

Massachusetts Passes Legislation Requiring Covered Employers to Provide Domestic Violence Leave for Employees

By Joseph T. Bartulis, Jr., Esq.

In August 2014, Massachusetts Governor Deval Patrick signed into law a new domestic violence leave law for employees. Covered employers, those who have fifty or more employees, must now allow employees to take off up to fifteen work days per twelve-month rolling year when domestic violence has been perpetrated against them or members of their family.

DOMESTIC VIOLENCE AND LEAVE USES DEFINED

Under the new law, “domestic violence” is defined as abuse perpetrated against the employee or a member of the employee’s family by a current or former spouse of the employee or the employee’s family member; a person who has a child in common with the employee or a member of his or her family; a person who is currently cohabiting or who has cohabitated with the employee or a member of his or her family; a person who is related by blood or marriage to the employee; or a person with whom the employee or the employee’s family member has or had a dating or engagement relationship. “Abuse” is defined to include, among other actions, attempting to cause or causing physical harm; placing another in fear of imminent serious physical harm; causing another to engage involuntarily in sexual relations by force or threat of force; depriving another of medical care, housing, food, or other necessities of life; or restraining the liberty of another.

Assuming the above eligibility for domestic violence leave access has been met, employees seeking to access domestic violence leave must use their accrued paid leave to tend to matters relating to the abuse. Approved reasons for taking domestic violence leave include pursuing medical attention, counseling, victim services, or legal assistance; obtaining a protective order from a court; appearing in court on matters related to the domestic violence, including meeting with the district attorney or other law enforcement official; attending a child custody proceeding; and tending to any other issues which are directly related to the domestic violence.

Provided that the employee works for a covered employer and the benchmarks for accessing domestic violence leave have been met, the next questions become: how does one access the leave, and what are the logistical issues associated with doing so?

ACCESSING ENTITLED LEAVE

While employees may not be denied leave if they meet the above criteria entitling them to domestic violence leave, the new law requires employees who access domestic violence leave to first use accrued paid leave days they have on the books (e.g., vacation, sick, personal) for the domestic violence leave before being entitled to access these days as unpaid. Only if employees have already exhausted all of their accrued paid leave days will they then be allowed to access whatever remainder of their domestic violence leave days exist, unpaid. For example, if an employee has ten accrued vacation days, one sick day, and one personal day remaining and the employee needs to take domestic violence leave for, say, four days, those days would be taken first from the days which are most applicable. Assuming the employee is not the one who was subjected to domestic violence, that would mean the days taken would be either vacation or personal and would be paid, since the employee has paid leave days on the books. If the employee is ill or injured as a result of domestic violence, he or she should be able to use accrued sick days. Assuming the employee provides the requisite amount of notice to access the domestic violence leave, the employer cannot deny the employee access to using accrued paid leave, regardless of whether the employer may have a policy prohibiting more than a certain number of employees from being out, e.g., on paid vacation or personal leave, at any one time. Next, assuming that employees who need to access domestic violence leave have no vacation or personal days on the books, they may next access their accrued sick leave days even if they are not actually sick. This is because all the other categories of paid leave have already been exhausted. Finally, assuming that employees needing domestic violence leave have no paid accrued leave time whatsoever to access, they will have all of their domestic leave time unpaid. For people who are familiar with the Family and Medical Leave Act (FMLA) and how an employee accesses FMLA leave, it is believed that the new Massachusetts domestic violence leave law is very similar to the manner in which FMLA days are accessed. As with the FMLA, the rolling year concept prevents the employee from taking off fifteen days for domestic violence in, say, December of one year and then seeking to access fifteen more domestic violence days just one month later in January of the immediately following calendar year. Another aspect similar to the manner in which FMLA is accessed is that an employer may agree, upon a request

to do so by an employee, to allow the employee to access domestic violence leave days as unpaid rather than drawing down paid leave days which the employee might prefer to preserve. Whether to agree to such a request is exclusively the employer's prerogative.

