

CHILDCARE LEAVE¹

A. Paid Childcare Leave

1. *Eligibility:* Childcare leave is provided to allow attorneys, male and female, to care for children newly arrived in their families. Every attorney is entitled to a two-week paid leave for the following childcare purposes:

- (a) the birth of a child of the attorney;
- (b) the adoption of a child by the attorney;
- (c) the placement of a child for foster care in the family of the attorney.

2. *Special Provision for Adoptive Parents:* In addition to the leave in subparagraph A.1 above, an attorney who has adopted a child is entitled to six weeks of paid leave immediately prior to or following the adoption.

3. *Application:* The two-week paid childcare leave is not in addition to the disability leave as a result of pregnancy, childbirth and related medical conditions during the first year following the arrival of the same child.

B. Extended Unpaid Childcare Leave

1. *Eligibility:* In addition to any paid leave (including paid childcare leave and disability leave as a result of pregnancy, childbirth and related medical conditions described above), every attorney may request an unpaid leave of absence for a period of up to nine months for the following child care purposes:

- (a) the birth of a child of the attorney;
- (b) the adoption of a child by the attorney;
- (c) the placement of a child for foster care in the family of the attorney.

2. *Criteria for Granting Request:* This leave is available to attorneys who are in good standing with the firm regardless of the attorney's seniority, upon request to the appropriate department chair or firm decision maker. Approval will be given unless the leave would unduly disadvantage the firm as a whole, or the work of the department or practice group directly affected.

3. *Reduced Work Schedule:* An attorney may work on a reduced work schedule during the period when he or she otherwise could be totally absent from work pursuant to this Child Care

¹ This sample policy was copied from the Philadelphia Bar Association's Model Policies. See http://www.philabar.org/member/governance/mp_parent2.asp (accessed September 14, 2005).

Leave Policy, provided that the attorney's department has work for the attorney on this basis. The nature of the arrangement, including the attorney's schedule of hours, workload, compensation, and benefits, will be determined by [insert appropriate person] together with the attorney. Approval will be given unless the reduced schedule would unduly disadvantage the work of the firm as a whole or the department or practice group directly affected.

C. Effect on Benefits

1. *Paid Childcare Leave:* During the paid child care leave, the attorney will receive the same benefits she or he would have received had that attorney been working full-time.

2. *Extended Unpaid Childcare Leave:* The firm or organization shall maintain health insurance benefits during the unpaid extended family care leave, regardless of the attorney's level of seniority. Other benefits will be maintained during the unpaid extended family care leave at the discretion of and in the circumstances determined by the firm. All benefits shall be restored after the leave has ended.

D. Effect on Partnership or Salary Increases

1. *Paid Childcare Leave:* The use of paid childcare leave shall affect neither a partnership determination nor its timing, nor shall paid childcare leave affect any salary increase an attorney might receive.

2. *Extended Unpaid Childcare Leave:* Use of extended unpaid childcare leave shall not be a factor in any partnership or salary increase decision. Use of extended leave may affect the timing of the determination if:

(a) any other unpaid leave affects the timing of the partnership or salary increase determination; and,

(b) the extended leave is used i) for more than a period of one year during the time preceding the partnership or salary increase decision; or ii) for a substantial amount of time during the last year before the decision is made.

COMMENTS

1. *The Family Medical Leave Act*

The Family Medical Leave Act, 28 U.S.C.A. § 2601 *et seq.* (the “FMLA”) entitles covered employees to 12 work weeks of leave (either unpaid or paid) during any 12 month period (1) because of the birth of a child of the employee and in order to care for the child and (2) because of the adoption or foster care placement of a child. Under the FMLA, the leave may be unpaid. The FMLA applies to employers who employ 50 or more employees.

The protections of the FMLA will be referenced where applicable. However, it sets forth a “bottom level” of safeguards that is, or should be, exceeded by law firms.

2. *Eligibility*

Childcare leaves are available to all men and women attorneys. They are available not only to biological parents, but also to adoptive parents and to attorneys who are providing foster care to a child. The model policy provides a presumption that the request will be granted, but also allows for consideration of the working needs of the law firm in granting the request.

The FMLA requirements apply only to an employee with one year and 1250 hours of service. Such a limitation is not recommended in the model policy. Some firms may nonetheless opt to use a minimum employment period before an attorney becomes eligible for childcare leave. Those firms may want to leave it flexible. For example, one organization with a leave of absence policy provides that “normally” employees with less than one year of service are not eligible for extended leaves. Such phrasing of the policy allows the firm to extend the leave to employees with less than one year of service in appropriate circumstances.

3. *Paid Childcare Leave*

The policy provides for two weeks of paid leave. Some firms may opt to provide paid leave for longer periods of time, particularly since it is not in addition to childbirth disability leave.

Recognizing that adoption of a child can be an expensive and time-consuming process, that adoptive parents have physical and emotional stresses and bonding needs just as biological parents do, and that paid disability benefits typically will not be available, the policy provides an additional six weeks of paid leave to adoptive parents.

4. *Extended Unpaid Childcare Leave*

The extended unpaid childcare leave provides for a leave of absence of up to nine months for child care purposes. The most common use of this extension probably will be for the care of a newborn infant.

5. *Effect on Benefits*

It is crucial to the welfare of families that health insurance benefits be in effect at all times. This policy provides for their continuation during all childcare leaves. Some firms may find it necessary to require employee payment of the required premiums if the extended leave is for a long period of time. If this is necessary the firm should take all reasonable measures to insure that no lapse of coverage occurs.

The FMLA requires the employer to maintain eligibility for coverage under any “group health plan” during the employee’s FMLA leave. The taking of leave shall not result in the loss of any employment benefit accrued prior to the leave. 29 U.S.C.A. § 2614(a)(2) and (c)(1).

6. *Notice*

Some firms may choose to add a requirement that employees give advance notice of a leave. The FMLA requires that at least 30 days notice shall be given for leave which is foreseeable based on an expected birth or placement or “such notice as is practicable.” 29 U.S.C.A. § 2612(e).

The firm may wish to require the attorney to prepare, when practicable, a “departure memorandum,” which outlines the attorney’s ongoing responsibilities and a plan for meeting those responsibilities during the attorney’s leave.

7. *Return to Work and Reinstatement*

The policy contains no provision regarding the circumstances of the return to work of the attorney. It assumes reinstatement to former position upon return to work. The FMLA requires that employees returning from FMLA leave be restored to their position, or its equivalent, upon return from leave. 29 U.S.C.A. § 2614(a). Such “restoration” may be denied under certain economic circumstances, and as to employees who are among the highest-paid 10 percent of employees. 29 U.S.C.A. § 2614(b).

Some firms may opt to make the right to take leave contingent upon the attorney’s advising the firm in advance that she or he intends to return to work on a full or reduced basis upon the completion of the leave. If so, the firm should include that requirement in its written policy and the requirement should be discussed with the attorney before the leave is begun.

Some organizations, especially those with highly structured departments, may also prefer to include a provision stating whether the attorney, upon return to work, will be placed in the same or an equivalent position. In no circumstances, however, may the use of the leave be the basis for demotion or other retaliatory work action.

8. *Application to Attorneys with Alternative Work Arrangements*

A firm may opt to include a provision indicating the circumstances in which child care leave applies to attorneys with pre-existing alternative work arrangements. The FMLA does not provide for a “reduced leave schedule” for family leave unless the employee and the employer so agree. 28 U.S.C.A. § 2612(b).