as discrimination against an employee based on their sex, gender identity, sexual orientation, sexual or gender stereotypes. For example, actions or decisions undertaken based on assumptions that males should not take leaves in order to bond or care for children or that females should take leaves or absence to care for children are discriminatory, in addition to constituting violations of the MPLA.

Violations of the MPLA may also constitute or coincide with unlawful retaliation under Chapter 151B. For example, an employer who denies a promotion to an employee because they took parental leave has imposed a penalty as a result of leave in violation of M.G.L. c. 151B, § 4(11A), and it might have also retaliated against the employee in violation of M.G.L. c. 151B, § 4(4) to the extent that the employee's taking of parental leave constitutes protected activity. More obviously, if the same employer terminates the employee because they complained that the denial of the promotion was unlawful under the MPLA, the employer has retaliated against the employee in violation of M.G.L. c. 151B, § 4(4).

In addition, an employer may not harass an employee for taking parental leave under the MPLA. Harassment reflecting stereotypical assumptions is strictly prohibited. This includes assumptions that males should not take a leave to care for newborns or children, or that females should be the primary caretaker. If an employer engages in verbal or physical conduct, based on sexual stereotypes about sex-based roles, and it has the purpose or effect of unreasonably interfering with an individual's work performance by creating an intimidating, hostile, humiliating, or offensive environment, the employer has violated M.G.L. c. 151B's proscription on harassment.

Chapter 151B, § 4(1) prohibits employers from taking an adverse action against an employee based on the employee's pregnancy. This can include terminating a pregnant employee based on a speculative belief that the employee's ability to perform would be diminished because of pregnancy or an unfounded concern that a pregnancy would result in absences, issues providing

coverage during leave,[23] or a fear of potential liability for the employer are impermissible reasons for requiring a pregnant employee to stop working.[24]

E. Policies

Parental leave policies must be consistent with the law[25] and provide parental leave on an equal basis regardless of sex, gender identity, sexual orientation, or any other protected class in M.G.L. c. 151B. For example, employment policies that provide employees who are new mothers with more leave than employees who are fathers violate M.G.L. c. 151B's proscription against sexual discrimination.[26] Moreover, an employer violates M.G.L. c. 151B when it adopts policies that provide more paid time off, flexible work arrangements, or other benefits based on sex or gender identity, or based on any other protected class in M.G.L. c. 151B. Employers are also prohibited from adopting policies or engaging in conduct based on sexual stereotypes. For example, the assumption that females are primarily responsible for bonding and caregiving fosters a stereotypical view about their commitment to work and their value as employees. Conversely, the assumption that males are not appropriate caregivers is based on sexual stereotypes. Employers are also prohibited from imposing more burdensome procedures for requesting a parental leave on classes of employees based on their protected status.

The Commission applauds employer efforts to provide additional, paid parental leave to employees for the purposes behind the MPLA. However, such benefits must inure equally to all employees regardless of the sex, gender identity, or other protected class status. "Primary caregiver policies" which provide more leave to the "primary caregiver" are likely to violate M.G.L. c. 151B. For example, a policy that provides more weeks of parental leave to a "primary caregiver" and fewer weeks to a "secondary caregiver," and designates birth mothers as the "default" primary caregiver, are based on a sex-based stereotype, and violate M.G.L. c. 151B. The Commission acknowledges

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[23] Gowen-Esdaile v. Franklin Publishing Co., 6 MDLR 1258 (1984) (termination of employee during troubled pregnancy because of employer's fears of further absences and coverage during leave deemed unlawful sex discrimination).

[24] Hammond v. Carol O'Leary Residential Cleaning Specialists, 35 MDLR 25 (2013), citing International Union, United Automobile, Aerospace and Agricultural Implement Workers of American, UAW v. Johnson Controls, Inc., 499 U.S. 187, 205-6 (1991) ("an employer may take into account only the woman's ability to get her job done… The decision to become pregnant or to work while being either pregnant or capable of becoming pregnant is reserved for each individual woman to make for herself.").

