

One Minute Memo[®]



New Texas Law Provides Equal Protection to Foster Parents Under Family Leave Policies

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Seyfarth Synopsis: At the state level, Texas law does not require employers to provide family leave to employees. However, a newly enacted law provides that if a Texas employer chooses to offer time off to employees to help them care for a biological or adoptive child, it must also offer the same leave to foster parents (i.e., to care for a foster child).

Texas House Bill 88, which Governor Greg Abbott signed into law on May 26, 2017, provides for the addition of Section 21.0595 to the Texas Labor Code. Section 21.0595 states that an employer commits an unlawful employment practice if: (1) the employer administers a leave policy under which an employee is entitled to personal leave to care for or otherwise assist the employee's sick child; and (2) that policy "does not treat in the same manner as an employee's biological or adopted minor child any foster child of the employee" who both resides in the same household as the employee and is under the conservatorship of the Texas Department of Family and Protective Services. The new law went into effect on September 1, 2017, and applies prospectively to conduct occurring after that date.

Thus, under this new law, where a company leave policy provides employees time off to care for their "children" or a "son or daughter", those terms must be interpreted to include foster children as well—similar to requirements under the federal Family and Medical Leave Act (FMLA). Under the FMLA (which applies to private employers with 50 or more employees), eligible employees may take up to 12 workweeks of job-protected leave for the birth or placement of a son or daughter, to bond with a newborn or newly placed son or daughter, or to care for a son or daughter with a serious health condition. The FMLA defines a "son or daughter" as a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis. According to the U.S. Department of Labor, the government agency charged with enforcing the FMLA, the broad definition of "son or daughter" is intended to reflect the reality that many children in the United States live with a parent other than their biological father and mother. The same rationale is reflected in Texas House Bill 88.

While enforcement of the new law will likely focus on *implementation* of leave policies, employers (particularly those not subject to the FMLA) should take this opportunity to review and update the language of any existing family leave policies to make clear that where an employee is permitted to take personal leave to care for a biological or adoptive child, the same opportunity extends to an employee seeking leave to care for a foster child. Importantly, this new Texas law does not require employers to provide such leave, and does not mandate that employers provide family leave in excess of what is already required under the FMLA or other existing policies.

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