



*Small Necessities Leave Act, Maternity Leave Act,
And Other Miscellaneous Statutes Governing Time Off*

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I. Introduction

In addition to the federal Family and Medical Leave Act and state and federal anti-discrimination laws, there are numerous other state and federal statutes that govern time off from work. These materials summarize those statutes that human resource professionals, business owners and managers, and others who deal with these issues are likely to encounter.

II. Small Necessities Leave Act

Massachusetts enacted the Small Necessities Leave Act (SNLA) in 1998, expanding upon the rights granted by the federal Family and Medical Leave Act (FMLA).

What Leave is Created?

The SNLA grants eligible employees a total of 24 hours of unpaid leave during any 12 month period, *over and above* the leave granted under the FMLA. The types of leave covered by this act include leave to:

1. Participate in school activities directly related to “educational advancement” of the employee’s child. This would include parent-teacher conferences or other similar “back to school” activities, and even activities such as interviewing for a new school. Note that the term “school” is defined in the SNLA to include public or private elementary or secondary schools, Head Start programs, and licensed children’s day care centers. The SNLA incorporates the definition of “son or daughter” from the FMLA.

2. Attend routine medical or dental appointments - for example, routine checkups and vaccinations.

3. Accompany an “elderly relative” [a defined term in the SNLA, meaning someone at least 60 years old related by blood or marriage to the employee] to medical or dental appointments, or more broadly for the purpose of other professional services relating to elder care. This includes time off needed to arrange for professional care at a nursing home or other rehabilitation facility.

What Employers and Employees does the SNLA apply to?

Like the FMLA, the SNLA applies to:

- Employers who have employed 50 or more persons each working day during each of 20 or more calendar weeks in a current or preceding calendar year
- Employees who also are eligible for FMLA leave, that is, to employees who:
 - have been with the employer at least 12 months;
 - have worked at least 1,250 hours during the previous 12 months;
 - and
 - work where the employer employs at least 50 people either at that worksite or at work sites within a 75-mile radius.

How to Calculate Leave

Just like under the FMLA, the employer is permitted to choose the method for determining which “12-month period” applies when calculating the 24 hours of leave that may be taken by the employee. So, for example, the employer can choose a calendar year, a fiscal year (if different from the calendar year), a 12-month period based upon the employee’s date of hire, or a 12-month period starting when the employee requests a leave under this act. It doesn’t matter which method the employer uses, just so long as the employer applies the method consistently and uniformly to all covered employees.

How the SNLA Works

The logistics of how the SNLA operates likely will frustrate most HR professionals, because there are few actual requirements imposed upon employees. So, for example, the employee “must” give at least 7 days notice, but only if the requested leave is “foreseeable.” As a practical matter, employers are not likely to argue with an employee who gives less than 7 days notice so long as the employee uses those magic words – “this appointment wasn’t planned/foreseeable/etc.” In those instances, the employee must only give “such notice as is practicable.” Again, reasonable people can and will disagree about what this means.

Helpful Tips to Avoid Problems

1. Remember that leaves of absence can be taken intermittently - that is, it need not be taken all at one time.
2. Employers may not force an employee to take more SNLA leave than is needed. So, for example, if the employee needs to take off 2 hours in the morning to attend a parent-teacher conference, the employer may not have a policy that provides that an employee must take

off time in blocks of half days or full days. That being said, an employer may (but need not) require the employee to take leave in increments of not less than 1 hour.

3. Even though the leave is unpaid, covered employees may elect (or an employer may require) to substitute accrued paid time off (in whatever form) for leave taken under the SNLA.

4. The employee need not use the phrase “Small Necessities Leave Act” when requesting a leave of absence. Therefore, HR 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.

5. 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. Therefore, HR must decide whether it wishes to undertake this additional record-keeping burden.

6. If an employee submits any type of medical documentation or information in connection with a leave request or certification, the employer must treat those records as confidential, and must maintain those records separate from the employee’s personnel record. For that reason, employers may wish to instruct employees to not submit any such documentation or information, so as to avoid having to create a separate file for these materials.

7. Inexplicably, the SNLA does not mandate that the employer post the employee’s rights at the workplace. However, given that most employees are used to being notified of their rights as employees either by postings or by memoranda circulated within a company, it is strongly recommended that employers notify employees in writing of the rights afforded under the SNLA. This can be accomplished in the usual manner - that is, either by posting the information in a central location (mailroom, lunch or break room, etc.), or by making the information available by written memo or in electronic form. Doing so will help eliminate confusion about the employee’s rights and the employer’s obligations, and hopefully will result in employees being more conscientious about leave requests and compliance with notification requirements.

III. Massachusetts Maternity Leave Statute

What Leave is Created?