[25] For example, a parental leave policy that does not allow employees to take leave during their first year of employment violates M.G.L. c. 149, § 105D. Commonwealth v. Cataldo Ambulance, 41 MDLR 90 (2019).

[26] See, e.g., Equal Employment Opportunity Comm'n v. Estee Lauder Cos., Inc., 2018 WL 4181710 (E.D. Pa. July 17, 2018) (EEOC submitting that providing new mothers with six weeks of paid parental leave for child bonding, in addition to medical leave, while offering only two weeks for child bonding to father violates Title VII.).

that many co-parents will share caretaking responsibilities and use parental leave for this purpose. Policies that explicitly presume that a female is a primary caregiver, or that define the primary caregiver as "the parent with primary caregiving responsibilities immediately after birth," for example, effectively deny co-parents, often males, their rights under the MPLA and under M.G.L. c. 151B, § 4(1). Similarly, an employer who imposes greater or more onerous eligibility requirements on male employees to take parental leave violates M.G.L. c. 151B. Primary caregiver policies that require an employee to prove that they are the primary caregiver by showing that their spouse has returned to work or is incapable of caring for the child contradict the legislative intent of the MPLA to permit parents to take leave so that they may bond with their children, irrespective of a co-parent's exercise of the same right.

XI. MPLA Notice and Posting Requirements

A. Posting Requirements

All employers must post a notice in a conspicuous place that contains at least the following information:

> PURSUANT TO M.G.L. C. 151B, § 4(11A) AND C. 149, § 105D EVERY EMPLOYEE AND DOMESTIC WORKER IS ENTITLED AS A MATTER OF LAW TO AT LEAST EIGHT WEEKS PARENTAL LEAVE FOR THE PURPOSE OF GIVING BIRTH OR ADOPTION OF A CHILD.
>
> EMPLOYEES ARE ELIGIBLE IF THEY COMPLY WITH THE FOLLOWING CONDITIONS:
>
> 1. THE EMPLOYEE IS EMPLOYED ON A FULL–TIME BASIS;
> 2. THE EMPLOYEE HAS COMPLETED AN INITIAL PROBATIONARY PERIOD SET BY THE EMPLOYER WHICH DOES NOT EXCEED THREE MONTHS OR, IN THE EVENT THE EMPLOYER DOES NOT UTILIZE A PROBATIONARY PERIOD FOR THE POSITION IN QUESTION, HAS BEEN EMPLOYED FULL TIME FOR AT LEAST THREE CONSECUTIVE MONTHS; AND,
> 3. GIVES TWO WEEKS' NOTICE OF THE ANTICIPATED DEPARTURE DATE AND NOTICE THAT THEY INTEND TO RETURN TO THE JOB, OR PROVIDE NOTICE AS SOON AS IS PRACTICABLE IF THE DELAY IS FOR REASONS BEYOND THE INDIVIDUAL'S CONTROL.
>
> DOMESTIC WORKERS MUST PROVIDE TWO WEEKS' NOTICE, BUT ARE NOT REQUIRED TO BE FULL TIME OR COMPLETE AN INITIAL PROBATIONARY PERIOD.
>
> BOTH EMPLOYEES AND DOMESTIC WORKERS ARE ENTITLED TO RETURN TO THE SAME OR A SIMILAR POSITION WITHOUT LOSS OF EMPLOYMENT BENEFITS FOR WHICH THEY WERE ELIGIBLE ON

THE DATE THE LEAVE COMMENCED, IF THEY TERMINATE 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.

IF THE EMPLOYER PROVIDES PARENTAL LEAVE FOR LONGER THAN EIGHT WEEKS, THE EMPLOYER SHALL NOT DENY THE EMPLOYEE OR DOMESTIC WORKER THE RIGHT TO RETURN TO WORK UNLESS THE EMPLOYER CLEARLY INFORMS THE EMPLOYEE OR DOMESTIC WORKER, IN WRITING, PRIOR TO THE COMMENCEMENT OF LEAVE AND PRIOR TO ANY SUBSEQUENT EXTENSION OF LEAVE THAT TAKING LONGER THAN EIGHT WEEKS OF LEAVE SHALL RESULT IN THE DENIAL OF REINSTATEMENT OR THE LOSS OF OTHER RIGHTS AND BENEFITS.

