Nothing in the MMLA 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 maternity leave than required under the MMLA. If the employer does not intend for full MMLA rights to apply to the period beyond eight weeks, however, it must clearly so inform the employee in writing prior to the commencement of the leave. [5] Sex Discrimination Issues Arising Under M.G.L. c. 151B Pregnancy and childbirth are sex-linked characteristics, and any actions of an employer that adversely affect an employee because of her pregnancy, childbirth or the requirement of a maternity leave may also amount to sex discrimination under M.G.L. c. 151B. [6] Employers may not treat employees and applicants who are affected by pregnancy or related conditions less favorably than employees who are affected by other conditions but who are similarly able or unable to work. [7] Such disparate treatment may constitute sex discrimination.

An employer may not deny a woman the right to work or restrict her job functions, such as heavy lifting or travel, during or after pregnancy or childbirth when the employee is physically able to perform the necessary functions of her job. The mere fact of pregnancy does not automatically establish a disqualifying disability. An employer may not, therefore, use a woman's pregnancy, childbirth or potential or actual use of MMLA leave as a reason for an adverse job action, such as refusing to hire or promote a woman or for discharging her, laying her off, failing to reinstate her or restricting her duties.

An employer may not, moreover, force a pregnant woman to take leave prior to giving birth if she is willing to continue working, nor can an employer prevent her from returning to work after she recovers from any temporary disability associated with her pregnancy or a related condition. [8] Similarly, an employer may not treat an employee returning from maternity leave less favorably than it treats other employees seeking to return to work after comparable absences for non-pregnancy reasons. Normal pregnancy and related short-term medical conditions may, at some point, incapacitate a woman from performing her usual work for a short period of time. In some circumstances these short-term conditions may rise to the level of a disability under Chapter 151B. [9] Whether or not an employee's short-term condition rises to the level of a disability, an employer must treat such employee in the same manner as it treats employees who are temporarily incapacitated or disabled for other medical reasons. When an employee is unable to perform some or all of the functions of her job, such as heavy lifting, because of pregnancy or a related condition, an employer must offer her the opportunity to perform modified tasks, alternative assignments or a transfer to another available position if the employer offers such opportunities to employees who are temporarily disabled for other reasons. Failure to do so may constitute sex discrimination. It may also constitute sex discrimination for an employer to base employment decisions on a woman's reproductive capacity. For this reason, employers may not adopt policies that limit or preclude women from performing specific jobs or tasks, such as performing physical labor or working with hazardous substances. [10] Providing maternity leave to female employees and not to males may, in some circumstances, constitute sex discrimination under Chapter 151B, §4(1). See Part III, Eligibility for Leave Under the MMLA.

Pregnancy-Related Medical Conditions as a Disability

Chapter 151B's prohibitions against disability discrimination protect employees who have a pregnancy-related disability. Generally, a normal, uncomplicated pregnancy will not be

considered a disability even if the employee is unable to work for a period of time as a result of the pregnancy or childbirth. A female employee will be considered a "handicapped person", however, if she can show that she has a pregnancy-related physical or mental impairment that substantially limits a major life activity, or that she is regarded as having or has a history of such an impairment. [11]In such a case, the employee is entitled to the same protections under Chapter 151B as are other disabled employees.

Under the MMLA an employer must grant eight weeks of maternity leave to an eligible female employee regardless of whether the employee is incapacitated from working or is a "handicapped person" as defined by Chapter 151B, § 1 during such period. If the employee is disabled at the expiration of her maternity leave, however, the employer may have an obligation, pursuant to Chapter 151B, to provide a reasonable accommodation to her disability. In some circumstances additional leave may constitute such reasonable accommodation. [12]; An employer may not require a pregnant employee to take maternity leave based on the fact that the employee is pregnant, nor may an employer require an employee to remain out of work for a fixed period of time before or after the birth of her child. To the extent that an employee is unable to perform the essential functions of her position, however, the employer should treat the employee as it would treat any other disabled employee, being mindful of obligations of nondiscrimination and reasonable accommodation.

Interrelationship of the MMLA and the FMLA

As described above, the MMLA requires covered Massachusetts employers to provide no fewer than eight weeks of unpaid leave to eligible female employees for the purpose of giving birth or for adopting a child under the age of 18 (or under the age of 23 if the child is disabled). 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, Wage and Hour Division, that applies to employers with 50 or more employees. The FMLA requires covered employers to provide up to 12 weeks of unpaid leave during a 12-month period to an eligible female or male employee who needs leave: (1) for a serious health condition of the employee which renders him/her unable to perform the functions of his/her job; (2) to care for certain family members who have a serious health condition; or (3) to care for a newborn, adopted or foster child.

In certain instances, the MMLA and FMLA will overlap. Where leave is taken for a reason specified in both the FMLA and MMLA, the leave may be counted simultaneously against the employee's entitlement under both laws. [13] For example, a female employee who takes a leave for the purpose of caring for a newborn or adopted child may be covered both by the FMLA and MMLA. In such an instance, provided that all FMLA requirements are met, the employee's leave may count simultaneously against her 12-week entitlement under FMLA and her 8-week entitlement under the MMLA. In other instances, however, the MMLA may entitle an employee to leave in addition to 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. [14] Thus, for example, if an employee takes 12 weeks of FMLA leave for a purpose other than birth or adoption of a child, she will still have the right to take eight weeks of maternity leave under the MMLA.

