

Parental Leave: New Challenge in the U.S. Workplace

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Elizabeth Walker is one of today's career women who has received increasing media attention over the last decade.

Promoted to assistant vice president for marketing services two years ago, she has been instrumental in her company's continued growth and success. Although her position requires long hours and extensive periods of travel, Walker enjoys dealing with other upper management types-boards of directors and the like, most of them male.

But then, at the same time as her last promotion, Walker became pregnant.

Many of the men she worked with were not accustomed to dealing with women at the board level - much less pregnant ones.

Beyond the good natured joking about her increasing size, Walker worried about the possibility of going into labour in the midst of a board meeting.

Walker's company also worried that she might not return to work after she gave birth. A lot of time and money has been invested in developing her expertise.

Like a growing number of working women, Walker felt she, too, had invested too much in her career to quit now.

Thanks to her company's policy on parental leave, Walker was able to have her baby and return to work. She and her husband are even planning a second child.(1)

Not all women have the protection Walker enjoys. Consider the case of Lillian Garland, a receptionist/PBX operator at California Federal Savings & Loan Association in Los Angeles. From January to April 1982, she took a four-month pregnancy disability leave. Upon notifying the Cal Fed personnel office she was ready to return to work, Garland was told, "We hired the person you trained." She was advised to look for a job elsewhere and that if a position at Cal Fed became available, she would be contacted.

Garland refused to accept Cal Fed's reply, turning to California's Department of Fair Employment and Housing for assistance. The Department, in turn, served Cal Fed with a complaint alleging that Cal Fed's disability leave policy violated California's 1978 Fair Employment and Housing Act since it failed to provide Garland with up to four months of pregnancy disability leave and reinstatement to the same or a similar job. Cal Fed subsequently filed suit claiming that the state law is preempted by existing federal legislation. The resulting conflict has become the focus of a four-year legal battle that is being heard by the U.S. Supreme Court next fall.(2) (Interestingly enough, the National Organisation of Women, the League of Women Voters, the National Women's Political Caucus, and the National Women's Law Centre, concerned that the increased cost of hiring women may lead to increased discrimination, has sided with Cal Fed.)

The issue of parental leave is thus quickly becoming an important question in the U.S. workplace. Women now comprise 44 percent (some 52 million) of the U.S. work force, and the percentage is steadily growing. An estimated 80 to 90 percent get little or no disability leave.(3) Many of these women will have no option but to attempt to retain

their jobs during their childbearing years.

A recent report by the Economic Policy Council of the United Nations Association - a group currently chaired by Robert O. Anderson, chairman of Atlantic Richfield Co., and Douglas A. Fraser, president emeritus of the United Auto Workers - notes that only 40 percent of American working women are entitled to as much as six weeks paid leave after childbirth, although a six-to-eight week post-natal leave is recommended by many physicians. Thus, for many, childbirth becomes synonymous with being fired. Presently, federal law does not require employers to have disability plans for employees.

Several states, however, have passed legislation regulating pregnancy benefits. California, Connecticut, Hawaii, Illinois, Massachusetts, Montana, New Hampshire, New Jersey, New York, Ohio, Rhode Island and Washington have temporary-disability laws or regulations which treat pregnancy like any other short-term-disability, and they apply to almost all companies. Not all of these states, however, guarantee a woman her job back following leave.

In this respect, the United States is far behind other countries in supporting families with newborns. Some 117 nations, including a large number of developing countries and every industrialised country except the United States, provide some form of statutory parental leave.(4) A British mother is entitled to paid leave from work for prenatal care, six weeks of parental leave with 90 percent of her wages and the right to take up to 35 weeks of parental leave and return to a comparable job. Swedish parents are entitled to 40 weeks leave at full pay, job seniority protection, a guarantee of returning to the same or similar job and of maintaining their fringe benefits while on leave. French mothers receive 16 weeks at full pay, up to a maximum covered by social security. West German mothers are likewise entitled to 14 weeks leave at 100 percent wage replacement. Canadian mothers receive 15 weeks at 60 percent of pay.

This sharp contrast has prompted groups such as Yale University's Bush Center Advisory Committee on Infant Care Leave to call for federal action. The committee has recommended subsidised, six-month job parental leaves for employed mothers of newborns. Such leaves of absence, underwritten by an insurance fund similar to those for disability, would provide 75 percent of the salary for at least three months to the parent (father or mother) on leave and ensure job protection and continuation of benefits. A bill currently in Congress, introduced by Representative Patricia Schroeder (D-Colo.), would require companies with five or more workers to offer both mothers and fathers an unpaid leave of up to 18 weeks within two years of the birth or adoption of a child and, upon returning, assurance of the same job or an equivalent one. The bill would also extend parental leave to include those who must care for a seriously ill child.

Advocates of such programme and legislation argue that they represent an important means for enabling women to bear children and remain in the workforce. The resulting increase in their income-earning potential would allow women to become more self-supporting. Moreover, advocates maintain that greater continuity in women's work force participation and, thus, a more highly experienced female labour force will contribute to increased national productivity and economic growth.

