



**Lowenstein Sandler's Employee Benefits & Executive Compensation Podcast:
Just Compensation**

**Episode 47:
Navigating the Nuances of Parental Leave**

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- Megan Monson:** Welcome to the Lowenstein Sandler Podcast Series. Before we begin, please take a moment to subscribe to our podcast series at lowenstein.com/podcasts or find us on Amazon Music, Apple Podcasts, Audible, iHeartRadio, Spotify, SoundCloud or YouTube. Now, let's take a listen.
- Welcome to the latest episode of Just Compensation. I'm your host, Megan Monson, partner in Lowenstein Sandler's, Executive Compensation Employment and Benefits Practice Group. I'm joined by two of my colleagues today who I'll turn it over to introduce themselves.
- Amy Schwind:** Thank you, Megan. My name is Amy Schwind. I'm counsel in the Executive Compensation Employment and Benefits Group. Glad to be here today.
- Lauren Hollender:** Hi there. I'm Lauren Hollender and I'm also in the Executive Compensation Employment and Benefits Group and I've been practicing law at Lowenstein for approximately 16 years.
- Megan Monson:** Thank you both so much for joining us today. Today's discussion will focus on parental leave for employees following the arrival of a new child, whether by birth, adoption, or foster care placement. We will discuss time off from work under the Federal Family and Medical Leave Act, as well as state law equivalent statutes and insurance compensation benefits such as short-term disability and paid family leave.
- We will also discuss the trend particularly for large companies to provide voluntary paid parental leave to employees in the form of salary continuation, the top-off available short-term disability, and paid family leave insurance benefits. The increasing number of states mandating parental leave with disparate eligibility requirements and varied benefits have made it increasingly difficult for multi-state employers to manage leave requests, pushing some employers to outsource all or some of their leave management responsibilities to third parties such as professional employer organizations commonly known as PEOs. Some companies draft comprehensive parental leave policies that provide a base level of time off

and compensation to eligible employees across all employee locations, even if the company is not legally required to do so by federal or state law.

In general, there's no one-size-fits-all approach for parental leave policy for multi-state employers. We will explore some potential options for structuring a policy in this podcast. We want to preface that this area of the law is complex and constantly evolving. Our hope today is to distill down concepts on which employers frequently have questions. As always, this is not intended to be an exhaustive discussion, and if you have questions related to particular circumstances in your workforce or regarding specific legal issues, we encourage you to consult with legal counsel. Amy, as a starting point, can you explain the basics of the Federal Family Medical Leave Act?

Amy Schwind:

The Federal Family and Medical Leave Act applies to employers with a minimum of 50 employees in the United States, but not all employees of a covered employer are eligible for FMLA leave. To qualify for FMLA, an employee must meet three requirements. They must have been employed by the company for at least 12 months, they must have worked at least 1,250 hours during the 12-month period immediately before the start of the leave, and they must be employed at a work site where 50 or more employees are employed by the company within 75 miles of that work site. It's important to note that the 75-mile radius requirement means that not all employees of a multi-state employer will be eligible for FMLA leave. Also, remote employees are considered employed by the work site to which the employee reports or from which their work is assigned, not their home residence. So that is really important to remember, especially if it's an employer with a one-off employee here or there that reports into a larger office, for example.

The FMLA provides family or medical leave to eligible employees for several reasons. For purposes of a parental leave discussion the two relevant bases for FMLA are because of incapacity due to pregnancy, prenatal medical care or childbirth, or to care for a child after birth or placement of a child with the employee for adoption or foster care within the 12-month period immediately following the new child's arrival. Under the FMLA, employees are eligible for up to 12 weeks of leave in a rolling 12-month period. Significantly, FMLA leave is unpaid. This doesn't necessarily mean though that the employee is entirely ineligible for any compensation. During an unpaid FMLA leave an employee may elect or they may be required to use available paid time off in lieu of unpaid leave, or the employee may be eligible for insurance benefits or salary continuation, which we will discuss later in this podcast.