Regarding how much advance notice employees must give their employer to access domestic violence leave, the law does not specify a particular number of days. Rather it provides that employees must provide as much advance notice of their need to access leave as required by their employer's leave policy unless the need for accessing the domestic violence leave occurred inside the required notice period, in which case the employee should give as much advance notice as is reasonably possible. In the case of imminent danger, the law allows for employees to take domestic violence leave without giving advance notice if doing so was not possible due to imminent danger to the health or safety of the employee or a member of their immediate family. Whenever imminent danger necessitated an employee's taking domestic violence leave without giving their employer advance notice of the leave, the employee nonetheless must notify the employer of having taken domestic violence leave no later than three workdays following the start of their domestic violence leave. If employees are unable to contact their employer within the first three days of taking leave due to imminent danger, the law does allow for the imminent danger notification to come from a member of the employee's immediate family and/or certain professionals who are assisting the employee with their domestic violence issues.

ADDITIONAL LOGISTICS

Having established who is entitled to domestic violence leave and how he or she may access it, I will now briefly highlight a few other provisions of the law of which all covered employers should remain mindful.

First, employers may require the employees to produce documentation which establishes that they are entitled to domestic violence leave. By way of illustration, domestic violence documentation includes such things as a police report, court documents, medical documents, and/or other documents which establish the ability to access domestic violence leave. In the event the employee does not provide documentation prepared by a third party, they may alternatively provide a sworn statement in writing detailing why they need domestic violence leave, which is signed under the pains and penalties of perjury.

Second, employers must restore an employee who accesses domestic violence leave to their prior position or an equivalent position.

Third, all information relating to an employee's taking domestic violence leave must be kept confidential.

Fourth, an employer may not discipline an employee for taking an unscheduled unauthorized absence if the employee produces the necessary documentation within thirty days of the last day on which the employee was absent, which establishes that the unscheduled unauthorized absence (e.g., no call/no show for two days) was due to domestic violence issues which would have otherwise entitled them to take that day off. Given that an employer may wish to discipline or discharge an employee promptly upon their taking off a day which was unauthorized at the time, the thirty-day window afforded to an employee to produce the document may, obviously, create difficulty for an employer who metes out a punishment and the employee/former employee then produces the requisite documentation within the thirty-day window for doing so. One possible way to address this problem would be to ask the employee if their absence was due to a domestic violence issue before the punishment is meted out. If they say yes, request that the employee produce sufficient documentation before the initial thirty days, since the unapproved leave concluded has been exhausted. If they timely produce sufficient documentation, no punishment is warranted. If they fail to produce the documentation within that initial thirty days, the employee may be disciplined at that time. Do note that if an employee suffers adverse employment action in violation of the domestic violence law, they may bring a civil action against the employer for lost wages, among possible other things. They will recover treble damages for lost wages and attorney's fees if they prevail. Additionally, the AG's office is authorized to enforce the law.

Fifth, the new law requires employers to affirmatively notify Massachusetts employees of their ability to access domestic violence leave. We suggest that the best approach is to prepare a domestic violence leave policy which captures all the key points in the law and add it to one's company employee handbook and simultaneously provide each employee with a copy of the new policy. Additionally, an employer may wish to post a summary of the new law in a conspicuous place where other statutory rights are posted.

ACTION ITEMS

All Massachusetts employers should promptly prepare a detailed domestic violence leave policy which captures the elements of the newly enacted domestic violence leave law. Employers should then provide each employee with a copy of the employer's new domestic leave policy and should additionally, not alternatively, consider placing a copy of the policy or the law in a conspicuous place in the workplace where it is viewable during the workday. Employers should do these action items now. To the extent you would like Fletcher Tilton to prepare a domestic violence leave policy for your company or organization, or if you have any further questions, please contact Attorney Bartulis.

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