B. Enforcing Rights Under the MPLA

The MCAD enforces the MPLA. To initiate a formal action, an employee must file a complaint with the Commission. The complaint must be filed within 300 days of the alleged violation of the MPLA, subject only to very limited exceptions. An aggrieved employee is therefore entitled to the same remedies under the MPLA as are generally available pursuant to M.G.L. c. 151B, including but not limited to monetary damages, civil fines, and other equitable remedies.

XII. Parental Leave Law Comparison Chart

	MPLA	FMLA	PFML
State/Federal Law	State	Federal	State
# of Employees	6 or more (1 or more domestic worker employees)	50 or more within seventy-file miles of each other	N/A
Types of Employees	Domestic Workers; Full-Time Employees		Employee of Massachusetts Business or State Agency
Exempted Employees	N/A	N/A	Employee of Municipalities, Districts, Political Subdivisions, Housing Authorities, Regional School Districts, and Regional Planning Commissions

Paid/Unpaid	Unpaid (but may be paid at the employer's discretion)	Unpaid (but may be paid at the employer's discretion)	Paid
Mandatory	Yes	Yes	Employers may decide whether to participate in PFML or provide equal or better coverage through a private leave plan.
Purpose	Birth or Adoption	Birth, Adoption, Care for a Family Member, or Managing Family Affairs for a Deployed Servicemember	Birth, Adoption, Care for a Family Member, or Managing Family Affairs for a Deployed Servicemember
# of Weeks Received	8 weeks per child	Up to 12 weeks per twelve-month period	Up to 26 weeks per benefit year
Earning Requirement?	N/A	N/A	Yes (e.g., $5,700 in 2022 or $6,000 in 2023 over the past four calendar quarters). Additionally, the person must earn at least 30x the eligible benefit amount.
Temporal Requirement?	Yes. To be eligible, employee must have completed a probationary period not to exceed 3 months, or if no probationary period, employed by employer for at least 3 months.	Yes. Employed by same employer for at least 12 months and at least 1,250 hours worked over that time.	N/A

XIII. Hypothetical Questions and Answers under the MPLA

A. Q&A on Eligibility for Leave

Question 1: Is a male employee entitled to eight weeks of parental leave for the birth or adoption of a biological child?

Answer 1: Yes, the law requires that all eligible employees, regardless of sex, have the same entitlement to parental leave and the same rights under the law.

Question 2: Is an employee who is unmarried and involved in a same-sex relationship entitled to eight weeks of parental leave to adopt a child?

Answer 2: Yes, an eligible employee is entitled to eight weeks of parental leave for the adoption of a child regardless of sex, gender identity, sexual orientation, or marital status.

Question 3: Employer has a parental leave policy that provides eight weeks of leave to female employees only. Does a non-binary employee have a right to leave upon the birth or adoption of their child?

Answer 3: Yes. The MPLA was amended in 2015 to provide eight weeks of parental leave to all employees, regardless of the sex or gender identity. The employer should update its policy to conform with the MPLA.

Question 4: Employer has a parental leave policy that provides sixteen weeks of leave to only employees who identify as female. Does a transgender employee have the right to sixteen weeks of leave upon the birth or adoption of their child?

Answer 4: Yes. Providing leave in excess of the eight weeks required by the MPLA to only employees who identify as female, would constitute discrimination based on gender identity in violation of M.G.L. c. 151B. The employer should update its policy to conform with the MPLA.

Question 5: May an employee take eight weeks of parental leave if they are not the primary caretaker of the child?

Answer 5: Yes, there is no requirement that the employee be the primary caretaker of the child.

Question 6: May an employer require verification of marital status before approving a request for parental leave?

Answer 6: No, marital status has no bearing on the leave entitlement.

Question 7: An employee has a child in January and takes eight weeks of leave. In June of the same year, the employee adopts a second child. Is the employee entitled to eight more weeks of leave?