Critics counter, however, that the cost of proposed parental leave legislation would be prohibitive. At present, no estimate of what parental leave might add to the total U.S. wage bill is available. It is also argued that the effects of temporary absences and the need to recruit substitutes (or manage without) would be operationally disruptive and a manpower nightmare. Finally, critics warn that parental

leave programmes could cause cries of discrimination by older female workers and males of all ages. They question whether it is really equitable to devote extra money, time, and attention to new parents without extending the same, or equivalent, benefits to other employees for reasons unrelated to pregnancy. While some employers offer a multitude of benefits and, thus, avert the appearance of favouring one group over another, a majority do not.

Legal Background

In 1973, the U.S. Equal Employment Opportunity Commission (EEOC) issued guidelines interpreting Title VII of the Civil Rights Act in which pregnancy was deemed to be equivalent to any other temporary disability for the purpose of employee benefits. The U.S. Supreme Court, however, gave little weight to this opinion. In a 6-3 1976 decision, *General Electric Co. v Gilbert*,⁽⁵⁾ the majority reasoned that a disability programme which excluded pregnant employees from coverage did not discriminate on the basis of sex. Greater benefits, the Court ruled, need not be paid to one sex due to its different role in "the scheme of human existence." In their dissenting opinions, Justices Brennan and Stevens declared that such a distinction was without meaning, pointing out as well that such male-specific ailments as prostatectomies were eligible for benefits under GE's disability programme.

Effective federal regulation of pregnancy benefits begin with Congressional amendment of Title VII in 1978. Known as the Pregnancy Discrimination Act, the amendment expanded the Title VII definition of "sex" to include explicitly the circumstances of "pregnancy, childbirth, or related medical conditions." New EEOC guidelines and explanations of the law were promulgated in the following year. As a result of this change, employers with 15 or more employees were obligated to provide benefits for pregnancy identical to benefits such as sick leave provided for other forms of temporary disability. Moreover, it is illegal to fire, refuse to hire, or deny a promotion to a woman because she is pregnant. If an employer has fewer than 15 employees, state discrimination laws/regulations may apply. Many state laws/regulations are stronger than federal law/regulations in protecting the rights of pregnant employees.

An employee taking leave for pregnancy, for example, may not be prevented from accumulating seniority or receiving insurance contributions if such benefits are furnished for other kinds of medical leave. The level and coverage of benefits, and eligibility criteria such as medical examinations must be the same for pregnancy as for other medical conditions. Leave for child care must be available on the same basis as leave for other nonmedical reasons. The Pregnancy Discrimination Act does not require an employer to provide health insurance for an abortion unless childbirth would endanger the life of the mother. Complications arising from an abortion, however, must be treated like other illnesses for benefit purposes, and employers who voluntarily include abortion in their coverage must provide equal disability benefits.

Discharge, refusal to hire, or mandatory leave due to pregnancy constitutes employment discrimination unless justified by bona fide occupational qualifications. Reinstatement following pregnancy must be on the same basis as that for other forms of medical leave. This might include, for instance, seniority retention following leave or receipt of insurance benefits.⁽⁶⁾ Employer rules requiring leave at a specific point of pregnancy have been validated on the basis of job performance requirements in the cases of airline flight attendants and school teachers.⁽⁷⁾

In 1983, *Newport News Shipbuilding and Dry Dock v EEOC*,⁽⁸⁾ the U.S. Supreme Court affirmed the validity of the Pregnancy Discrimination Act and overrode the 1973 *Gilbert* decision. The *Newport News* case also provided an interesting interpretation of the Pregnancy Discrimination Act. At issue was an employer health insurance plan which covered the spouses of both male and female employees, but excluded pregnancy from spousal benefits. However, the U.S. Supreme Court held that "since the sex of the

spouse is always the opposite of the sex of the employee, it follows inexorably that discrimination against female spouses in the provision of fringe benefits is also discrimination against male employees" (emphasis added). Thus, men would by definition receive fewer benefits and suffer discrimination under Title VII. The High Court's ruling that the Pregnancy Discrimination Act protects men as well as women for reasons of pregnancy opens the possibility of future wider Title VII application. Paternity leave for males or the protection of male reproductive systems from occupational hazards are potential areas where equal benefits may be demanded.⁽⁹⁾

Collective Bargaining Agreements

Collective bargaining agreement provisions providing some form of pregnancy leave exist in roughly 40 percent of all labour-management contracts, covering approximately the same proportion of employees represented by unions. Certain industries characterised by a high percentage of women employees, such as textiles, electrical machinery, or retail trade, have an above-average number of pregnancy leave provisions, although these provisions are scarce in the predominantly female apparel industry. Three-quarters of pregnancy leave provisions deal with the extent to which seniority is retained following leave. While prior to the Pregnancy Discrimination Act one-third of contracts provided for mandatory leave at a specific month of pregnancy, currently only four percent do so. Various agreements also offer leave for adoption, child care, or paternity.⁽¹⁰⁾