Unlike the FMLA, the MMLA does not require an employer to specifically designate leave as MMLA leave. Thus, if an employee takes leave for an MMLA purpose, such as giving birth, that

leave will count towards that employee's MMLA 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. [15] Under the MMLA, an employee may take a maternity leave each time she gives birth or adopts a child. Thus, for example, if an employee gives birth in January and adopts a second child in March, she would be entitled to two separate eight-week maternity leaves under the MMLA for a total of 16 weeks. By contrast, under the FMLA, leave is limited to a maximum of 12 weeks in a 12-month period.

Inquiries regarding rights and obligations under the FMLA should be directed to the United States Department of Labor's Wage & Hour Division.

MMLA 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(1) AND C. 149, §105D EVERY FULL-TIME FEMALE EMPLOYEE IS ENTITLED AS A MATTER OF LAW TO AT LEAST EIGHT WEEKS MATERNITY LEAVE IF SHE COMPLIES WITH THE FOLLOWING CONDITIONS:

1. SHE HAS COMPLETED AN INITIAL PROBATIONARY PERIOD SET BY HER EMPLOYER WHICH DOES NOT EXCEED SIX MONTHS OR, IN THE EVENT THE EMPLOYER DOES NOT UTILIZE A PROBATIONARY PERIOD FOR THE POSITION IN QUESTION, HAS BEEN EMPLOYED FOR AT LEAST THREE CONSECUTIVE MONTHS; AND
2. SHE GIVES TWO WEEKS' NOTICE OF HER EXPECTED DEPARTURE DATE AND NOTICE THAT SHE INTENDS TO RETURN TO HER JOB. SHE IS ENTITLED TO RETURN TO THE SAME OR A SIMILAR POSITION WITHOUT LOSS OF EMPLOYMENT BENEFITS FOR WHICH SHE WAS ELIGIBLE ON THE DATE HER LEAVE COMMENCED, IF SHE TERMINATES HER MATERNITY 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 MATERNITY 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.

B. Notice by Employees

An employee seeking maternity leave must give two weeks notice of her anticipated date of departure and intent to return. "Anticipated" date of departure does not mean "exact" date. Thus, for example, an employee who gives birth prior to her anticipated departure date is entitled to start her maternity leave earlier. Likewise, an employee may desire to start her 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 the

uncertainty inherent in delivery and adoption dates and the needs of the employer to plan in advance for an employee's absence.

Enforcing Rights Under the MMLA

The MCAD enforces the MMLA. An employee, to initiate a formal action, must file a complaint with the MCAD. The complaint must be filed within 300 days of the alleged violation of the MMLA, subject only to very limited exceptions. A violation of the MMLA constitutes a violation of M.G.L. c. 151B, §4(11A). An aggrieved employee is therefore entitled to the same remedies under the MMLA as are available pursuant to M.G.L. c. 151B.

Hypothetical Questions and Answers Under the MMLA

Question 1: Employee develops a medical condition in the seventh month of her pregnancy. Her doctor hospitalizes her for three weeks until her condition stabilizes, and then she is able to return to work. Would her three-week leave come under the MMLA?

Answer 1: No. The three weeks would not count as MMLA leave because it is not "for the purpose of giving birth." Employee may be entitled, however, to this three weeks of leave under the employer's sick leave or disability policy, under the FMLA, or as reasonable accommodation if the condition constitutes a disability under Chapter 151B. Employee would still be entitled to eight weeks of maternity leave under the MMLA at the time her child is born.

Question 2 Employee schedules her maternity leave to begin before her expected due date. Does the period before the due date count as maternity leave under the MMLA?

Answer 2: Yes. Maternity leave may be taken "for the purpose of giving birth," which is defined as leave taken for the purpose of preparing for or participating in the birth or adoption of a child, and for caring for the newborn or newly adopted child.

Question 3: Employee has a knee operation in January. She takes 12 weeks of leave, which is designated by her employer as FMLA leave. Employee has a baby in June of that year, and requests an additional leave of absence as maternity 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 Employer done anything wrong?

Answer 3: Yes. Employee is entitled to an additional eight weeks of leave under the MMLA. The first 12 weeks did not count as MMLA leave, since it was not for the purpose of giving birth or adopting a child.

Question 4: Employee has a baby in January. She takes 12 weeks of leave, which is designated by Employer as FMLA leave. At the expiration of the 12 weeks, she asks for an additional 8 weeks of maternity leave in connection with the same child. Does Employer have to grant her request?

Answer 4: No. Employer has already complied with the MMLA's requirement that Employee receive up to 8 weeks of leave for the purpose of giving birth to a child. In this instance, the MMLA leave runs concurrently with the FMLA leave.

Question 5: Employee has a child in January, and takes eight weeks of leave. In June, she adopts a second child. Is she entitled to eight more weeks of leave?

Answer 5: Yes. The MMLA allows eight weeks of leave each time Employee gives birth or adopts a child.