Massachusetts has had a maternity leave statute since 1972. The law provides 8 weeks of leave to female employees who have met certain criteria. It is up to the employer whether the leave will be paid or unpaid.

What Employers Are Covered and Which Employees Are Eligible?

The Massachusetts maternity leave statute applies to all employers having 6 or more employees (other than non-profit clubs that are exclusively social in nature, or non-profit fraternal associations or corporations).

Those eligible under the Massachusetts statute are female employees who have completed 3 months of work, or some other specified probationary period with the employer. The statute covers full time employees. The statute does not define the term “full time,” however, and the Massachusetts Commission Against Discrimination (the state agency that oversees and enforces this statute and all other anti-discrimination statutes) has no express policy regarding what constitutes “full time.” Nonetheless, the employer would be well advised to use the definition of “full time” it uses for other purposes. For example, this definition may be contained in an employee handbook or in the company’s benefit plans.

How the Act Works / Helpful Tips

1. The Massachusetts Maternity Leave Statute applies when an eligible female employee gives birth to or adopts a child under 18 years old (or under 23 if the child is mentally or physically disabled). As written, the statute permits leave to be taken at the time of the birth or adoption, but not substantially earlier or later than that time.
2. The employee must give two weeks’ notice of her anticipated date of departure and of her anticipated return date.
3. If the leave is unpaid, the employer must permit the employee to use, concurrent with the maternity leave, accrued paid sick, vacation, or personal time, but the employer may not require the employee to use that accrued time.
4. Under most circumstances, there is no need to accrue seniority or to pay for any benefits, plans, or programs while the employee is on maternity leave. That being said, the employee may be entitled to receive benefits as a result of a collective bargaining agreement, company policy, or an employment agreement. In addition, if an employer generally provides

these benefits to employees for leaves unrelated to maternity leaves, then the employer must provide the same benefits to employees on maternity leave.

5. When the employee returns to work, there can be no loss in the seniority or benefits to which she was entitled when she first went on leave. Note, however, that if more senior employees in the same or similar positions are laid off while the employee is out on maternity leave, she need not be reinstated. [No Massachusetts court has ruled on the enforceability of this provision, but the U.S. Supreme Court upheld a substantially similar California law.]

6. The statute requires that the employer post a notice of the rights afforded under this statute wherever there are female employees.

7. An employer cannot refuse to grant leave to an eligible employee on the ground that doing so would create a hardship.

8. By its terms, the Massachusetts maternity leave statute applies only to female employees. In recently published guidelines, the Massachusetts Commission Against Discrimination suggested that providing leave to female employees only, and not to male employees, might violate federal anti-discrimination laws even though the employer has complied with state law. Indeed, the Equal Employment Opportunity Commission (the federal counterpart to the state agency), in a manual that provides guidelines for complying with all federal anti-discrimination laws, has stated that if an employer grants maternity leave, “the employer may not deny paternity leave to a male employee for similar purposes.” No Massachusetts court has considered whether the state statute violates other laws (for example, the state anti-discrimination statute, the Massachusetts Equal Rights Act, and Massachusetts Constitution), but employers may wish to consider providing leave to all employees, regardless of gender, so long as the other criteria of the statute are met.

IV. Massachusetts Wage and Hour Laws and Related Statutes

Massachusetts has a statute, known popularly as the Wage and Hour Law, that creates a number of rights for employees in terms of time off. In addition, there are a number of other statutes (such as the statute that defines legal holidays) that affect the wages paid to employees and the hours worked. Below are the most important provisions.

Meal Periods

Massachusetts law requires employers to provide a 30-minute meal break to every employee who works more than six hours in a day. [Theoretically, an employee might be entitled to two such breaks if the employee works a very long shift.] The statute provides an exception from this mandate for specific operations (iron works, glass works, paper mills, letter press establishments, print works, bleaching works, and dyeing works), and employers may request an exemption from this meal break requirement directly from the Attorney General's Office.

The statute does not require that the meal break be paid. However, if an employee's movements are restricted during the meal break, or if work is required during the meal period, the Attorney General's Office has said that the meal period must be paid by the employer. Example – if a secretary is asked to take over the switchboard so that the operator can take a break, then the secretary must be paid.

An employee may voluntarily waive his or her right to take a meal break. Employers would be well advised, though, to document this by having the employee waive the right in writing, and to place this document in the employee's personnel file. Any employee who waives their right to take a meal break may revoke that waiver at any time.

