In developing a parental leave policy, employers need to account for federal and state job-protected leave entitlements, some states’ paid leave benefits and antidiscrimination laws.

Smart (and Legal) Maternity/Paternity/Parental Leave Policies
Increasingly, employers are focusing on benefits related to pregnancy, birth and parenting. The U.S. Navy recently tripled paid maternity leave from six to 18 weeks,¹ Net-flix made news by offering “unlimited” paid parental leave for one year for both new fathers and mothers² and the District of Columbia proposed the nation’s most generous payroll tax-funded paid family leave of 16 weeks.³

To design and administer paid leaves for maternity, paternity and parenting, employers must coordinate with a number of existing laws, including (1) job-protected leave entitlements, (2) state-mandated paid leave benefits and (3) antidiscrimination laws.

Federal FMLA and State Leave Laws⁴

The federal Family and Medical Leave Act of 1993 (FMLA) provides unpaid, job-protected leave for events covered under typical maternity/paternity/parental paid leave policies.⁵ If FMLA applies, employers must comply with its arcane provisions. Both new parents are entitled to FMLA leave, generally 12 weeks of leave in a 12-month period.⁶ Time off to care for a spouse disabled by pregnancy/childbirth is covered, as is leave for bonding with a new child acquired by birth, adoption or foster care placement.

Most employers will want policies providing that whenever FMLA applies, paid leave under the employer’s policy counts toward or “runs concurrently” with FMLA/state leave entitlements. The following example illustrates the importance of considering whether FMLA and paid leave should run concurrently:

Company X’s policy provides for 90 days of paid maternity leave. Jane, who is FMLA-eligible, applies for and takes 90 days of paid maternity leave. Jane then applies for 12 weeks of FMLA. Jane has 12 additional weeks of job-protected leave over and above her maternity leave, unless Company X has designed its paid maternity policy to run concurrently with FMLA and followed FMLA designation and notice formalities.⁷

FMLA’s strict rules apply unless FMLA is inapplicable or exhausted. For example, Netflix’s announcement of unlimited paid parental leave provides: “Each employee gets to figure out what’s best for them and their family, and then works with their managers for coverage during their absences.”⁸ However, FMLA job protection applies whether or not employees “work with their managers.”⁹ For maximum flexibility to manage the business, policies that provide longer paid leaves should formally designate the first 12 weeks of the paid leave as FMLA and specify that once FMLA is exhausted, different terms and conditions govern the remaining leave.

When employees return from FMLA leave, they must be restored to the same job or to a virtually identical equivalent.¹⁰ Same pay and benefits are not enough—Hours, working conditions, privileges, perquisites, status, effort, responsibility and authority must match. Regulations also govern post-FMLA salary increases and bonuses.¹¹ Employers cannot use the taking of FMLA leave as a negative factor in employment actions such as promotions, pay or discipline. Thus, where paid leave is also covered by FMLA, the whole bundle of FMLA rights applies. On the other hand, if paid leave continues beyond FMLA, it is possible to put employees on notice that different reinstatement rights apply.

Coordination With State-Mandated Benefits

Netflix’s unlimited leave design eschewed any coordination with short-term disability or state benefits. "Parents can return part-time, full-time, or return and then go back out as needed. We’ll just keep paying them normally, eliminating the headache of switching to state or disability pay.”¹² Sounds good from the employee’s perspective, but is it a good idea for employers?
In California, when employers pay the difference between the state short-term disability insurance (SDI) benefit and the employee's full wage, disability pay doesn’t reduce SDI benefits. Because SDI income is not reportable income for tax purposes, receiving part of their paid leave through SDI gives employees a tax break. Normal pregnancy disability (eight weeks) can combine with another state program, Paid Family Leave (PFL) (up to six weeks), to provide up to $15,456 in state benefits. Under the District of Columbia proposal (with a top benefit of $3,000 per week for 16 weeks), employer savings by coordinating with government benefits can be significant.

In all of the states providing benefits for pregnancy disability, it may make sense to integrate pay during maternity leave with those mandated benefits. Similarly, coordination of parental leave policies with other paid time off such as short-term disability, paid sick leave and vacation (whether paid for by the employer or a multiemployer benefit plan) will be important for some employers.

Discrimination Laws

Maternity/paternity/parental benefits implicate federal/state/local discrimination laws, including laws prohibiting discrimination based on gender, pregnancy, sexual orientation, marital/familial status, caregiving and disability. The Equal Employment Opportunity Commission’s (EEOC’s) Enforcement Guidance: Pregnancy Discrimination and Related Issues (June 25, 2015) observes that pay and accommodations for disability related to pregnancy/childbirth can be limited to women affected by those conditions. Providing leave or accommodations that are not disability-related (e.g., for baby bonding or child care) must be without regard to gender and traditional male-female stereotypes. If new moms get paid bonding leave, so must new dads.

Likewise, in states with laws against marital status or sexual orientation discrimination, it would be illegal to limit paid parental leave to married parents or opposite-sex couples. Some state and local laws provide protections and accommodations for caregiving, including “small necessities leave” or leave for child care or school emergencies that do not differentiate based on gender, sexual orientation or marital status.

