



Portfolio Media, Inc. | 860 Broadway, 6th Floor | New York, NY 10003 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Employers Shouldn't Strike Out On Leave For New Dads

By **Ben James**

Law360, New York (April 10, 2014, 6:45 PM ET) -- The recent controversy over a New York Mets player missing two games because of the birth of his first child shows that there's still antipathy toward men taking childbirth-related time off, but lawyers warn that employers who limit male workers' efforts to use parental leave may be stepping into a legal minefield.

The criticism that Mets second baseman Daniel Murphy has drawn from talk-radio personalities after heading to Florida for his son's birth, and the backlash that criticism inspired, should serve as a reminder for employers that despite any socially entrenched aversion to paternity leave that may exist, laws such as the Family and Medical Leave Act — and possibly Title VII — protect new dads' rights to take time off, attorneys say.

"Although it was very much, and in some ways still is, embedded in our cultural norms that a man should be at work while the woman is at home taking care of the baby, this view has shifted over time," said Mintz Levin Cohn Ferris Glovsky and Popeo PC member Mike Arnold. "This cultural shift has resulted in laws like the Family and Medical Leave Act, which said in part that we value the right of the father to bond with his newborn, and employers must respect this statutory right regardless of their views on this issue."

Murphy, who availed himself of his right under a collective bargaining agreement to take three days of paternity leave, saw his decision questioned by WFAN host Mike Francesa as well as commentator and retired NFL quarterback Boomer Esiason. Esiason said Murphy's wife should have scheduled a C-section before the season began so that Murphy wouldn't have had to miss any playing time, a comment for which he later apologized.

Backlash over the talk-radio criticism came quickly. CNN journalist Josh Levs, who filed a U.S. Equal Employment Opportunity Commission gender bias charge against CNN parent Time Warner Inc. last year over the company's allegedly discriminatory paid time off policy for new parents, said in an open letter published on the Huffington Post that the radio hosts' comments were "so mind-bogglingly clueless it's hard to believe they were real." Levs' bias charge "is still in the hands of the EEOC," he told Law360 in an email Thursday.

The Murphy controversy comes as an increasing number of employers have been voluntarily adopting paternity leave policies, according to Ogletree Deakins Nash Smoak & Stewart PC's Brian Gershengorn. But offering some paid time off for new dads isn't a silver bullet, because a parental leave policy that treats men and women differently could inspire a worker to bring a private suit or even catch the attention of the U.S. Equal Opportunity Employment Commission.

"There are certainly some pitfalls that employers can run into depending on what type of

paid leave policies they are going to provide," Gershengorn said.

The reaction to the criticism of Murphy's decision shows that its widely accepted that men have the right to take some parental leave, said Kelley Drye & Warren LLP's Mark Konkel. But what remains ambiguous is the question of exactly how much leave men, who don't have to go through the physical rigors of childbirth, are owed.

Under the FMLA, eligible employees of both genders are entitled to up to 12 weeks of unprotected, job-protected unpaid leave for the birth of a son or daughter, or to bond with that newborn. But in situations where employers go above and beyond their obligations and offer paid parental leave, the treatment of men and women can vary.

The policy Levs lodged his EEOC claim against Time Warner over allegedly offered 10 weeks of paid time off to women who give birth, as well as both women or men who have infants through adoption or surrogacy, but afforded biological fathers only two weeks of paid parental leave.

"What you're going to see over time is further development over how much paternity leave a man is entitled to," Konkel said. "The EEOC takes the position that a wide disparity between a man and a woman could be evidence of discrimination."

For employers looking to avoid legal trouble, having written policies in place that are consistently enforced can help stave off discrimination as well as FMLA claims, attorneys say.

"We're really all over our clients about putting the proper procedures and policies in place and consistently applying and enforcing their leave policies," Arnold said.

Arnold also stressed the importance of training managers and supervisors to be aware of what rights workers have, adding that managers ought to have a "working knowledge" of employees' FMLA rights.

When it comes to paid parental leave policies, some difference between the time off available for men and women isn't necessarily illegal, but the policy should be properly worded to make clear that whatever disparity may exist isn't simply based on gender, he added.

"The Murphy story underscores that it is commonly accepted that men have a legitimate interest in spending time with their newborn child," Konkel said. "Of course, the devil's in the details."

--Editing by Elizabeth Bowen and Chris Yates.

All Content © 2003-2014, Portfolio Media, Inc.