

THE
NATIONAL LAW REVIEW

Parental Leave Benefits Are Under Scrutiny - Be Sure Yours Don't Discriminate!

Monday, September 17, 2018

As the pool of talented employees tightens, more and more employers are offering perks and benefits to lure the best and the brightest into their ranks. Offering generous benefits for working parents is one of the particularly hot trends at the moment, with paid time off chief among them. Companies offer a range of paid leave options to new parents, including pay for bonding time, medical appointments, adoption services, pay during Family and Medical Leave Act (FMLA) leave and for up to 40 weeks beyond FMLA leave, and much more.

While these perks are welcome among new parents and employers seeking to foster an inclusive and positive work environment, they can come at a cost if employers are not careful about how they implement their parental leave policies.

For example, in July 2018, the Equal Employment Opportunity Commission (EEOC) [settled](#) a massive class action lawsuit against a national employer for \$1.1 million over disparate parental leave practices. In its lawsuit, the EEOC alleged that the company's paid parental leave program automatically provided male employees who are new fathers less generous parental leave benefits than those it provided to female employees who are new mothers. Specifically, the company's policy, in addition to providing new biological mothers with paid leave time to recover from childbirth, provided new mothers an additional six weeks of paid leave for child bonding time. New fathers, on the other hand, were only eligible for two weeks of paid bonding leave. In addition, new mothers were provided with a flexible return to work benefit after paid bonding leave expired, while new fathers were expected to return to full time work immediately.

In its lawsuit, the EEOC argued that providing longer leave time for "primary caregivers" than for "secondary caregivers," and allowing different return-to-work policies, amounted to sex discrimination in violation of Title VII of the Civil Rights Act of 1964.

It is also important to remember that [some states](#) provide greater protections for new parents and may in fact mandate that employers provide certain minimum leave benefits. Accordingly, state law claims alleging sex, sexual orientation, and familial discrimination are conceivable for adoptive and same-sex parents who do not have a naturally born child.

There is, however, an important distinction between paid leave for recovering from childbirth, and paid leave for bonding or other non-medical reasons. The former (recovery from childbirth) is uniquely applicable to biological mothers, and thus paid leave benefits for childbirth recovery and medical-related issues can be provided to birth mothers alone. However, the latter (bonding time) should be applied on a gender-neutral basis.

In other words, companies with parental leave policies that provide paid child bonding leave should review their policies to determine whether they apply similarly or differently to men and women, and to natural parents, adoptive parents, and same-sex couples. If it is apparent that the bonding time policy applies differently to different categories of parents who fall within a protected status (either at the federal or the state level), then the policy may invite a claim of disparate treatment on the basis of sex, sexual orientation, familial relations, or some other protected category. Neutralizing the policy to apply equally to all types of new parents will limit



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liability exposure. Legal counsel should be consulted to ensure leave and other benefit policies are not inadvertently discriminatory.

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