

Employment Law Corner

Monthly Report



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June Updates

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Employment Law Corner: Maternity and Parental Leave

A Tale of Two Leaves:

Maternity and Paternal leave are great recruitment tools and help to support parents in the workplace. Historically, states and individual companies have created additional protections for birthing mothers under their own Maternity Leave law or policy. In recent years, to be more inclusive and understanding that women aren't the only care takers of children, Maternity Leaves have been replaced with the expanded Parental Leave, which provides both parents leave for birth and bonding with a child.

When creating your own policy there are some important factors to keep in mind. Let's dive in:

Federal Law:

Under Federal law, there is only one main protection for parents seeking leave for a recent birth, and that is the good old FMLA. FMLA allows both parents to take up to 12 weeks of unpaid leave for birth or bonding with a child. This also includes foster care placement and adoption. This leave applies to both parents and can be taken within a year of the child being born.

This is the only leave under the FMLA that is not intermittent. However, an employer and employee can mutually agree to allow intermittent leave. Just remember what you do for one, you must do for all.

There is a nuance for couples who work for the same employer, they can only take 12 weeks combined FMLA and not 12 weeks each. Keep an eye out for issues surrounding the new Federal legislation on the Pregnant Workers Fairness Act and the PUMP Act, this will affect the birthing parent when they return to the workplace.

State Specific Considerations:

As much as we would love to delve into the state specific jurisprudence of leave laws available in each state, we do only have two pages to work with. With that said, in the event your state has its own specific Paid Family and Medical Leave, it likely will have a provision for birth and bonding leave as well and generally would apply to both parents. Here are the states to pay

attention to: California, Colorado (beginning in 2024), Connecticut, Delaware, DC, Maryland, Massachusetts, New York, Oregon (September 2023), Rhode Island, and Washington.

Some of these states do also have their own parental leave (like Massachusetts and California) but in many cases it usually runs concurrently with FMLA and the state paid leave.

EEOC Considerations:

A frequent error that trips up many well-intentioned companies is not providing the same amount of birth and bonding leave for both mothers and fathers or the birthing parent and the non-birthing parent. Let's provide a brief history of *Johnson v. Univ. of Iowa*, 431 F.3d 325, 328 (8th Cir. 2005).

In this case, Johnson and his wife Jennie were expecting their first child. Johnson (the father) was told that he would not be permitted to use his sick leave for absences related to the birth of their daughter, unlike his wife Jennie, who could. Johnson filed a complaint with the Iowa Civil Rights Commission for gender discrimination and made its way to the 8th Circuit Appeals Court. The premise of his claim was that he was being discriminated against for being male when he too was a parent of the child and would be caring for the child as well. The court held the policy was discriminatory – the key reason being the Employer did not distinguish that its maternity leave was based on disability related to childbirth. Instead, the leave was for birth and bonding leave, which the Court held should be applied to both parents equally, regardless of gender. Therefore, Johnson was entitled to the same amount of leave.

The takeaway here is if you do want to offer more leave for the mother (or birthing parent) under your maternity leave policy, then you need to make your maternity leave based on the "medical recovery related to childbirth." That distinction allows you to treat the two differently. However, if the policy is simply birth and bonding leave, then both parents are entitled to equal amounts and benefits.

Company Specific Maternity and Paternal Leave:

So, what does that mean for your company? In most cases, having a good maternity leave is a great recruitment tool and important in supporting women in the workplace. If you do decide to provide maternity leave, then be sure to have it specifically connected to the medical related issues due to childbirth and require the employee to provide proof of disability (which can simply be a doctor's note). If you decide to provide Paternal Leave, be sure to give both parents equal amount of time for birth and bonding leave.

Want to create a Maternity or Paternal Leave Policy? Need someone to review your policy? **We can help!**

Contact Us



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