

Wells Fargo Prime Services

Industry and Regulatory Updates

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Navigating Parental Leave

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Your employee has shared her good news - she is having a baby! She immediately wants to know how much time off she is allowed and how much of that time will be paid. At a minimum, your company must have a parental leave policy that complies with applicable law. A more generous leave policy will help your company attract and retain talent. Creating a parental leave policy that is right for your business is a complicated, yet important task.

What is Parental Leave?

Parental leave has two parts: (i) pregnancy-related medical leave; and (ii) parental bonding leave. The first type is limited to women who give birth, while parental bonding leave must be offered to both men and women equally. Failing to provide sufficient leave time, or offering leave in a discriminatory manner, can result in a disgruntled employee filing a lawsuit.

What Laws Require Parental Leave?

Companies who employ 50 or more employees within a 75-mile radius must comply with the federal Family Medical Leave Act ("FMLA"). To be eligible for FMLA leave, an employee must have worked for his or her employer for at least a year and a minimum of 1,250 hours. Under the FMLA, employees may take up to 12 weeks of unpaid leave for pregnancy-related incapacity or to care and bond with a new child. While up to 12 weeks of leave is allowed, pregnancy-related disability in the case of a healthy birth typically lasts only 6 to 8 weeks.

Employers also must comply with state laws which may offer benefits in addition to, or in the absence of, the FMLA. For example, New Jersey and New York both have state family leave laws. The New Jersey Family Leave Act ("NJFLA") and New York Paid Family Leave Act ("NYPFLA") provide 12 weeks and 10 weeks respectively of bonding leave, but neither provides pregnancy disability leave. For FMLA covered employers, the leave time a woman takes for her own condition will count under the FMLA only. Once FMLA leave is exhausted, she may then take time to bond with her baby under state law. This creates the possibility of up to 24 weeks of available parental leave time for female employees in New Jersey and up to 22 weeks of available parental leave time for female employees in New York. By contrast, a father's parental bonding leave runs concurrently under the FMLA and the New Jersey and New York statutes. It is capped at 12 weeks.

Smaller employers are not off the hook. The NJFLA (as of June 30, 2019) applies to companies with 30 or more employees, and the NYPFLA applies to private employers who have just one employee! Therefore, small employers in both states who are not bound by the FMLA must still provide state mandated leave.

Even when not required by those laws, employers may be required to provide leave as a reasonable accommodation under the Americans with Disabilities Act (ADA). Granting leave may still be advisable even if the ADA does not apply. Firing an employee right after she gives birth or applies for state-mandated benefits is almost never a good idea! Employers who deny leave altogether risk claims of pregnancy discrimination and/or retaliation under the anti-retaliation provisions of many state benefits laws.

Available Sources of Compensation During Parental Leave.

Parental leave under the FMLA and many state laws is unpaid. While employees are usually eligible for state mandated temporary disability benefits and in some states, paid family leave insurance benefits, there usually remains a gap in pay. To fill that gap, companies often develop salary continuation policies in which the company agrees to "top off" or pay the difference between the employee's salary and available insurance benefits. Salary continuation benefits are best defined as the difference between the employee's weekly salary and the amount of benefits the employee is *eligible to receive* from other sources. The goal is to incentivize employees to apply for available benefits.

Salary continuation benefits should be defined separately for pregnancy-disability leave and parental bonding leave, although an employer may choose to cap the total amount it offers. For example, an employer can provide 8 weeks of salary continuation benefits for pregnancy-disability and 8 weeks for parental bonding, but limit the total combined number of salary continuation weeks to 12.

Companies must ensure their bonding leave benefits are gender neutral. Gone are the days when employers can offer bonding leave to mothers but not fathers. Some employers grant more weeks of bonding leave to primary versus secondary caregivers, but companies must be careful not to discriminate or make assumptions about caregiving based upon gender stereotypes.

The circumstances under which employers can require employees to use available sick or vacation time ("PTO") while on leave is becoming more limited. Employers can usually do so only during entirely unpaid portions of leaves. States that offer short-term disability benefits or paid family leave generally prohibit employers from

requiring employees to exhaust PTO prior to or while receiving benefits. This means an employee may still have an available bank of PTO upon return from leave.

Conclusion

Navigating the complex maze of laws that require parental leave and determining what benefits your company wishes to offer requires careful legal analysis and many choices. Companies should be proactive and craft a policy that is right for their business and complies with the law.

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