



New York State Department of Labor
David A. Paterson, Governor
Colleen C. Gardner, Commissioner

July 1, 2010

VIA EMAIL: [REDACTED]

Re: Request for Opinion
Leave of Absence - Labor Law § 202-a
Bone Marrow Donation
RO-10-0079

Dear [REDACTED]:

I have been asked to respond to your letter of May 17, 2010 in which you ask five questions regarding the rights of and requirements for employees who donate bone marrow under New York State Labor Law §202-a. Specifically, you requested information on the frequency with which an employee may request a leave of absence to donate bone marrow, the requirements for notice and physician verification, and the penalties to employers for violating these requirements.

New York State Labor Law §202-a states, in full, as follows:

§ 202-a. Leave of absence for bone marrow donations

1. For the purposes of this section, the following terms shall have the following meanings:

(a) "Employee" means a person who performs services for hire for an employer, for an average of twenty or more hours per week, and includes all individuals employed at any site owned or operated by an employer but shall not include an independent contractor.

(b) "Employer" means a person or entity that employs twenty or more employees at at least one site and includes an individual, corporation, partnership, association, nonprofit organization, group of persons, county, town, city, school district, public authority or other governmental subdivision of any kind.

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2. An employer must grant leaves of absence to an employee who seeks to undergo a medical procedure to donate bone marrow. The combined length of the leaves shall be determined by the physician, but may not exceed twenty-four work hours, unless agreed to by the employer. The employer may require verification by a physician for the purpose and length of each leave requested by the employee to donate bone marrow.

3. An employer shall not retaliate against an employee for requesting or obtaining a leave of absence as provided by this section for the purpose of undergoing a medical procedure to donate bone marrow.

4. The provisions of this section shall not prevent an employer from providing leave for bone marrow donations in addition to leave allowed under any other provision of law. The provisions of this section shall not affect an employee's rights with respect to any other employee benefit otherwise provided by law.

Since the express language of the statute does not provide answers to the questions you have raised, it falls to the Commissioner to construe the meaning of the statute in accordance with her general authority to enforce provisions of the Labor Law. Labor Law § 21(1). In construing this statute, we are guided by the general proposition that Section 202-a constitutes remedial legislation and as such, it is "to be liberally construed so as to permit as many individuals as possible to take advantage of the benefits it offers." (*Settlement Home Care, Inc. v. Industrial Board of Appeals*, 151 A.D.2d 580, 581 (2nd Dept. 1989) (internal citation omitted)). The legislative history is also helpful to ascertain the intent of the legislature where the language of the statute is unclear. (McKinney's Statutes §92(b)).

In the case of Labor Law § 202-a, the legislative history of this provision makes it clear that the intent of the legislation was to encourage individuals to donate bone marrow by removing a potentially large impediment to their being able to do so, i.e. their fear about the effect that taking time off from work for this purpose would have on their job security. It was hoped that by providing protections against employer retaliation and by assuring time-off for the donating employee, the size and diversity of the donor registry would increase. This being said, however, you are correct in your assertion that the legislature did not specify that the time off from work had to be paid and, therefore, apparently intended that the leave could be either paid or unpaid at the employer's discretion. (1995 NY Assembly Bill 5506-A, 218th Sess., pg. 7-8). Therefore, while some employers may choose to provide paid leave for this purpose, it is not mandated that they do so under law.

Also, please note that the provisions regarding leave for bone marrow donation in Section 202-a are in addition to any other sick or annual leave otherwise allowed to the employee, including, but not limited to, up to twelve weeks of leave time per year as permitted under the Federal Family and Medical Leave Act (FMLA). (29 C.F.R. § 825.200; 29 USC. Ch. 28). Since the FMLA is a federal law over which this Department has no jurisdiction, it would be

inappropriate to render an opinion interpreting its requirements. Should you have any further questions with regard to that statute, I suggest you contact the United States Department of Labor for guidance in that regard.

In this general context, the answers to your questions are as follows:

1) *How often is an employee entitled to use this leave (i.e. 24 hours within a 12 month period or as often as they request the leave?)*

Labor Law §202-a(2) provides that an employer is required to provide at least 24 work-hours of leave to an employee for the purpose of bone marrow donation. Since employees do not typically work 24 hours in a row, it is reasonable to assume that these work hours may be spread across multiple shifts which the employee was regularly scheduled to work. Leave should be available in order to allow the employee to make the donation, recuperate from same, and respond to any complications that might arise. There may be some interruption in shifts covered between the making of the donation and associated recovery and the response to complications, which may not appear immediately thereafter.