There are specific rules when it comes to this, which is called the FMLA substitution rule, and actually the Department of Labor just issued an opinion letter related to this topic in January. When an employee requests leave that may qualify for FMLA leave, an employer is required to provide certain notice of rights and obligations and specifically designate authorized time off as time that will be counted against the employee's available FMLA

leave allowance. The required forms can be found on the US Department of Labor website. Failure to comply with these obligations may result in civil penalties or time off that is not counted against available FMLA leave. FMLA leave is job protected leave meaning subject to limited exceptions, employees who do not exceed their authorized parental leave time are entitled to be reinstated to their former position or an equivalent position when leave ends. Overall, the FMLA is a well-established law with a really comprehensive scheme of regulations. I haven't addressed every touch point of the law here, but this gives the bigger picture of what we're talking about.

Megan Monson: Thanks, Amy. That was really helpful. Lauren, do states have their own leave laws that are analogous to the FMLA?

Lauren Hollender: The answer is yes, many states do. Some states don't, but it's evolving and more states are coming on board with these types of laws. The important thing to know is that they are not identical to FMLA. The differences between these state laws and the federal FMLA include different eligibility criteria such as tenure or the minimum number of hours an employee must work in order to qualify for the state leave. There is different length of available leave. The FMLA provides 12 weeks of leave. Some of these state laws provide different entitlements based upon the specific reason for which leave is granted. Some might have fewer basis for leave. For example, New Jersey and New York have a family leave law as opposed to a family and medical leave law, meaning that in those states the state law doesn't provide for personal medical leave. And another difference might be the availability of monetary insurance benefits through a state-paid family leave program.

At present, there are 13 states plus the District of Columbia that have enacted legislation that either provides unpaid time off for parental leave or paid family leave insurance benefits. These states include California, Colorado, Connecticut, Delaware, Maine, Maryland, Massachusetts, Minnesota, New Jersey, New York, Oregon, Rhode Island, and Washington. And some of these programs have yet to take effect and there are still more programs waiting in the wings to be enacted.

Megan Monson: So, for states that have these type of parental leave laws, will time available under the federal and state laws run at the same time?

Lauren Hollender: Very good question. So, the answer is sometimes yes, sometimes no. So let me explain because this is where a lot of employers get confused. So, several times there are the time off under both the federal statute and the state statute will run concurrently, basically at the same time. And this happens when the reason for leave simultaneously qualifies as a reason for leave under both the federal FMLA and a state leave law. For example, if an employee, say a father, needs time off to care for a child or other family member, they may qualify for up to 12 weeks of leave under both the FMLA

and 12 weeks of leave under a state leave law such as the New York Paid Family Leave Law or New Jersey Family Leave Act. In that case, the employee is eligible for a total of 12 weeks of family leave and the leave taken by this employee counts against both that employee's FMLA leave entitlement and the state leave law entitlement.

So, this pregnancy disability leave under the FMLA is taken before a birthing parent then takes bonding leave. If the birthing parent lives in a state like New York or New Jersey where there is a state family leave statute that provides for bonding leave, then the birthing parent will still have the entire 12 weeks of bonding leave left available to them after completing disability leave. Again, as I mentioned, this is because under those state laws there is no personal medical leave, so the clock is not ticking on the available allowance under those state laws. So, for this pregnant woman, the total leave allowance in New York and New Jersey could be as many as 24 weeks depending on the length of disability leave.

Megan Monson: Yeah. I could certainly see how this can be complicated and difficult for employers to understand and really requires looking at things through a careful lens in terms of both the state and federal leave requirements as well as the reason for the leave. So, we suggested always good to consult legal counsel on any complex issues. So Amy, are the leaves that we've already talked about typically paid or unpaid?

Amy Schwind: FMLA leave and New Jersey Family Leave Act leave are unpaid leave. While New York paid family leave is called paid leave, it is in some ways a misnomer since the pay is not from the company but rather from a state insurance plan and the maximum benefit is not full compensation. It's actually 67% of the employee's average weekly wages up to a cap of \$1,177.32 in 2025 and that number changes every year. But even if the leave is, quote, an unpaid leave, the employee may be eligible for certain insurance benefits during leave but not paid directly from the company unless the company elects to provide voluntary salary continuation or the employee is allowed to use available paid time off in lieu of unpaid leave.