Answer 7: Yes. The MPLA allows eight weeks of leave each time the employee gives birth or adopts a child.

Question 8: Employee is eligible for paid family leave under the MA Paid Family and Medical Leave law (PFML) and the MPLA. Employee gives birth to twins and requests sixteen weeks of leave, on the grounds that she has given birth twice. Must the employer give her the sixteen weeks?

Answer 8: Yes. An employee who gives birth to twins has given birth to two children and is entitled to eight weeks of unpaid leave for each child under the MPLA. In this instance, PFML will run concurrently with the employee's MPLA leave, so the employee will have twelve weeks of paid leave under PFML and then four weeks of subsequent unpaid leave under the MPLA.

Question 9: Employee adopts two babies at the same time. They request sixteen weeks of leave, on the grounds that they have adopted two children. Must their employer give them the sixteen weeks?

Answer 9: Yes, the eligible employee is entitled to sixteen weeks. The MPLA treats multiple adoptions the same as multiple births.

Question 10: Employee adopts an adult of 21 years of age who has a mental disability. Is the employee entitled to MPLA leave?

Answer 10: Yes. The MPLA applies to adoption of a child under the age of 23 if the child has a physical or mental disability.

Question 11: A couple in which both individuals work for the same employer is adopting a baby. How much MPLA leave is each individual entitled to take?

Answer 11: Since both individuals work for the same employer, they are entitled to only eight weeks of leave between the two of them under the MPLA.

Question 12: An employee, the Chief Technology Officer of the company, requests parental leave because their spouse will be giving birth. Employer denies the leave, on the grounds that the employee's absence and restoration following leave would cause undue hardship to the business. Has the employer complied with the MPLA?

Answer 12: No. If the employee meets the eligibility requirements for the MPLA, they are entitled to take parental leave and be restored to the same or similar position, even if granting leave and restoring them to their position would cause hardship to the employer. Undue hardship is not a defense under the MPLA.

Question 13: Employer's Collective Bargaining Agreement provides for six weeks of parental leave only. Is the employee entitled to a full eight weeks of MPLA leave, even if granting such leave to them would violate the terms of the Collective Bargaining Agreement?

Answer 13: Yes. The employer may not avoid the requirements of the MPLA by a Collective Bargaining Agreement or other contract.

Question 14: An employer's written policy is to permit employees to take a parental leave after one year of employment. Has the employer done anything wrong?

Answer 14: Yes, this policy is inconsistent with the MPLA which requires employers to provide certain employees a parental leave after a probationary period, not to exceed three months.

Question 15: The employer's employee handbook provides that employees are not eligible for any benefits prior to completing a six-month probationary period. The employee requests to begin parental leave four months after the start of their employment. Are they entitled to the leave?

Answer 15: Yes. An employee is eligible for parental leave once they have completed an initial probationary period set by their employer which cannot exceed three months, or once they have

completed three months of employment. MPLA leave is not a benefit that the employer can withhold as a matter of policy or otherwise.

Question 16: An employee who works 25 hours per week is considered a part-time employee under the employer's handbook and is not eligible for the benefits given to full-time employees. Is the employee eligible for MPLA leave?

Answer 16: No. Absent other factors tending to show full-time status, the employee would be considered a "part-time" employee, and therefore would not be eligible for MPLA leave. The employee may be entitled to leave under the federal Family and Medical Leave Act (FMLA), however, or if employer provides leaves to part-time employees for other reasons.

B. Q&A on When Parental Leave May be Taken

Question 17: An employee schedules parental leave to begin before the expected due date of a birth. Does the period before the due date count as parental leave under the MPLA?

Answer 17: Yes, if the leave is scheduled to begin close to the due date or adoption date in order to prepare for the birth or adoption.

Question 18: An employee informs her employer that she is pregnant, that she expects to deliver the baby in June, and that she plans to return to work following her leave. The baby is delivered prematurely, in May. Is the employee entitled to take her parental leave early?

Answer 18: Yes. The MPLA requires the employee to give two weeks' notice of her "anticipated date of departure and intention to return." The employee has satisfied this requirement; therefore, she is entitled to the leave.