Litigation over disproportionate paid leave for new mothers has become a reality. A male CNN reporter filed a charge with EEOC to challenge a policy providing ten weeks of paid leave to birth mothers and adoptive parents, while biological fathers were limited to two weeks of paid leave. Advocates of gender equality for women applaud such challenges because until men have equal pay and leave related to child care, women will shoulder a disproportionate amount of the burden.

Employers providing generous paid maternity/paternity/parental leaves need to design and administer their policies with multiple laws, regulations and even local ordinances in mind. Otherwise, the good deed of providing paid parental leave might be punished.

**Takeaways**

- Parental leaves involve coordination with job-protected leave entitlements, state-mandated paid leave benefits and antidiscrimination laws.
- Both new parents are entitled to FMLA leave, generally 12 weeks of leave in a 12-month period.
- Employers may want to consider having their paid maternity leave policy run concurrently with FMLA leave.
- Employees returning from FMLA leave must be restored to the same job or a virtually identical equivalent, and employers can’t use FMLA leave as a negative factor in employment actions such as promotions, pay or discipline.
- In all states providing benefits for pregnancy disability, it may make sense to integrate pay during maternity leave with those mandated benefits.
- Providing leave or accommodations that are not disability-related must be without regard to gender and traditional male-female stereotypes.

**Learn More**

**Education**

Family and Medical Leave Act (FMLA)
Visit www.ifebp.org/elearning for more information.

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Essential Guide to Family & Medical Leave
Endnotes

1. Department of the Navy press release, "SECNAV Announces New Maternity Leave Policy," July 2, 2015, available at www.navy.mil/submit/display.asp?story_id=87987. The new Navy/Marine maternity leave policy combines six weeks of paid maternity leave with 12 weeks of paid convalescent leave. The leave does not have to be taken all at once, but it must all be taken within a child’s first year.


3. The Universal Paid Leave Act of 2015 provides up to 16 weeks of paid time off to care for a newborn baby or a sick relative, to recover from an illness or to recuperate after a military deployment. This proposal goes farther than any state law, offering up to a maximum of $3,000 per week; see http://lims.dccouncil.us/Download/34613/B21-0415-Introduction.pdf.

4. States with family and medical leave laws include California, Connecticut, the District of Columbia, Hawaii, Maine, Minnesota, New Jersey, Oregon, Rhode Island, Vermont, Washington and Wisconsin. Most expand the leave time, eligibility or both. For brevity, this article discusses only the federal Family and Medical Leave Act (very superficially), but employers are cautioned to comply with state and local laws as well.

5. Some state laws similar to FMLA provide more than 12 weeks of leave, as is the case with the District of Columbia and California (in California, combined pregnancy disability leave up to 17.33 weeks plus 12 weeks of “baby bonding” add up to seven months). FMLA does not preempt more generous state laws.

6. Spouses employed by the same employer may be limited to a combined total of 12 workweeks of FMLA leave for the following reasons: birth and care of a child; for the placement of a child for adoption or foster care (and to care for the newly placed child); and to care for an employee’s parent who has a serious health condition. However, a spouse would have additional FMLA leave to care for a spouse disabled by pregnancy or birth.

7. Under the regulations, retroactive designation of paid parental leave as FMLA is sometimes permitted if an employer fails to timely designate paid leave as FMLA leave. The employer may be precluded from a retroactive designation if the employee can show that he or she has suffered harm or injury.


9. 29 C.F.R. §825.700(a) provides: “An employer must observe any employment benefit program or plan that provides greater family or medical leave rights to employees than the rights established by the FMLA. Conversely, the rights established by the Act may not be diminished by any employment benefit program or plan.”

10. 29 C.F.R. §825.214. FMLA contains an exception to reinstatement for individuals predesignated as key employees if holding their job open would result in substantial economic injury to the employer.

11. Under the regulations, an employer may deny a bonus that is based on achieving a goal, such as hours worked, products sold or perfect attendance, to an employee who takes FMLA leave (and thus does not achieve the goal) as long as it treats employees taking FMLA leave the same as employees taking non-FMLA leave. 29 C.F.R. §825.215(c)(2).


13. When maternity/paternity/parental benefits are provided through an Employee Retirement Income Security Act (ERISA) plan, state and local laws may preempt. See Air Transport Ass’n of Am. v. City of County of S.F., 992 F.Supp. 1149, 1180 (N.D.Cal. 1998), affirmed in part and remanded in part on other grounds, 266 F.3d 1064 (9th Cir. 2001). Federal antidiscrimination laws like Title VII and the Americans with Disabilities Act are not preempted.


15. Johnson v. Univ. of Iowa, 431 F.3d 325, 328 (8th Cir. 2005) (“If the leave given to biological mothers is granted due to the physical trauma they sustain giving birth, then it is conferred for a valid reason wholly separate from gender, but if leave is designed to provide time to care for and bond with a newborn, then there is no legitimate reason for biological fathers to be denied the same benefit.”).

16. For example, in 2013, San Francisco passed the Family Friendly Workplace Ordinance (FFWO) effective January 1, 2014. The FFWO requires employers of 20 or more to use an interactive process when a fixed or flexible schedule is requested as an accommodation by a caregiver. See http://library.amlegal.com/ntx/gateway.dll/California/administrative/chapter12sanfranciscofamilyfriendlywork?f=templates&fn=default.htm&sid=amlegal:sanfrancisco_ca$anc=JD_Chapter12Z.


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