Megan Monson: What type of insurance benefits might be available to employees during parental leave?

Amy Schwind: So, the first category is short-term disability. During pregnancy disability, a birthing parent may be eligible for short-term disability benefits. Those benefits are a type of insurance that replaces a portion of the employee's income for a limited period of time when the employee is unable to work due to a temporary non-work-related injury or illness. These benefits are not required in all states and currently only five states require them, and those states include California, Hawaii, New Jersey, New York, and Rhode Island. Many employers do though still provide these benefits to employees anyway through a private insurance plan. The typical benefit amount is a percentage of salary ranging from 40% to 70% up to an insurance plan maximum. And

notably the New York State short-term disability benefit is extremely low. It's only \$170 a week. Benefits are generally available after a one-week waiting period and employees are typically required to use available paid time off during the waiting period.

The second category is paid family leave benefits, paid family leave benefits provide a portion of an employee's wages while they take time off of work for specific family-related reasons, including caring for a new child and that is known as parental bonding leave. These benefits are only available in approximately 13 states currently, and that includes, among others, California, New York, and New Jersey. Eligibility varies by state, but generally employees have to meet a required employment duration and there's an hours worked criteria. Benefits are self-funded by employees through payroll deductions each pay period. The maximum benefit varies by state, but again, it only represents partial income replacement up to a maximum benefit. Many states allow up to 12 weeks of benefits. They also allow employees to take these benefits on an intermittent rather than continuous basis, which can be administratively difficult for some employers to manage. Intermittent generally means taking a week here or there as opposed to all 12 weeks in a row. I also want to stress that these benefits are for bonding and they are not tied to gender or having given birth, so they are equally available to mothers and fathers. Often employers are surprised to learn this.

Megan Monson: What can companies do to supplement insurance benefits during parental leave if they want to and why would they do so?

Lauren Hollender: I'll take that. Many companies provide paid salary continuation benefits during parental leave for various business reasons, often because they want to be generous to their employees in order to be competitive in the market or just to help and attract from retain talent. So these, what we call salary continuation benefits, refer to a program where an employer continues to pay an employee their full salary during a period of parental leave, less that amount the employee is eligible to receive in either short-term disability benefits or paid family leave insurance benefits. The intention here is to provide the employee with full income replacement. Although in cases where these insurance benefits are available, income replacement comes from two sources, insurance for the underlying benefit and then the company's portion to top off that benefit. So, this obviously requires some coordination by the company to make sure that the employee is not receiving in a windfall and not receiving more than a hundred percent of their regular income.

So typically, the employers can calculate what the employee is anticipated to collect in these short-term disability and paid family leave benefits and then pays the delta. Basically, the differential between their regular wages and what expected insurance benefits the employees can receive. And the employees are left then to file for the insurance benefits. The company doesn't typically administer that, although some do. Important to recognize

that there's a difference between available time off and available salary continuation. Many times, some companies adopt salary continuation programs for the full length of time employees are eligible for parental leave. So, let's say the full 12 weeks of FMLA leave. However, other companies aren't that generous and they choose to provide a fixed number of weeks of benefits in which case employers should be careful to explain to their employees that there's a difference between the amount of available time off the employee has for parental leave and the available compensation from the company.

So basically, you need to explain to the employee, while you may take up to 12 weeks of time off, not all 12 weeks will be paid by the company, rather you will get your underlying either short-term disability benefit or paid family leave benefit for the entire duration and then maybe six weeks will be topped off by the company. So, these plans can be designed in many ways and when implementing a salary continuation program, there are many things to consider and many options as to how to structure it.

So, what are the criteria the employer has to consider? Since this is a voluntary, are we going to make this program available to only full-time employees or are we also going to include some part-time employees who work a minimum number of hours, let's say 30 numbers of hours per week? Is there going to be a tenure requirement? When we craft these programs, we see most employers are imposing a minimum either six month or one year duration tenure requirement before an employee would be eligible for these benefits from the company.

