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## 4 Tips For Crafting An Airtight Parental Leave Policy

By **Amanda Ottaway**

Law360 (November 20, 2020, 6:25 PM EST) -- Balancing federal, state and local leave requirements can be daunting for even the most sophisticated employers. And with a pandemic lingering and a new presidential administration looming, that's as true now as ever.

President-elect Joe Biden has expressed support for mandating paid family leave at the federal level, individual states have been implementing **their own paid leave requirements** and proactive employers have **sweetened their policies** in an effort to attract the best talent.

"It makes your head spin," said Ogletree's Kelly Hughes of the slew of leave laws and options available in various states.

Here, experts identify four tips for parental leave policies that satisfy the law and do right by workers.

### **Make Sure Your Approach Is Gender-Neutral**

Both Hughes and attorney Debra Friedman of Cozen O'Connor emphasized the importance of a gender-neutral parental bonding policy as a top priority.

"The number one mistake I see when I review handbooks is calling them maternity leave policies, and only offering the benefit to women," Friedman said.

There's a distinction between leave to recover from childbirth and leave to bond with a new child, said Hughes, though she added that employers often choose to have paid leave policies run concurrently with and supplement short-term disability for birth parents.

But the leave for bonding with a new child, the attorneys cautioned, must be offered equally to all employees regardless of gender. The differentiation between the two kinds of leave, Hughes said, is "critical."

Friedman said it's a common mistake to offer mothers a better benefit than fathers in what an employer might believe is a "pro-woman, progressive" option.

"Some employers are quite surprised to hear that although their intentions are to recognize the role that many women play in the family, it isn't necessarily progressive because it's loaded with assumptions that may or may not be true in all cases," said Friedman.

U.S. Supreme Court precedent on Title VII of the Civil Rights Act of 1964 holds that it's illegal to treat men and women differently based on gender stereotypes. In the past five years or so, the attorneys said, discrimination lawsuits by fathers over leave policies have picked up steam.

In one example of such a suit, JPMorgan in 2019 agreed **to shell out \$5 million** to settle a suit alleging the company gave short shrift to men by providing women more parental leave. Estee Lauder struck a **\$1.1 million deal** in 2018 to end a U.S. Equal Employment Opportunity Commission suit saying the company's leave policy was stacked against fathers.

### **Don't Rely On A One-Size-Fits-All Solution**

In the absence of a federal law mandating paid parental leave, states have been left to their own

devices, said Hughes, of Ogletree Deakins Nash Smoak & Stewart PC.

"In one respect it would be helpful if we could get all states on board, and we have something that's uniform, that would be amazing," she said. "I don't think that's going to happen, but that would be great, for employers in particular."

Kathryn Barcroft of Solomon Law Firm emphasized that employers should keep their handbooks updated as state and local laws change and should have employees acknowledge that they've read it.

In a case where a federal law, such as the Family and Medical Leave Act — which offers 12 weeks of unpaid but job-protected leave — provides the baseline and a state or other jurisdiction wants to offer something more generous, the more generous law controls, Hughes said.

A policy must be clearly written so that employees can understand it, Hughes said, and it must explain how the various types of leave overlap and work in tandem with each other — which she said can be challenging, even for employment lawyers.

Andrew Melzer of employee-side firm Sanford Heisler Sharp LLP suggested including a provision that assures employees there will be a concrete, collaborative plan for delegating their work and helping them transition both in and out of the leave.

Employers could also consider "annualizing" the employee's metrics, or extrapolating from their performance outside the leave period to make an educated guess about what their productivity would have been during the leave period, Melzer said, so that they're not penalized for missing that time.

Friedman pointed out that a poorly written policy could lead employees to believe they can "stack" their leave — for example, using up the company's parental leave first, then following it with an additional 12 weeks of FMLA leave to extend their time off — because the company wasn't clear that the various types of leave had to be used at the same time, or concurrently.

Hughes said employers should make sure their human resources departments are trained on the relevant laws and policies and can help workers with questions.

### **Make Clear That You Won't Retaliate**

Friedman strongly recommended that bosses include a no-retaliation provision in their parental leave policies, telling their employees that they won't be punished for using the leave and that, in fact, they want workers to take advantage of it.

The FMLA's job-protected leave means they can expect to return to the same or an "equivalent" job, according to the U.S. Department of Labor.

If an employer offers more than that — for example, six months of leave — but does not specify what will happen to the position, a "reasonable expectation" from the worker would be that her employer has agreed to hold her job for her, Friedman said.

"If that's not the employer's intention, if they want more flexibility with a lengthy leave, as business conditions can change over time, then they really should spell that out in their policy so that employees know beforehand that if they use the leave beyond a certain period they're not necessarily guaranteed their job on their return," she said.

Melzer made a similar point.

"The policy does create an expectation, that's the purpose of it — that people are going to get this," he said, of job protection. "And it's encouraging them to do it, and that creates an expectation that their job will be protected. So there could be a contract claim or other conceivable common law claims that might come into play, even if there's not necessarily a statutory claim."

Hughes said that if a company does decide to lay off a worker who is on leave or has recently used it, it should "do a double-check" to make sure it needs to eliminate their role, and that the layoff is not in any way "related to the fact the person took advantage of the policies."

## **Look At Your Policy As A Recruiting Tool**

Tech companies, which are "leading the way" in providing their employees with increasingly generous parental leave, use it as a recruitment and retention tool, Friedman said.

Lamenting the nation's lack of a federal paid leave policy, Barcroft noted simply that "employees will be happier" if their bosses provide them with paid family leave.

Hughes agreed. Companies can build loyalty by showing support for their employees, which in turn could make workers more willing to make sacrifices down the road.

"Allowing an employee to spend that critical time bonding with their child, whether through childbirth or through adoption placement — number one, it's beneficial for society in general, and number two, allowing the employee that time to focus and direct all of their attention and energy to that relationship is going to allow them to feel they have support from their employer," she said.

--Editing by Haylee Pearl.

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