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CLIENT ALERT

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MASSACHUSETTS COMMISSION AGAINST DISCRIMINATION REINTERPRETS MASSACHUSETTS MATERNITY LEAVE ACT AS APPLYING TO MEN

Massachusetts Commission Against Discrimination (“MCAD”) Commissioner Martin Ebel recently announced what may be a dramatic change in policy by the MCAD regarding the Massachusetts Maternity Leave Act (“MMLA”). According to Commissioner Ebel, Massachusetts employers must provide maternity leave under the MMLA to men as well as women, even though the statute specifically applies to “female employees” only.

The MMLA generally requires that employers with six or more employees provide “full-time” “female” employees eight weeks of leave for the purposes of giving birth or adopting a child (provided that various other conditions of the statute are met). Given that the language of the MMLA is limited to “female” employees, Massachusetts employers generally have not provided MMLA leave to men. Thus, male employees would be eligible for paternity leave only if they qualified for leave under the Federal Family and Medical Leave Act, or if the employer otherwise had a policy of providing paternity leave.

Earlier this month, at a speaking engagement at a Boston law firm, Commissioner Ebel announced that the MCAD would begin applying the MMLA in a “gender-neutral” fashion, meaning that the MCAD will now view the MMLA as applying equally to men and women. This new position contradicts the MCAD’s previous position on this point, as stated in the “MMLA Guidelines” published by the MCAD. Furthermore, this new position contradicts the clear language of the statute itself, which applies only to “female” employees. At the speaking engagement, Commissioner Ebel claimed that the MMLA Guidelines are currently under review and will be revised shortly.

There has been much discussion and debate in the business and legal community regarding Commissioner Ebel’s announcement. Many believe that the MCAD’s new interpretation exceeds its constitutional authority to implement the MMLA, and constitutes the making of a “regulation,” which requires a specific administrative process. Another MCAD Commissioner, Sunila Thomas George, also spoke publicly regarding this issue last week. At a continuing legal education class, Ms. George cautioned that the Commissioners intend to submit a “Letter to the Editor” to a local legal newspaper in coming weeks to state the MCAD’s official position. Hopefully, the letter will clarify the MCAD’s position and will be signed by all of the MCAD’s Commissioners, including its new Chairman, Malcolm Medley.

Where does this leave Massachusetts employers? The most conservative approach would be to immediately provide MMLA leave to otherwise eligible male employees, as well as female employees, and to consider amending written family leave policies to that effect. However, given that the MCAD’s official position on this issue remains uncertain, many employers undoubtedly will wait for further clarification before taking the step of amending their policies and practices. In the interim, if presented with a request for MMLA leave by a male employee, it may be wise to consider granting the request. As a practical matter, if the male employee is eligible for FMLA leave, he would be entitled to 12 weeks of FMLA paternity leave regardless, and that leave would run concurrently with any MMLA leave.

We will keep you informed of ongoing developments regarding this issue.