Question 19: An employee who is adopting a child that is sixteen years old is asking for intermittent MPLA leave to make court appearances and other preparations for the adoption. They are asking for a total of forty days off, spread out over six months. Does the employer have to grant that leave?

Answer 19: Yes, the MPLA leave can be an intermittent leave.

Question 20: Is a foster parent who intends to adopt the child entitled to unpaid leave under the MPLA?

Answer 20: Yes. M.G.L. c. 149, § 105D specifically covers employees who intend to adopt.

Question 21: Employee develops a medical condition related to pregnancy prior to giving birth. Employee is hospitalized for three weeks under doctor's orders until the condition resolves, at which point the employee is able to return to work and does return to work. Would the three-week leave come under the MPLA?

Answer 21: No. The three-week leave for the medical condition would not count as MPLA leave because it is not "for the purpose of giving birth," which means preparing for childbirth, childbirth itself, participating in childbirth, and/or caring for a newborn. The employee may be entitled to

leave under the Paid Family and Medical Leave law (PFML), the Family Medical Leave Act (FMLA), or under the employer's sick leave or disability policy. In addition, the employee may be entitled to leave for the medical condition as a reasonable accommodation under the Pregnant Workers Fairness Act, M.G.L. c. 151B, or the Americans with Disabilities Act, as amended, if the medical condition constitutes a disability under state or federal law. The employee would still be entitled to eight weeks of parental leave under the MPLA at the time the child is born.

Question 22: A female employee has a knee operation in January. She takes twelve weeks of leave, which is designated by employer as FMLA leave. She gives birth to a baby in June of that year and requests an additional leave of absence as parental leave. Employer denies her request for leave, on the grounds that she has used up her total family and/or medical leave entitlement for the year. Has the employer done anything wrong?

Answer 22: Yes. The employee is entitled to eight weeks of leave under the MPLA. The twelve weeks taken under the FMLA for the knee operation did not count as MPLA leave, since it was not for the purpose of giving birth or adopting a child.

Question 23: Employee has a baby in January and takes 12 weeks of leave to care for the child, which is designated by the employer as FMLA leave. At the expiration of the 12 weeks, employee asks for an additional 8 weeks of parental leave in connection with the same child. Is the employee entitled to this leave under the MPLA?

Answer 23: No. Employer has already complied with the MPLA's requirement that the employee receive up to eight weeks of leave for the purpose of giving birth to a child. In this instance, the MPLA leave runs concurrently with the FMLA leave.

C. Q&A on Employee Rights and Prohibited Employer Conduct

Question 24: At the time their leave begins, employee has five weeks of accrued vacation time. Employee informs their employer that they do not wish to use their accrued vacation concurrently with their MPLA leave. May the employer require them to use their accrued vacation pay during their MPLA leave?

Answer 24: No, 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.

Question 25: At the time their leave begins, the employee has accrued sick time. Employee informs their employer that they do not wish to use their accrued sick time concurrently with their MPLA leave. May their employer require them to use sick time concurrently with their MPLA leave?

Answer 25: It depends on the nature of the sick leave. If the sick leave was accrued pursuant to the Earned Sick Time Statute ("EST statute"), M.G.L. c. 149, § 148C, then the employer may require the employee to use that sick leave concurrent with their MPLA leave. The employer may not require the employee to use any sick leave which was not accrued under the EST statute. For example, if the employee has accrued forty hours of sick leave pursuant to the EST statute, but

pursuant to the employer's policy, has accrued an additional eighty hours of sick leave, the employee will be required to use forty hours of sick leave concurrent with their MPLA leave and may use eighty hours of sick leave after the MPLA leave, provided that the employee qualifies for the sick leave under the employer's policy.

Question 26: Prior to an employee's parental leave, the employee received dental insurance through the employer, as did all other employees. During the leave, the employer eliminated dental insurance for all employees. Is the employee entitled to dental insurance upon their return from leave?

Answer 26: No, because the employee would have lost the dental insurance even if they had not taken leave.