Then there's usage criteria. And as Amy had mentioned before, some of these laws allow employees to take leave on an intermittent basis, which can be very difficult for a company to administer, especially when an employee takes one week here or one week there, one day here, one day there. So, in order to incentivize employees to perhaps take parental leave in larger blocks of time or on a wholly continuous basis, sometimes employers will devise these salaries, continuation benefits, making them only available when employees take parental leave in certain minimal intervals of time. This basically says to the employee, we have this benefit available for you, but if you don't take leave on the schedule we like, then these benefits will not be available for you. So that's some of the criteria the employer has to consider when devising this.

The other is to determine the number of available weeks the employer wants to offer. This is where the options for how to draft a salary continuation program multiply. So, one option for the employer is to create one allowance, let's say 12 weeks of paid time off to eligible employees. And typically, this program is drafted to top off either short-term disability or paid family leave benefits so that birthing mothers can begin receiving salary continuation during pregnancy disability leave, whereas non-birthing parents begin receiving benefits during parental bonding leave. This is the type of policy that does not differentiate between mothers and fathers, birthing and non-birthing, or adoptive parents, or primary or secondary

caregivers. There's just a flat allowance. The company's going to top off 12 weeks or some fixed number of weeks for all employees.

Another way, sometimes companies want to be able to provide the birthing mother with additional time off to account for her disability. And so sometimes employers will create separate disability salary continuation benefits as opposed to parental bonding leave salary continuations. So, a company cannot do anything that discriminates between female and male parents on the basis of gender. Therefore, it wouldn't be acceptable to create different benefits based upon status as either a mother or a father. Rather, we would create different benefits based upon if you were disabled, you receive a benefit and if you're having parental bonding leave, you would receive a benefit.

Amy Schwind:

And I just want to jump in here to underscore, so Lauren, you're alluding to terms that are frequently used maternity leave and paternity leave. And I know I frequently see employers still using those terms and I'm sure, Megan, that you see it frequently in diligence and I know, Lauren, you come across it all the time as well. So, I just want to emphasize that these are terms that are inherently discriminatory and they are not terms that should be used by employers.

Lauren Hollender:

Thank you. Yes. Very important. Gone are the days of the old maternity leave policy that grants greater benefits than the paternity policy. All right. So, I just want to review how an employer can create a separate type of salary continuation program that contains two components: a disability salary continuation benefit and a parental bonding leave benefit. Under this program, a birthing mother would be eligible for two types of salary continuation benefits like she's eligible for two different types of insurance benefits. She's short-term disability and paid family leave. An employer can provide two different benefit allowances and the employer can then cap the total number of weeks of any combination of available salary continuation benefits in a rolling, let's say 12 or 24 month, period. So let me give you an example. The company would provide an eight-week disability salary continuation benefit only available to the birthing mother during pregnancy disability leave, and an eight-week parental bonding leave salary continuation benefit, which would then be available to both birthing and non-birthing parents when they take parental bonding leave.

But a couple of caveats here because I'm sure some people are hearing this and feeling like I'm favoring mothers over fathers. And if an employer does adopt this type of program, I recommend that the disability salary continuation benefit be extended not only to pregnant employees, but to all eligible employees who suffer a disability. This stems from the concern that limiting the benefit to only pregnancy disability is arguably discriminatory on the basis of a gender since it is exclusively available to females. Of course, once you create a disability salary continuation benefit to all disabled employees, the cost of that benefit is going to become significantly higher. So, this is a consideration if you go down this path.

An alternative way for an employer to provide salary continuation disability benefits to employees, including pregnant birth mothers, is to offer supplemental disability insurance. So instead of devising the plan I've just mentioned, some will go on the open market to secure these benefits at the employee's election or the company can pay for it. So that's another way of financing that element of leave for the pregnant woman.

