Employment Law Corner

Monthly Report

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November Updates

"So, When Are You Thinking of Retiring?" The Question That Can Cost You

Early Voting Means Early Obligations: Is Your Voting Leave Policy Ready?

Eleven Weeks to a Handbook That Protects You in 2027

Internal Investigations: 3 Common Mistakes and 3 Quick Reminders

Baby on Board: Maternity Leave, Paternity Leave, and the Pregnant Workers Fairness Act

Few life events raise as many workplace questions as a growing family. An employee announces a pregnancy, and suddenly HR is juggling the Pregnant Workers Fairness Act (PWFA), the FMLA, state paid leave programs, lactation rules, and the company's own parental leave policy. Each with its own triggers, timelines, and traps. Add a new father asking why he gets less time off than his female coworkers, and a routine leave request can quickly turn into a discrimination claim.

With the EEOC expected to propose changes to its PWFA regulations this month, now is the right time to make sure your approach holds up.

Here's what you need to know:

The PWFA: Accommodation Starts on Day One

In effect since June 2023, the PWFA requires employers with 15 or more employees to provide reasonable accommodations for a qualified employee's known limitations related to pregnancy, childbirth, or related medical conditions, unless the accommodation would cause an undue hardship. It borrows the ADA's framework, but it is not the ADA:

- **No disability required.** The limitation can be minor or temporary, such as nausea, back pain, a lifting restriction, or the need to attend prenatal appointments.
- **No waiting period.** Unlike the FMLA, there is no length-of-service requirement. A pregnant employee hired last week is covered.
- **Temporarily unable to perform an essential function? Still qualified.** An employee remains "qualified" if the inability is temporary, they could perform the function in the near future, and the function can be reasonably accommodated.
- **Leave is not the default.** You cannot require an employee to take leave if another reasonable accommodation would allow them to keep working.

- **Documentation is limited.** You may request supporting documentation only when it is reasonable under the circumstances. Extra restroom breaks, keeping water nearby, breaks to eat and drink, and sitting or standing as needed will almost always be reasonable for a pregnant employee, and medical documentation generally should not be required for them.

Maternity Leave vs. Parental Leave: Know the Difference

One of the most common policy mistakes we see is lumping everything into "maternity leave." Legally, there are two different types of leave:

1. **Pregnancy and childbirth recovery leave.** Medical leave tied to the birth parent's physical recovery, typically six to eight weeks after delivery. Because it is based on a medical condition, it can be limited to the employee who gave birth.
2. **Bonding or parental leave.** Leave to care for and bond with a new child, whether by birth, adoption, or foster placement. It must be offered on the same terms regardless of sex.

Paternity Leave: Where Well-Meaning Policies Go Wrong

Even generous parental leave policies can create liability. In the EEOC's first lawsuit challenging a parental leave policy, the agency alleged that Estée Lauder's "primary caregiver" structure gave new fathers only two weeks of paid bonding leave compared to six weeks for new mothers. The case settled in 2018 for $1.1 million. A year later, JPMorgan Chase paid $5 million to settle a class action brought by fathers who alleged its policy presumed mothers were primary caregivers eligible for 16 weeks of paid leave, while fathers received two weeks unless they could show otherwise.

Watch for:

- Policies labeled "maternity" and "paternity" leave that provide different amounts of bonding time.
- "Primary caregiver" designations that presume mothers qualify and require fathers to prove it.
- Manager comments questioning why a father needs time off, or suggesting leave will hurt his career.
- Policy language that leaves out adoptive, foster, or same-sex parents.
- Discouraging or penalizing fathers who use FMLA leave. Interference and retaliation protections apply equally to all parents.

Do You Have Questions?

We can help! Our **Employment Counsel On-Call Triage Service** is a perfect resource for employers of all sizes looking to receive guidance on employment law and HR-related questions. We work with clients day in, day out to help them navigate complex legal issues and implement best practices. We receive unique questions every day through the **On-Call Service** and are ready to tackle any issue where you need help!

Who We Are:

• We represent employers exclusively from coast to coast in all facets of employment law and litigation. Our mission is solving problems and anticipating issues so you can concentrate on your business.

• We are constantly searching for the trends and upcoming issues in the law that will impact our clients. We want our clients to be informed and ready. Our familiarity with the workplace and our approach sets us apart from other law firms, making us well equipped to handle your unique needs.

• We are not like other firms: Anyone can tell you what the law states and its limits. That is easy. We find creative solutions within those restrictions that move your business forward. We seek to minimize your risk so you can get back to business. Learn how we can help your business: **Foley & Foley PC attorneys specialize in Employment and Labor Law in the Public and Private Sectors (foleylawpractice.com).**

Meet Wendy Hansen

Wendy brings a broad range of employment law skills to our team. She is the Practice Leader of the Employment Counsel On-Call Triage Service which services thousands of clients across the country. She has experience in handling a variety of questions and claims in employment law, including: FMLA, ADA, FLSA, criminal background checks, medical marijuana, wrongful termination, and harassment.



Wendy is the firm's Organizational Restructure and Reduction in Force Practice Leader and the FMLA and State-Specific Leave Law subject matter expert. She is also the lead for the firm's Education and Training Practice and has hosted and conducted hundreds of webinars for clients, covering topics and trainings for HR personnel, supervisors and mid-level managers; and standard employees.

For more info, check out her bio **here**!

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