Equal paid parental leave: The emerging trend that is not emerging quickly enough

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This goes without saying, but it is 2018. People did not have to be part of the workforce 50 years ago to recognize or appreciate how far society has advanced, and how much the law has developed when it comes to equal treatment of men and women in the workplace.

Despite the strides made, not all things employment-related between men and women are yet equal. One example that continues to come up with more frequency: paid parental leave following the birth or adoption of a child.

Which begs the question: Why, in an age when companies are more progressive than ever and employers are focused on keeping employees happy and healthy, do businesses continue to draft and implement paid parental leave policies offering women more time off than men following the birth or adoption of a child?

Male employees have been fighting (and winning) the paid parental leave battle in sex discrimination charges and lawsuits for more than a decade. The problem is not just a stagnant society playing catch-up with the law. Rather, the limited court analysis and legal guidance on this issue are not exactly clear, and some would go so far as to say they are downright confusing.

Amid the confusion, there are important considerations employers need to be aware of when deciding whether to offer paid parental leave to their employees.

THE LAW DOES NOT REQUIRE PAID PARENTAL LEAVE

Importantly, no state or federal law requires employers to provide paid parental leave to their employees.

The Family and Medical Leave Act of 1993, 29 U.S.C.A. § 2601, entitles eligible employees of covered employers to take unpaid leave of up to 12 workweeks in a 12-month period for the birth of a child and to care for the newborn child. Employers can choose to make this leave paid at their discretion.

Additionally, some states (including California, New York, New Jersey and Rhode Island) now offer paid family leave, but the time off is paid by states and not employers. And while more states (such as Washington in 2020) are likely to join the list, there is no national law requiring paid parental leave for new moms and dads.

In this respect, National Public Radio reports that the United States — home to nearly 4 million newborns in 2016 — is a global outlier in the paid parental leave realm.¹

Problems arise when employers offer more paid leave to women than they do to men.

Although the law does not require paid leave, it does require employers to treat all employees equally when it comes to employment privileges and benefits. The federal law, Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. § 2000(e), expressly states:

It shall be an unlawful employment practice for an employer (1) ... to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of the individual's ... sex.


But the analysis does not stop there. Both the courts and the Equal Employment Opportunity Commission have said that employers can offer female employees more paid parental leave than men, if they do so for the right reasons. This is where employers usually find themselves drafting lawsuit-prone paid leave policies.

THE REASON MATTERS

Offering female workers more paid leave is permitted only when the leave is needed to recover from the physical effects of childbirth.

On June 25, 2015, the EEOC issued enforcement guidance on pregnancy discrimination and related issues.² The guidance mandates that parental leave, provided for reasons other than recovery from the physical limitations imposed by pregnancy or childbirth, be offered equally to males and females.

The EEOC states:

Employers should carefully distinguish between leave related to any physical limitations imposed by pregnancy or childbirth ... and leave for purposes of bonding with a child and/or providing care for a child. Leave related to pregnancy, childbirth or related medical conditions can be limited to women affected by those conditions. However, parental leave must be provided to similarly situated men and women on the
same terms. If, for example, an employer extends leave to new mothers beyond the period of recuperation from childbirth (e.g., to provide the mothers time to bond with and/or care for the baby), it cannot lawfully fail to provide an equivalent amount of leave to new fathers for the same purpose.

The few courts that have addressed this topic have reached similar holdings.

For instance, in Johnson v. University of Iowa, 431 F.3d 325 (8th Cir. 2005), the 8th U.S. Circuit Court of Appeals declined to find discrimination where the University of Iowa’s parental leave policy allowed biological mothers to use accumulated sick leave upon arrival of a new child without extending the same benefit to biological fathers.

While the court’s finding had constitutional considerations not applicable to private employers, its rationale in finding the policy was not discriminatory may indicate how other courts would decide the issue.

The 8th Circuit said: “If the leave given to biological mothers is granted due to the physical trauma they sustain giving birth, then it is conferred for a valid reason wholly separate from gender. If the leave is instead designed to provide time to care for … a newborn, then there is no legitimate reason for biological fathers to be denied the same benefit.”

Some employers draft paid leave policies granting biological mothers more paid leave with the fair assumption that mothers need time to recover from the physical limitations of childbirth. But employers should be careful when they maintain this assumption while expanding their policies to include adoptive parents or parents using a surrogate. By doing so, the purported reason for giving new biological fathers less paid leave is no longer validly based on a mother’s medical needs that arise from physical childbirth.

This very issue came up when Josh Levs, a reporter for CNN, filed a charge of discrimination with the EEOC in 2013 against Time Warner, CNN’s parent company. Levs alleged sex discrimination related to Time Warner’s paid parental leave policy. Under the policy, birth mothers and adoptive parents were entitled to 10 weeks of paid leave while biological fathers received only two. Time Warner settled the charge with Levs in 2015.

Similarly, employers may attempt to make their policies sex and gender neutral by designating greater leave for the “primary caregiver.” But problems can arise when male employees challenge the employer’s assumption about who is the primary caregiver.

Last year, the American Civil Liberties Union filed a charge with the EEOC against J.P. Morgan for denying male employees the same amount of paid parental leave as female employees. Specifically, the company offered 16 weeks of paid parental leave, but gave one new father only two weeks of paid leave under the presumption that he was not the primary caregiver. The ACLU argued that J.P. Morgan’s parental leave policy discriminated against both mothers and fathers by reinforcing the stereotype that raising children and being the primary caregiver is the woman’s role. The charge is still pending.

Finally, paid leave policies that grant women more time off for bonding with a newborn will also not hold up under Title VII.

The EEOC issued a press release in July indicating that Estée Lauder has agreed to settle a class-action lawsuit by paying $1.1 million to 210 men who claimed sex discrimination under the company’s paid parental leave policy. The lawsuit alleged that the policy unlawfully granted women six weeks of paid leave for child bonding after medical leave for pregnancy while providing only two weeks of bonding time for new fathers.

OTHER CONSIDERATIONS

What does all of this mean for employers that offer paid childbirth-related leave only to new mothers?

Employers should consider these issues and evaluate whether their maternity leave policies comply with the law. Leave related to pregnancy, childbirth or related medical conditions can still be limited to female employees affected by those conditions.

But if an employer extends paid maternity leave to new mothers for reasons beyond recovery from childbirth (e.g., to provide mothers paid time off to bond with and care for the baby), it cannot lawfully fail to provide an equivalent amount of leave to new fathers for the same purpose.

Using the title “maternity leave” instead of “parental leave” does not automatically exempt employers from providing an equal amount of paid time off to new fathers.

CREATING AND IMPLEMENTING A COMPLIANT POLICY

Employers that offer paid parental leave, or are contemplating doing so, should consider giving all new parents (male and female, adoptive or by surrogate) the same amount of paid leave. Similarly, if employers offer partially paid leave, the paid amount (such as 50 percent of the employee’s normal salary) should be equal for men and women.

Employers should also take great care to ensure their policies are implemented as written, and if companies do intend to give only biological mothers paid leave for recovery after childbirth, the policy should expressly state the leave is for physical recovery from childbirth and no other reason.

Most importantly, employers should train their human resources staff to properly administer leave under the policy and avoid making stereotypical comments (such
as comments indicating that only women should take off to care for newborns). Employers should also remind HR representatives and managers that new fathers cannot be discouraged from taking leave to accommodate parental responsibilities, even if it is known that the new mother has also taken leave.

NOTES


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