

PUBLICATION

Paternity Leave Policy Comes Under Scrutiny

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In October 2013, a CNN reporter filed an EEOC charge against CNN's parent company, Time Warner, Inc., alleging that Time Warner's parental leave policy is unlawfully discriminatory. According to the claimant, Josh Levs, Time Warner's policy provides 10 weeks of paid time off for all new parents – except biological fathers. The company allows 10 weeks of paid time off to women who give birth, and to men and women who have infants through adoption or surrogacy. In contrast, new biological fathers are only offered two weeks of paid parental leave. While this case is in its very early stages, it does serve as a useful reminder for employers to review their parental leave policies to ensure they are compliant with Title VII (and, of course, the Family Medical Leave Act, which requires employers provide 12 weeks of unpaid leave to an eligible employee, regardless of gender, to care for a child).

The general guideline promulgated by the EEOC is that under Title VII, employers may give women leave for the time period during which they are incapacitated due to pregnancy, childbirth and related medical conditions. Of course, because men cannot get pregnant, employers have no duty to provide similar leave for them. However, employers may not treat women more favorably than men when it comes to other types of leave, including leave for caregiving or childcare purposes. This is where employers may run into trouble. While an employer may provide more leave time for women than for men with regard to care of a newborn, an employer must show that the disparity in leave time available is due to women's potential need for disability leave associated with pregnancy. This may be difficult to do where the disparity in leave time is significant. For example, in cases where an employer may offer 16 weeks of paid time off to new mothers, but only three weeks to new fathers, the difference in time may be difficult to ascribe solely to the new mothers' medical needs related to pregnancy and childbirth.

Employers should keep a close watch on this claim, in the event that the EEOC determines it has merit. Regardless of the EEOC's finding, employers should consider evaluating their parental leave policies to ensure compliance with Title VII. One safe, though admittedly expensive, option is to provide equal parental leave time to both male and female employees. Companies such as Bank of America have already implemented such policies, offering 12 weeks of both maternity and paternity leave to their employees. Another option is to create a parental leave policy equally applicable to men and women, and a separate leave policy limited to a period that women are incapacitated by pregnancy and childbirth. Regardless of how such policies are structured, employers should ensure that they are not facially discriminatory, and are applied in a gender-neutral manner.