Arbitrators have been guided strongly by existing federal and state regulation in their interpretation of union contracts. This is particularly true where saving or non-discrimination clauses necessitate conformity to external legal standards.⁽¹¹⁾ Further, given the availability of an alternate remedy under Title VII, arbitration rulings which ignore prevailing discrimination law risk irrelevance.⁽¹²⁾ For example, before 1978 arbitrators were generally unwilling to include pregnancy under contractual definitions of sickness, arguing that childbearing was a normal, voluntary condition.⁽¹³⁾ Now, however, the issue has been largely settled by federal statute. On the other hand, arbitrators in their interpretations have resisted expanding the coverage of pregnancy leave provisions into areas such as child care⁽¹⁴⁾ or "severe sickness".⁽¹⁵⁾ Likewise, the use of pregnancy benefits for the adoption of a child has been rejected⁽¹⁶⁾. However, at least one arbitrator has been willing to include adoption in a general "maternity leave" provision, indicating the need for caution in the drafting of contract language.⁽¹⁷⁾

Conclusion

In the U.S., policies regarding retirement, apprenticeship, and equal employment opportunity have received widespread acceptance. The notion of establishing a series of policies dealing with maternity concerns, however, has yet to be openly received. Many employers may find this notion discomfiting because it breaches the traditional boundary between work- and family-life. They may well respond to the legal obligation to provide equal benefits by actually reducing employee benefits or even excluding women from employment.

Maternity concerns, however, form a central dilemma for an increasing number of U.S. working women. Clearly, this dilemma presents major implications for maternal and child health, for mother-child relationships, for job and career development, and for family economic security. At the same time, this concern is a two-way street. Working women have an obligation to their employer to handle their absence with minimum job disruption. With demographers predicting labour shortages in the U.S. during the 1990s, it is inevitable that American companies will have to adopt more flexible parental-leave policies to attract and retain employees. Ignoring this reality is unrealistic. Doing so will only complicate the meshing of work and family lives.

The current attention being focused on parental concerns in the U.S. goes beyond present issues. It carries potential for future changes in U.S. society. The realization that work and family conflicts are not temporary or limited to the earliest months of life is being increasingly recognized throughout the industrialized world.⁽¹⁸⁾ Dual career couples attempting to raise families, for instance, inevitably experience growing challenges throughout their years of parental responsibility. Likewise, with the aging of the U.S. population, more employees will predictably be involved in caring for their own mothers and fathers. The requirements of such caretaking will necessitate new human resource management practices. Parental leave may well just be the beginning. How U.S. employers face this realization will be a strong statement on contemporary values.

Footnotes

1. The authors gratefully acknowledge Catherine Rasberry, *Baton Rouge Business Report*, for suggesting this opening vignette.
2. The U.S. 9th Circuit Court has ruled that the California law is not superseded by the federal Pregnancy Discrimination Act, discussed below, in *California Federal Savings and Loan Association v. Guerra*, 758 F2d 390 (1985).
3. Sheila B. Kamerman, Alfred J. Kahn, and Paul Kingston, *Maternity Policies and Working Women*. New York: Columbia University Press, 1983, p.5; various U.S. Bureau of Labor Statistics press releases.
4. Sheila B. Kamerman, *Maternity and Parental Benefits and Leaves: An International Review*. New York: Columbia University Center for the Social Sciences, 1980; Sylvia Ann Hewlett, *A Lesser Life: The Myth of Women's Liberation in America*. New York: William Morrow, 1986, pp. 96-97.
5. 429 U.S. 125 (1976).
6. The Supreme Court in *Nashville Gas Co. v. Satty*, 434 U.S. 136 (1977), had ruled prior to the amendment that the loss of seniority for pregnancy but not for other types of leave violated Title VII.
7. See, e.g., *deLaurier v. San Diego Unified School District*, 588 F2d 674 (1978), *Harriss v. Pan American World Airways*, 649 F2d 670 (1980).
8. 462 U.S. 669 (1983).
9. Theresa Johnson, "The Legal Background and Implications of Pregnancy Benefits," *Labor Law Journal*, 35 (June 1984), 352-9.
10. Bureau of National Affairs, *Collective Bargaining Negotiations and Contracts*, 1983, U.S. Bureau of Labor Statistics, *Characteristics of Major Collective Bargaining Agreements*, 1980.
11. Benjamin W. Wolkinson and Dennis H. Liberson, "The Arbitration of Sex Discrimination Grievances," *Arbitration Journal* 37 (June 1982), 35-44.
12. *Alexander V. Gardner-Denver Co.*, 415 U.S. 36 (1974).
13. *Miller Brewing Co.*, 64 LA 389 (1975), *Millinocket School Committee*, 65 LA 805 (1975).
14. *Saint Joseph Hospital*, 73 LA 482 (1979), *ARA Manufacturing Co.*, 79-2 ARB 8562 (1979).
15. *Cheektowaga Central School Board*, 80 LA 225 (1982).
16. *Laporte Community Schools*, 79-2 ARB 8536 (1979).
17. *American Federation of Government Employees*, 71 LA 93 (1978).
18. See, e.g., Ana Novakovic, "Why Should Industry Pay for Parental Leave?" *Women in Management Review* (Summer 1986), 79-82.