Holidays

Holidays are another form of time off from work, and are governed by statute. Massachusetts law creates eleven so-called "legal holidays":

- New Year's Day (January 1)
- Martin Luther King, Jr. Day (third Monday in January)
- President's Day (third Monday in February)
- Patriot's Day (third Monday in April)
- Memorial Day* (last Monday in May)
- Independence Day* (July 4)
- Labor Day* (First Monday in September)
- Columbus Day* (second Monday in October)
- Veterans Day* (November 11)
- Thanksgiving* (fourth Thursday in November)
- Christmas Day* (December 25)

Employers should be advised of the following when traversing the mine field of holidays:

1. The holidays listed above with an asterisk are covered by the so-called Sunday “Blue Laws” restrictions, discussed below. Generally speaking, these holidays are treated in the same manner as Sundays, except that retail stores may open on Memorial Day, Independence Day, and Labor Day at any hour for the sale of all goods except for alcohol.

2. Massachusetts law distinguishes between retail and non-retail establishments for purposes of application of the holiday laws. So, for example, retail employees may be required to work on those holidays listed above without an asterisk, but non-retail employees may not be forced to work on those holidays.

3. If employees work on a legal holiday, the employer must pay time and one-half.

4. No statute requires employers to pay for holidays. As a practical matter, though, most employers pay the employees for these days (effectively giving employees eleven days of paid time off over and above other paid time off). In addition, many employers provide paid holidays over and above the legal holidays, for example, the day after Thanksgiving; Christmas Eve Day; and New Year’s Eve Day.

5. Employers in Suffolk County must contend with two more legal holidays – Evacuation Day (March 17th) and Bunker Hill Day (June 17th).

6. When a legal holiday falls on a Sunday, it ordinarily is celebrated on the following Monday. When a legal holiday falls on a Saturday, the employer may celebrate the holiday on a Friday (though the employer need not recognize the holiday).

7. Many employers require that an employee work on the day before and the day after a holiday in order to receive holiday pay, so as to cut down on the number of instances where employees may attempt to turn a three-day weekend into a four- or five-day weekend by being absent on one or both days on either side of the legal holiday.

8. Employers do not need to count a paid holiday as time worked when calculating overtime.

Sunday / “Day of Rest” Laws

Despite legal challenges, Massachusetts continues to have the so-called “Blue Laws” on its books. Accordingly, there continue to be restrictions on the kinds of work that may be performed and the types of businesses that may be open on Sundays. A business must consult with counsel to figure out the particular applicability of these laws to its operations. Generally

speaking, most types of retail operations are permitted to conduct business on Sundays, as are manufacturing facilities where continuous operation is required.

Assuming your business is permitted to operate on a Sunday, this impacts time off for employees. Massachusetts has a so-called “Day of Rest” statute that provides, generally speaking, that virtually all employees are entitled to one day off from work in seven calendar days. Note also that most employers must pay time and one-half to its employees who work on Sunday, without regard to the number of hours worked during the week.

V. Military Leave Statutes

State Statute

Massachusetts has a leave statute that protects employees (other than persons employed in a temporary position) who serve in a military reserve unit. Specifically, any covered employee who is a member of such a unit is entitled to a leave of absence of up to seventeen days to fulfill annual training and other service-related requirements.

Employers should note the following:

1. The employer has the discretion to make this a paid or unpaid leave.
2. The leave may not adversely affect the employee’s status, seniority, pay, vacation, sick leave, bonus, advancement, or any other advantages of employment.
3. To trigger such a leave, the employee must provide notice of the dates of departure and return from this military leave.

Federal Statute

In addition to the state statute, there is a federal statute that governs employee’s rights in connection with service-related leaves of absence. Under this federal law, an employee in a non-temporary position has certain rights to be re-employed after performing military service for a period of up to five years (and longer if the employee is engaged in involuntary active duty). Generally speaking, the statute provides that a covered employee must be reemployed in a position the employee would have attained if they had not taken the military leave of absence, assuming the person is qualified to perform all of the duties associated with that position. Note that the employer must make reasonable efforts to qualify the person for that position. In the alternative, and if despite the employer’s reasonable efforts the person is not qualified for the

more senior position, the statute provides that the person must be reemployed in the position the person was employed in on the date of departure for military leave.

Employers should note the following about this federal statute:

1. The employee must give advance written or oral notice of impending service to the employer. In most instances the employee must apply to be reemployed within 90 days of returning from military service. The time limit may be extended if the individual was injured or was hospitalized.

2. Once an employee has been reinstated, the employee may not be terminated, except for cause, for six months in circumstances where the employee completed more than 30 days of military service, or for one year where the employee completed more than 180 days of military service.

3. The federal statute does contain a safety valve provision: reemployment is not required if the “employer’s circumstances have so changed as to make such reemployment impossible or unreasonable,” or if reemployment would impose an undue hardship on the employer.

VI. Short and Long Term Disability Plans

Many employers offer short and/or long term disability plans to their employees. These plans offer wage replacement benefits for employees who are unable to work based on a physical or mental condition. Any such plans, like pension plans, are governed by a federal statute known as the Employee Retirement Income Security Act, or ERISA. Although ERISA does not impose any requirements with respect to time off from work, it does impose other requirements that could arise in the context of a leave.

