

ADVISORY 98/1

An Advisory from the Attorney General's Fair Labor and Business Practices Division on An Act Providing Employees Leave for Certain Family Obligations

Pursuant G.L. c. 23, § 1(b), the Office of the Attorney General issues the following Advisory:

An Act Providing Employees Leave for Certain Family Obligations

A statute enacted on August 04, 1998, G.L. c. 149, § 52D (“Act”), mandates that certain eligible employees be permitted to take a total of 24 hours of unpaid leave during any twelve month period. These 24 hours are in addition to the 12 weeks already allowed under the Federal Family and Medical Leave Act. The Office of the Attorney General has been entrusted with the enforcement of the Act.

The Act incorporates by reference sections 2611 through 2615 of the Federal Family and Medical Leave Act. 29 U.S.C. §§ 2601, et seq. In order to fully understand the Act, and comply with its provisions, employers and employees must review the parallel federal statute. The purpose of this Advisory is to provide notice of the Attorney General’s interpretation of the state statutory requirements.

Eligible employees:

Employees are eligible for the 24 hours of leave under the statute if their employer has 50 or more employees. 29 U.S.C. § 2611(B). For purposes of determining the number of employees, the statute includes all employees of the same employer working within 75 miles of the worksite of the employee requesting the leave. *Id.* In addition, the employee must (1) have been employed for at least 12 months by the employer from whom the leave is requested, and (2) provided at least 1,250 hours of service to the employer during the previous 12 month period. 29 U.S.C. § 2611 (A).

Purposes for which the leave may be taken:

The 24 hours of leave may be taken by an eligible employee for any of the following purposes:

- (1) to participate in school activities directly related to the educational advancement of a son or daughter of the employee, such as parent-teacher conferences or interviewing for a new school;
- (2) to accompany the son or daughter of the employee to routine medical or dental appointments, such as check-ups or vaccinations;

- (3) to accompany an elderly relative of the employee to routine medical or dental appointments or appointments for other professional services related to the elder's care, such as interviewing at nursing or group homes.
G.L. c. 149, § 52D(b).

Given the breadth of the statute, employers are urged to give a liberal interpretation to the purposes for which the leave may be taken.

Definitions:

The term "son or daughter" is defined as a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in *loco parentis*. The son or daughter must either be under 18 years of age or 18 years of age or older and incapable of self-care because of mental or physical disability. 29 U.S.C. § 2611(12).

The term "elderly relative" is defined as an individual of at least 60 years of age who is related by blood or marriage to the employee, including a parent. G.L. c. 149, § 52D(a).

The term "school," is defined as a public or private elementary or secondary school; a Head Start program assisted under the Head Start Act, 42 U.S.C. §§ 9831 et seq.; or a children's day care facility licensed under G.L. c. 28A.

Any twelve month period:

Employers are permitted to choose any of the following methods for determining the "12-month period" in which the 24 hours of leave may be taken. Whatever method chosen must be applied consistently and uniformly to all employees.

- the calendar year;
- a fiscal year;
- the employee's anniversary date;
- the 12 month period measured forward from the date of the employee's first request for leave under the Act; or
- a "rolling" 12-month period measured backward from the date an employee uses any leave under the Act.

29 C.F.R. § 825.200 (b).

Intermittent leave:

Leave under the Act may be taken intermittently or on a reduced leave schedule. G.L. c. 149, § 52D (c). An eligible employee need not take the entire 24 hour leave at once, but may take a few hours of time depending on the employee's needs, as long as the total leave does not exceed 24 hours

during any twelve month period. Employers may require that employees take the leave in minimum increments of no less than one (1) hour.

Substitution of vacation/personal/sick leave:

An eligible employee may elect, or the employer may require the employee to substitute any of the employee's accrued paid vacation leave, personal leave or sick leave for any of the leave provided under the Act. G.L. c. 149, § 52D (c). While the 24 hours need not be paid, if the employee chooses to substitute it for paid leave that the employee has accrued, the 24 hours of the leave period would then also be paid in the same manner as the paid leave.¹ The Act does not require employers to provide paid sick leave or paid medical leave in any situation where the employer would not normally provide such paid leave. Id.

Notice requirement:

To be entitled to the leave period, employees must provide notice to their employer as follows:

- if the need for leave is foreseeable, the employee must request the leave not later than 7 days in advance;
- if the need is not foreseeable, the employee must notify the employer as soon as is

practicable.

G.L. c. 149, § 52D(d).

Employers may require that, to the extent possible, the notice by the employee be in writing. If not feasible, employees may request leave orally. Employees need not make reference to the Act in order to assert their rights under the law.

Certification:

Employers may require that a request for leave be supported by a certification. G.L. c. 149, § 52D(e). Attached to this Advisory is a suggested form that may be used by employees to fulfill this obligation if so required. A certification, if produced timely, may serve to comply with the Act's notice requirement. Certificates and/or requests for leave provided by employees must be kept in the employee's personnel record and must be maintained for three years. G.L.

c. 149, § 52C. Records and documents relating to medical certifications or medical histories of employees' family members must be maintained as confidential medical records and kept in files

¹ Employers are urged to consult with the United States Department of Labor with respect to any wage deduction from employees who are exempt from the overtime requirements of the Fair Labor Standards Act, 29 U.S.C. §§ 201 et seq., as salaried executive, administrative, or professional employees.

separate from the usual personnel files.

Enforcement:

The Act authorizes the Attorney General to initiate a criminal action against an employer who violates the Act and/or to seek injunctive or declaratory relief against such employer. As noted earlier, the Act incorporates, among other sections, Sections 2614 and 2615 of the Federal Family and Medical Leave Act. These sections specify the conduct prohibited by the Act. The Act is violated if the employer:

- Ⓒ fails to provide the leave properly requested by an eligible employee. 29 U.S.C. § 2615 (a)(1); or
- Ⓒ fails to restore the employee to the position held by the employee when the leave commenced, or fails to restore the employee to an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment. 29 U.S.C. § 2614(1); or
- Ⓒ discharges or in any manner discriminates against any individual for opposing any practice made unlawful by the Act. 29 U.S.C. § 2615 (a)(2); or
- Ⓒ in any other manner discriminates against any individual because the individual:
 - has filed any charge, or has instituted or caused to be instituted any proceeding, under or related to the Act; or
 - has given, or is about to give, any information in connection with any inquiry or proceeding relating to any right provided under the Act; or
 - has testified, or is about to testify, in any inquiry or proceeding relating to any right provided under the Act. 29 U.S.C § 2615(b).

In the absence of any relevant state case law interpreting the Act, the Attorney General intends to look for guidance to the federal interpretation of those provisions which are incorporated into the Act.

Any employer convicted of a criminal violation of the Act is subject to a fine of up to \$500. G.L. c. 149, § 180. In addition, any aggrieved employee may institute a civil action for injunctive relief and/or damages against his or her employer. Should the employee prevail, he or she will be entitled to treble damages, costs of the litigation and reasonable attorney's fees. G.L. c. 149, § 150.

Employers are encouraged to notify employees of their eligibility to request leave under this Act by way of posting or issuing a memoranda to all employees.

SAMPLE CERTIFICATION

Employee's Certification

I certify that on _____ I will/did take _____ hours of leave for the following purpose:

to participate in school activities directly related to the educational advancement of a son or daughter

to accompany the son or daughter of the employee to routine medical or dental appointments such as check-ups or vaccinations

to accompany an elderly relative to routine medical or dental appointments or appointments for other professional services related to the elder's care

Employee's Signature: _____ Date: _____