The requirement to permit leave applies each time an employee requests leave for the purpose of donating bone marrow; there is no limit to the number of times an employee may be entitled to such leave, subject to the 24 hour threshold. (1995 NY Assembly Bill 5506-A, 218th Sess., pg. 5). However, as a practical matter, the employee's physician will likely determine how frequently the employee will be able to make donations and how long it will take the employee to recover from any donations made.

Therefore, while the employer is not required to provide a total of more than 24 work-hours of leave to the employee for each donation, such leave must be provided each time the employee requests leave for the purpose of donating bone marrow. Of course, nothing prohibits an employer from offering more generous leave to all employees or to specific employees who may be engaging in a bone marrow donation program for a family member or other individual.

2) *If an employer requests a physician's verification, what is considered physician verification? (i.e. the completion of a certification of healthcare provider similar to FMLA? A standard doctor's note? A form created by the employer requesting certain information? A phone call to the doctor's office?)*

Labor Law §202-a(2) provides, in relevant part, that the employer "may require verification by a physician for the purpose and length of each leave requested by the employee to donate bone marrow." While an employer is not required to obtain physician verification, employers are permitted to confirm with the employee's physician that the amount of time the employee is requesting for the leave is related to the bone marrow donation.

Therefore, any reasonable method used by the employer which requests confirmation from the employee's physician that the employee has donated bone marrow, the dates of the procedure, and any time needed for recovery and follow-up treatment would be permissible under Section 202-a. Such methods include those utilized under the FMLA or by an employer's

internal verification process so long as such confirmation does not operate as an unreasonable hardship upon the employee or violate any other rights the employee may have to the confidentiality of medical information or the physician-patient privilege.

3) *How many days in advance must an employee request the leave? (i.e. 7 days, 10 days, 14 days)*

While New York State Labor Law §202-a is silent on this matter, that Section should be liberally construed so as to effectuate its purposes. (See, McKinney's Statutes §§ 341; § 92(a); see also, *Settlement Home Care, Inc. v. Industrial Board of Appeals*, 151 A.D.2d 580, 581 (2nd Dept. 1989)). Accordingly, an employer cannot require any advance notification if to do so would frustrate an employee's ability to donate bone marrow in emergency situations or when it is needed. It is our understanding that bone marrow donation is most often a scheduled event but that individuals who are part of a marrow registry can be called to donate on short notice. Where an employee is making a *scheduled* bone marrow donation, they should notify their employers when such procedure is scheduled but, in no event, less than twenty-four hours prior to the day of donation. When the donation is *unscheduled*, the employee should notify the employer as soon as possible after receipt of the request to donate. It is important to note that employers may allow for use of leave to donate bone marrow without any prior notice if the employer so chooses.

4) *Are there employer notice requirements similar to the NY blood donation leave? (i.e. post signage? Written communication to all employees?)*

No such notice requirements currently exist. However, this Department encourages employers to provide such notice to employees since the purpose of the statute is to encourage employees to provide life preserving or life saving services. As such, should the employer wish to give notice to employees of their right to take leave to donate bone marrow there are free to do so in whatever manner they choose. These methods can include mentioning this leave in employee handbooks or employer leave policies, discussing the leave at staff meetings, mentioning bone marrow donation in employee newsletters or intranet postings, issuing HR notices regarding the leave, and other means that employers typically use to communicate with employees.

5) *What are the penalties for violation? 1st offence, 2nd offence, 3rd offence, fines, penalties?*

New York State Labor Law §202-a(3) prohibits an employer from penalizing an employee who requests or obtains a leave of absence for the purpose of making a bone marrow donation. Labor Law §213 provides that a violation of, or noncompliance with, "any provision of the labor law" could result in either a civil action and/or a misdemeanor. A first offence is punishable by "a fine of not more than one hundred dollars;" a second offence is punishable "by a fine of not less than one hundred nor more than five hundred dollars, or by imprisonment for not more than thirty days or by both such fine and imprisonment;" any subsequent offences are punishable by "a fine of not less than three hundred dollars, or by imprisonment for not more than sixty days, or by both such fine and imprisonment." Additionally, Labor Law § 215 states that a private employer cannot "discharge, penalize, or in any other manner

discriminate or retaliate against any employee” if the employee has “exercised rights protected under” the Labor Law; to do so could result in a civil action being brought against the employer by either the employee or by the Commissioner.

This opinion is based exclusively on the facts and circumstances described in your request and is given based on your representation, express or implied, that you have provided a full and fair description of all the facts and circumstances that would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your letter might require a conclusion different from the one expressed herein. This opinion cannot be used in connection with any pending private litigation concerning the issue addressed herein. If you have any further questions, please do not hesitate to contact me.

Very truly yours,
Maria L. Colavito, Counsel

By: 
Michael Paglialonga
Assistant Attorney I

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cc: Carmine Ruberto