

PATERNITY LEAVE POLICIES: PROCEED WITH CAUTION

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For new parents, time at home to bond with their newborn child during the first few months after birth or adoption is very important. This small window is also important for fathers, as they did not have a chance to bond with the child during pregnancy. So if this time is critically important, why are fathers – on average – taking much less time off from work to bond with their newborn children than are mothers?

As fathers are beginning to request time off from work to care for newborn children with increasing frequency, employers are naturally trying to keep their employees happy by providing paternity leave. Historically, fathers have been hesitant to take advantage of this benefit because of the stigma attached to individuals who do so. While the stigma certainly remains in some circles, fathers are becoming much more willing to avail themselves of paternity leave as it becomes more readily available. This paradigm shift is likely to continue for the foreseeable future and will have a significant impact on workforces across the country. What can you do to stay ahead of (or keep up with) the curve?

ARE EMPLOYERS REQUIRED TO PROVIDE PAID PATERNITY LEAVE?

First things first. While there is currently no federal law requiring employers to provide paid paternity leave,

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many businesses are “covered employers” for purposes of the Family Medical Leave Act (FMLA) and therefore must provide 12 weeks per year of unpaid leave for a host of reasons, including the birth and care of a newborn child.

The FMLA does not provide benefits to every employee, however. Where FMLA coverage does not exist, some local jurisdictions have stepped in to require additional benefits. For example, San Francisco became the first city in the country to pass legislation requiring many employers to provide workers with paid parental leave in 2016. Although it is the first city to do so, we can rest assured that other cities will follow suit.

“NO GOOD DEED GOES UNPUNISHED”

Even where the law does not require such leave, some employers provide additional employee benefits above and beyond what is mandated by federal law. This is certainly an acceptable practice, but doing so can cause more harm than good if not handled with care. From a practical perspective, providing additional benefits may aid in increasing employee morale and may help an employer attract top talent, but can lead to legal issues if not administered in a consistent and thoughtful manner.

IS IT DISCRIMINATORY TO CONSIDER BIRTH MOTHERS TO BE PRIMARY CAREGIVERS?

For example, in June 2017, the ACLU filed a complaint with the Equal Employment Opportunity Commission (EEOC) alleging an employer discriminated against fathers who requested parental leave. The employer has a policy of providing 16 weeks of parental leave to employees, but allegedly denied leave to a father because it determined he was not the “primary caregiver.” The ACLU alleges the company informed the employee of its presumption that a child’s primary caregiver is the birth mother, and that he would have to show that his wife was returning to work within 16

weeks of childbirth, or was medically incapable of taking care of the baby, in order to receive the benefit. According to the complaint, the employee was only allowed two weeks of leave as a “non-primary” caregiver.

The ACLU believes the employer’s practice violated Title VII of the Civil Rights Act, which bans gender discrimination in employment, among other things. Although the EEOC has provided some guidance on this topic, it is still very much an evolving area of the law, and employers would be wise to monitor developments to stay abreast of the latest news.

WHY ARE FATHERS NOT TAKING PATERNITY LEAVE?

For employers who do provide paternity leave, there might be some confusion as to why fathers are generally hesitant to avail themselves of the benefit. According to a recent Deloitte survey, one in three men say they will not take advantage of their employer’s paid parenting leave because they believe their jobs would be in jeopardy. In another recent study published by Bloomberg Law, new fathers identified the cultural stigma associated with taking paternity leave as the reason they avoid it.

In certain work environments, raises and opportunities for overtime, which lead to more income, are tied to how much time a person spends at work. Therefore, if a father is out of work for three months to care for a child, he could potentially lose opportunities to earn additional income. In some workplaces, men who avail themselves of paternity leave report feeling ostracized, which can have a chilling effect on those individuals who choose to pursue paternity leave.

There is also some evidence that the amount of time a father is allowed to be out of work on paternity leave is on average significantly less than mothers. According to a recent survey by the Society for Human Resource Management (SHRM), new mothers receive an average of 41 days (approximately eight weeks) off following

childbirth, compared to 22 days (approximately four weeks) for new fathers. For some, the fact that many policies provide more time for mothers than for fathers conveys a clear message that fathers should return to work as soon as possible.

WHAT'S THE FUTURE OF PARENTAL LEAVE?

The topic of paid parental leave, including for new mothers, fathers, and adoptive parents, has been a topic of discussion after the initial federal budget proposal was released by the Trump administration. The reality of such a paid leave proposal, however, both at the federal and state level, is uncertain. The fact that it is being discussed underscores the importance and growing resonance of this particular issue.

Even without government intervention, private businesses have adopted their own policies in order to offer a better work environment for their employees. Over the last decade or so, for example, some of the most well-known companies have expanded or implemented paternity leave policies. Netflix offers a full year of paid paternity leave, and other companies such as Etsy, Spotify, Twitter, and Facebook offer leave ranging from 17 to 26 weeks.

In 2011, Major League Baseball (MLB) implemented a paternity leave policy allowing players up to three days off to be present for the birth of a child. In the first six seasons since it was implemented, an average of 25 MLB players per year took advantage of the leave policy. In the first half of the MLB's 2017 season, 26 players have already taken leave, including All-Star pitchers Stephen Strasburg (Washington) and Zack Greinke (Arizona).

EMPLOYERS SHOULD DO THE FOLLOWING

In order to keep up with the law and with the latest trends in workplace benefit offerings, you should consider the following suggestions:

- Revisit existing parental leave policies to ensure legal compliance.
- When possible, draft parental leave policies providing caregiving leave equally for fathers and mothers.
- Consult human resources and legal counsel when making decisions regarding granting or denying leave requests.
- Cultivate a work environment where employees feel comfortable taking paternity leave.

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