

Parental Leave Policies: Getting Yours Just Right

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Background

It is unlawful for an employer to discriminate in any employment related action -- including the payment of wages, grant of benefits, or other terms, conditions and privileges of employment -- on the basis of any of the protected classes defined by federal, state and local laws. Those protected classes include race, color, religion, sex -- including sexual orientation, gender identity, and pregnancy, national origin, age, disability, genetic information as referenced in the Genetic Information Nondiscrimination Act, military service veteran status, marital status, or any other protected characteristic. These categories are defined by laws and regulations such as Title VII of the Civil Rights Act of 1964, the Equal Pay Act of 1963, the New Jersey Equal Pay Act, the Age Discrimination in Employment Act of 1967, the Pregnancy Discrimination Act of 1978, the Immigration Reform and Control Act of 1986, the Americans with Disabilities Act as Amended, Executive Order 11246 of 1965, the Family and Medical Leave Act of 1993, the Uniformed Services Employment and Reemployment Rights Act of 1994, and the New Jersey Law Against Discrimination. Paid time off provided by an employer's policy is a privilege of employment and a form of compensation.

Although many working parents in the U.S. do not have access to employer-paid parental leave, according to the Bureau of Labor Statistics, up to one-quarter of medium to large employers currently provide their employees access to some form of paid parental leave for the birth or adoption of a child. While such benefits go a long way in recruiting and retaining employees and promoting work-life balance, problems arise when parental leave policies are applied disparately between biological mothers, fathers, adoptive parents, same sex couples, and other non-parent employees. It is essential that employers review their policies to avoid unintentional and unlawful bias in their application.

Case Examples

In May, 2019, JP Morgan agreed to pay 5 million dollars to settle a class action lawsuit arising from allegedly discriminatory application of its parental leave policies. A discrimination claim originally was filed with the Equal Employment Opportunity Commission ("EEOC") by employee Derek Rotondo who claimed he was denied 16 weeks of paid parental leave offered to "primary caregivers" under JP Morgan's policies. The policies at issue provided biological mothers up to 16 weeks off as the infants' presumptive "primary caregivers" but permitted biological fathers only 2 weeks off as presumptive "non-primary caregivers." The class action was filed on behalf of Rotondo and other similarly situated male employees alleging gender discrimination in violation of Title VII of the Civil Rights Act of 1964, and 19 corresponding state laws. The settlement required JP Morgan to revise its policies to afford male employees equal bonding time, and compensate several thousand male employees to whom the bank had denied paid paternity leave between 2011 and 2017.

Similarly, in July 2018 the cosmetics giant Estée Lauder settled a class action lawsuit brought by the EEOC, in the U.S. District Court for the Eastern District of Pennsylvania, for Sex Discrimination based upon nearly identical parental leave policies. In 2013, Estée Lauder implemented a generous new parental leave program that provided new biological mothers paid time off for childbirth recovery, plus an additional six weeks for bonding, and temporary modified flex-schedules upon

their return to work to allow them to ease into their responsibilities as a new parent. To be sure, it was an admirable effort on the company's part to assist employees during their transition into parenthood. Like JP Morgan, however, Estée Lauder's employees who became new fathers only received two weeks paid time off for child bonding purposes, and no flex-schedule upon their return to work. The EEOC alleged that Estée Lauder's paid parental leave policy unlawfully discriminated against male employees on the basis of gender in violation of Title VII and the Equal Pay Act. Estée Lauder settled that matter by paying \$1.1 million to the class and revising its policies to allow all employees equal access to paid time off to bond and care for a child following a birth or adoption.

The foregoing cases are based upon employees obtaining gender-neutral access to paid time off for bonding with a child under the employers' policies. However, employers also may encounter gender discrimination claims based upon the medical recovery provisions of their paid time off parental leave policies. If an employer's policy provides paid time off for the mothers' medical recovery from childbirth and/or pregnancy complications, the employer also must provide an equal amount of paid time off to its employees for other, gender-neutral medical conditions. The main concept, here, is that the terms, benefits and other perquisites of employment must be applied equally without more or less favorable application to one group of employees over another based upon a protected class such as gender.

Takeaway

Sex-based pay discrimination includes benefits such as paid leave. It is, therefore, essential that parental leave policies be gender-neutral. When reviewing your current parental leave policies, or if you are considering implementing a new one, keep the following factors in mind:

1. Provide male and female employees the same amount of time to bond with their child, or better yet, adopt a non-gender-based parental leave policy applicable to all employees.
2. Ensure the policies clearly distinguish paid time off for the mothers' medical recuperation from pregnancy and/or child birth complications from time off for the purpose of child bonding.
3. Avoid using facially neutral terminology that implies gender-based stereotype biases such as "primary caregiver" and "secondary caregiver" designations.
4. If your maternity leave provides paid time off for the biological mother's medical recovery from pregnancy and/or child birth complications, ensure all employees also have access to an equal amount of paid time off for medical recovery from gender-neutral medical conditions.