Question 26: Employer grants a bonus to all employees who have worked for one year. At the time their MPLA leave commences, the employee has worked ten months. Must employer grant them the bonus upon their return from leave?

Answer 26: No. The employer need not count the two months of parental leave in computation of months of service for the purposes of the bonus unless it is the employer's practice to count such time for employees who take other types of leaves. In addition, employee may be eligible for the bonus, upon completion of two months of service following their return from leave, if similarly situated employees are also deemed eligible for the bonus.

Question 27: Prior to an employee's leave, they are eligible for participation in the Company 401K Plan. Upon return from their leave, the employer no longer permits them to participate in the Plan on the grounds that there has been a break in employee's service. Has the employer violated the MPLA?

Answer 27: Yes. Parental leave may not affect the employee's right to participate in programs for which the employee was eligible at the date of their leave.

Question 28: An employee informs their employer that they intend to take MPLA leave on June 1 for eight weeks. After eight weeks, when the employee tries to return to work, the employer denies restoration because the employee never explicitly said they intended to return. Has the employer violated the MPLA?

Answer 28: Yes. The employee implicitly confirmed their intent to return when they characterized their departure as a leave and limited that leave to eight weeks.

Question 29: Prior to an employee's leave, the employee was a Vice President. Upon return from their leave, they were transferred to a position with the same pay, but which was not considered an officer-level position, and which had a lower grade level. No other officer-level employees were similarly transferred. Has the employer complied with the MPLA?

Answer 29: No, because the new position does not have the same status as the prior position, unless the employer can prove that it would have transferred the employee even if the employee had not taken a leave.

Question 30: Prior to an employee's leave, the employee was a secretary, working the day shift, at a location fifteen minutes from their home. Upon return from leave, the employee was reinstated as a clerk, working the night shift, and was transferred to a location one and one-half hours from their home. No other employees were similarly transferred. Has the employer complied with the MPLA?

Answer 31: No. The two positions are not "similar," because of the significant difference in their respective duties, schedule, and commute.

Question 32: Prior to the employee's leave, the employee was a full-time shipping clerk who worked the day shift. Prior to their return from leave, the employee requests that they be reinstated to a part-time shipping clerk position on an evening shift, which also has a slightly higher rate of pay. Employer offers to reinstate employee to their previous position. Has the employer complied with the MPLA?

Answer 32: Yes. The MPLA does not require an employer to return an employee to a part-time position, or to a position with greater pay or benefits. The employer is required only to return the employee to the same or similar position.

Question 33: While the employee is on leave, the employer decides to eliminate their position for operational reasons. Employer's decision is not in any way linked to employee's pregnancy or need for parental leave. Is employee entitled to reinstatement?

Answer 33: The employee would not be entitled to reinstatement if the employer can show that that it eliminated the employee's entire department (or other employees similarly situated as the employee) as part of an operational change.

Question 34: While the employee is on leave, the employer discovers that the employee has been embezzling money from the company and decides to terminate the employee. The employer's decision is not in any way linked to employee's parental leave. Is the employee entitled to reinstatement?

Answer 34: No, the employee would not be entitled to reinstatement if the employer can show that it would have terminated the employee even if the employee had not taken the parental leave because of the embezzlement.

Question 35: Employer's parental leave policy provides ten weeks of parental leave. An employee takes ten weeks of leave. May the employer deny job restoration on the grounds that the employee has taken more than eight weeks of leave without violating the MPLA?

Answer 35: No. If the employer agrees to provide parental leave for longer than eight weeks, the employer must reinstate the employee at the end of the extended leave unless before the leave it clearly informed the employee in writing that taking longer than eight weeks of leave shall result in the denial of reinstatement or the loss of other rights and benefits.

Question 36: During a job interview, an applicant informs the employer that she is pregnant. The employer chooses not to hire her, on the grounds that the employer does not want to have to grant parental leave. Has the employer done anything wrong?

Answer 36: Yes. The employer may not consider the employee's pregnancy, or potential need for leave, in hiring decisions since doing so would constitute sex discrimination under M.G.L. c. 151B.