For example, ERISA requires employers to provide plan information (typically referred to as “summary plan descriptions”) to participating employees. ERISA also gives participating employees the right to bring a lawsuit to enforce plan provisions or to remedy any violations of the statute. As a result, whenever any employee takes time off for medical reasons, the employer should ensure both that the employee has been given appropriate information about any disability plans and that it complies with its obligations under the plan. If an employee fails to apply for benefits to which he was entitled under a disability plan, and he later proves that his failure resulted from his lack of knowledge about the plan, the employer could face some liability. Also, as with many statutes protecting employees, an employer cannot discriminate

against an employee who exercises her rights under ERISA. So, for example, if an employee on leave asks for a copy of a benefit plan, she cannot be terminated based on her request.

VII. Workers' Compensation Act

Employees taking leave for medical reasons also might seek benefits under the Massachusetts workers' compensation act. While short and long term disability plans generally offer benefits for any disability, regardless of the cause, workers' compensation benefits are available only to employees who are injured on the job. Not surprisingly, the workers' compensation act imposes a number of requirements on employers, so employers should immediately seek counsel when an employee suffers a work-related injury or requests leave for such an injury. In addition to the standard prohibition barring discrimination against an employee exercising his rights under the workers' compensation act, another provision warrants mention: if an employee has lost his job as a result of a work-related injury, the employer must give the employee preference over other employees when hiring for a suitable job.

VIII. Civic Duty-Related Leaves of Absence

Voting – In Massachusetts, employees may request that they be given a short leave of absence to vote within the first two hours after polls open in their precinct. Being paid for this time is up to the employer's discretion, and accordingly most employees prefer to vote either before or after work (made easier by virtue of the fact that most polling places are open both before and after average work day hours).

Jury Duty and Related Issues – Massachusetts law provides that employers must pay regular wages to employees for the first three days of jury duty. This applies to employees who serve as jurors at trials as well as employees who are selected to serve as grand jurors. This includes full-time, part-time, temporary assignment, or casual employees. [An employer may petition the court if paying a juror during the first three days of jury duty presents an extreme financial hardship.] Thereafter, the Commonwealth pays a modest per diem to jurors, and the employer has the option (but not an obligation) to pay the difference. Many employers in fact choose to pay the difference, but ordinarily payment is conditioned on the employee's promise to show up for work in the event the court day is shortened or cancelled.

Be advised that many courts in Massachusetts hold jury trials between 9:00 a.m. and 1:00 p.m., devoting the balance of the day to other important court business. Therefore, depending on

the employee's regularly-scheduled hours of work and the proximity of the courthouse where the employee is fulfilling his or her jury duty, an employee may be able to work some portion of the day after serving as a juror. Please note – it is against the law to discharge an employee who misses work on account of jury duty.

A related problem arises when an employee is served with a subpoena to testify in court. There is a statute in Massachusetts that provides that employees ought not be “penalized” for complying with a subpoena issued in connection with a criminal case, thereby being forced to miss some or all of a work day. Arguably, if an employer fails to pay an employee who has missed work under these circumstances, this could be seen as a penalty. Therefore, employers would be well advised to pay employees for time off from work if the employee provides proof that he or she was subpoenaed to testify. Employers certainly are entitled to request documentation, and moreover employers need not pay an employee if the employee chooses to testify in court without being served with a subpoena, but instead has volunteered to testify in court, as sometimes happens.

IX. Time Off Related to Working Schedules (Vacations)

There are no laws in Massachusetts mandating that an employer grant paid vacations to its employees. In practice, however, nearly all employers provide paid vacation benefits in some form to remain competitive.

That being said, laws pertaining to vacation benefits are not well understood and somewhat controversial, in part because of the manner in which the laws are applied. For example, many employers have a policy that provides that employees who are terminated due to misconduct (including, for example, theft from the worksite) forfeit their right to receive accrued and unused vacation benefits upon termination. While this policy appears to be based on common sense, the Massachusetts Attorney General's Office takes the position that once a vacation benefit has been “earned” by the employee, it is to be treated just like “wages” and may not be taken away from the employee under any set of circumstances, including those of the employee's own making!

Thankfully, the Attorney General's Office has taken a somewhat more enlightened and practical approach to what is commonly known as “use it or lose it” vacation benefit policies, that is, policies that provide that an employee will forfeit vacation benefit if not used within a specified period of time. Such a policy must be publicized to the employees.

X. Conclusion

If there is a bottom line, it is this – employers should seek legal advice when formulating leave policies, implementing policies for the first time, or when confronted with unusual or out-of-the-ordinary circumstances. In the end, the employer will save time, aggravation, and money in the short- and long-term by doing so.