

## MDS Alert

### **Policies and Procedures: Don't Get Tripped Up By Family Leave Policies**

**Hint: Craft separate policies for pregnancy leave versus parental leave and know your rights as an employee.**

Companies in many industries have come under fire for their maternal and parental leave policies. Stay ahead of the curve by making sure you have policies in place that are fair to your facility's employees and in compliance with the law - but don't leave your residents out to dry either.

#### **Don't Let Your Facility Be Liable**

Not differentiating between maternity leave and parental leave could invite unwanted attention from **the Equal Employment Opportunity Commission (EEOC)** or your state's civil rights office.

"While often overlooked, one policy that could expose an employer to liability is its maternity leave or parental leave policy," says **Tiffany A. Buckley-Norwood**, principal at **Jackson Lewis P.C.** in Detroit.

If you're not overly familiar with the EEOC's guidance on pregnancy, make a point to read through it soon (you can find a link at the end of this story). Now's a good time to reevaluate your practice's policies and make sure everything is up to scratch. Regardless of your current employee makeup, you don't want to risk noncompliance.

#### **Don't Mistake 'Maternity' Leave as All-Encompassing**

The EEOC differentiates between leave related to pregnancy and leave related to bonding to or caring for a child. So, if your practice's current policy allows for new mothers to take time off after birth to care for their newborns - but you don't allow fathers the same option - you may be in violation of the Pregnancy Discrimination Act.

"Leave related to pregnancy, childbirth, or related conditions can be limited to women affected by those conditions. Parental leave must be provided to similarly situated men and women on the same terms," says the EEOC in its guidance on pregnancy discrimination and related issues.

"The risk arises in an employer policy that does not make a distinction between medical-related leave and leave for child bonding or child care yet provides greater leave time entitlement to female employees than male employees," Buckley-Norwood says.

However, it's OK to have a maternity leave policy that's focused on postpartum recovery. But the language of the policy needs to be explicit in its relation to the childbirth experience.

"In light of the EEOC's guidance and as a best practice, employers should use appropriate terminology in their policies to distinguish between leave related to any medical conditions or physical limitations imposed by pregnancy or childbirth, including recovery from childbirth (medical/maternity leave) and leave for purposes of child bonding or care (bonding time/parental leave). If the term 'maternity leave' is used, it should be defined in the policy. Further, it should be clear in the policy that nonmedical parental leave is being provided equally to women and men. Employers should also ensure that their parental leave policy is consistent with any legal obligations under the Family and Medical Leave Act and state law," Buckley-Norwood says.

#### **Check Employee Status Before Leave**

The Family Medical Leave Act (FMLA) ensures medical or caregiving leave for employees who meet certain criteria.

"Under the FMLA, an eligible employee may take up to 12 workweeks of leave during any 12-month period for one or more of the following reasons:

- (1) the birth and care of the employee's newborn child;
- (2) the placement of a child with the employee through adoption or foster care;
- (3) to care for the employee's spouse, son, daughter, or parent with a serious health condition; or
- (4) to take medical leave when the employee is unable to work because of a serious health condition," according to the EEOC.

Your facility is required to grant this leave if your company employs more than 50 people for more than 20 weeks per year. If you meet these conditions, you must also incorporate these criteria into your leave policies:

- "an employer must maintain the employee's existing level of coverage under a group health plan while the employee is on FMLA leave as if the employee had not taken leave;
- "after FMLA leave, the employer must restore the employee to the employee's original job or to an equivalent job with equivalent pay, benefits, and other terms and conditions of employment;
- "spouses employed by the same employer are not entitled to more than 12 weeks of family leave between them for the birth and care of a healthy newborn child, placement of a healthy child for adoption or foster care, or to care for a parent who has a serious health condition; and
- "an employer may not interfere with, restrain, or deny the exercise of any right provided by FMLA; nor may it discriminate against any individual for opposing any practice prohibited by the FMLA, or being involved in any FMLA related proceeding," according to the EEOC.

If an employee is coming up on the end of her 12-week FLMA-allowed leave, make sure management or someone at the facility checks in with the employee. Ensuring open communication can prevent potential future lawsuits.

### **Consider Voluntarily Offering Leave to Bolster Bottomline**

The **Internal Revenue Service** (IRS) recently published guidance on how the 2017 Tax Cuts and Jobs Act could incentivize companies to provide family leave. The Act provides "a tax credit to employers that voluntarily offer paid family and/or medical leave to employees," says **Megan Holstein**, principal at **Jackson Lewis P.C.** in Denver.

To take advantage of the tax credit, facility management or business administration should confer with applicable lawyers and accountants. But the IRS guidance says, "Employers must have a written policy in place that meets certain requirements, including providing:

- "At least two weeks of paid family and medical leave (annually) to all qualifying employees who work full time (prorated for employees who work part time), and
- "The paid leave is not less than 50 percent of the wages normally paid to the employee."

**Resource:** Find out more about the Equal Employment Opportunity Commission's guidance on pregnancy and pregnancy-related discrimination: [https://www.eeoc.gov/laws/guidance/pregnancy\\_guidance.cfm#IC3](https://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm#IC3).

You can read the Internal Revenue Service's FAQ on the family medical leave tax credits here: <https://www.irs.gov/newsroom/section-45s-employer-credit-for-paid-family-and-medical-leave-faqs>.