Then if an employer adopts a salary continuation benefit, the other caveat is that it should include criteria that the eligible employee must first qualify for underlying short-term disability benefits either through a state plan or a private insurer to qualify for the company benefit. Why do I say this? This way, the company's not weighing in on whether or not someone is disabled, which can be a very complicated task. Rather, the company is devising a benefit that first relies upon some insurance agency or some insurance plan administrator to make the determination as to whether the person is disabled. And in that case, when they succeed with that claim, the employer then tops off that amount. The benefit of this is that if the disability claim is denied, the employee's recourse is to appeal the denial through channels outside the company and go straight to the insurer rather than get the company involved.

And yet another caveat when providing disability salary continuation benefits. The number of weeks of available benefits is confined to the number of weeks or days the employee's doctor says the employee is actually disabled. So, I mentioned previously that birthing parents are typically disabled for only six to eight weeks post-birth if they don't suffer complications. An employer cannot promise an employee disability salary continuation benefits that extend beyond the length of time the is actually disabled. So, you can't say to a birthing mother, "You have 12 weeks of FMLA medical leave. We're going to guarantee you 12 weeks of disability salary continuation benefits." Rather, you need a doctor's note to certify she's actually disabled. And there is a court case currently pending against the law firm of Jones Day in which a plaintiff, a father claims that affirms parental leave policy that did just that, guaranteed people at a certain number of weeks during disability leave without requiring a medical certification, was discriminatory on the basis of sex because it wasn't tailored to the actual period of disability and denied the father's the equivalent time off. So that claim is out there and that's being litigated right now.

Another caveat—I know there are many—when providing a disability salary continuation benefit is to consider whether you're going to make it available only in the case of total disability for basically catastrophic disability or whether you're going to allow an intermittent partial disability to qualify an employee for benefits. Obviously, if you allow some intermittent disability payments, the leave could extend for many weeks and a lot of employers aren't willing to do that. So, I'm going to move now on since we've already discussed the fact that maternity and paternity policies have gone by the wayside.

Now, I wanted to discuss primary and secondary care government policies. Yes, some employers offer different salary continuation benefits based upon an employee status as either a primary or secondary caregiver, but this policy has definitely fallen out of favor. First, because it is often administered or interpreted in a discriminatory manner with the assumption that mothers are always primary caregivers and fathers are always secondary caregivers. And second, because there's difficulty in defining exactly who is a primary caregiver. According to a recent survey, more than half of employers who offer paid bonding leave have moved away from primary, secondary caregiver policies. But nevertheless, I know many employers still want to draft these and they can implement them if carefully crafted and if they administer them in a non-discriminatory way.

So, when you're doing so, be mindful of the following. First, develop a clear definition of primary caregiver. Defining, quote, primary caregiver, close quote, is nothing more than a primary caregiver within a policy is not very useful. Rather, we suggest that you be more expansive and define it as the person who meets the child's physical needs more than anyone else. And this becomes much more expansive. Primary caregivers perform a variety of tasks including feeding, bathing, changing, and monitoring the health and well-being of a child. Only one parent or guardian can be the primary giver at a given time, but both parents or guardians can serve as the primary caregiver at different times.

An employee is a primary caregiver if their child is being cared for at home and if they are one, the person who provides primary care for the child immediately following the child's birth, adoption, or foster placement; two, if the employee assumes the role of primary caregiver after their spouse or partner has been the primary caregiver and returned to work; or three, the employee is the spouse or partner of a mother who has a complicated postnatal pregnancy and is unable to care for the child. The definition needs to be carefully crafted so that both males and females, birthing parents and non-birthing parents, can avail themselves of primary caregiver status. This will avoid claims of discrimination. And when you administer these plans, it's very important to accept an employee's self-designation and we frequently devise certification forms so that an employee will certify themselves as either the primary or secondary caregiver.

Megan Monson:

Thank you so much, Amy and Lauren, for sharing a lot of great information with us about the various types of leave that can be offered, both at a state and federal level as well as ways that employers can offer their employees other potential leave benefits for various leaves of absences. We hope that you found today's discussion useful. Thanks for joining us today. We look forward to having you back for our next episode of Just Compensation.

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