

Is paternity leave a benefit just for Hong Kong's married men?

Hong Tran and Kay McArdle from Mayer Brown JSM look at implications for employers of plans to give fathers time off for their child's birth

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Happy father Ivan Wong and his wife, Shelley Lo, with their sons at home in Kowloon City. Thanks to new company policy, Ivan was able to enjoy paternity leave when they gave birth to their children. Photo: Edmond So

As employers prepare their policies and procedures for the introduction of paternity leave legislation, questions are being asked about whether denying unmarried employees these benefits would be unlawful.

Offering paternity leave benefits only to married employees could land employers in hot water under both the Sex Discrimination Ordinance (SDO) and, potentially, the Family Status Discrimination Ordinance (FSDO).

In his maiden policy address, Chief Executive Leung Chun-ying called for paternity leave legislation to be enacted as soon as possible.

This followed the introduction in April of a pilot scheme giving civil servants paternity leave of five working days on full pay.

The Labour Advisory Board endorsed the government's proposal to introduce three days of paternity leave for employees with at least 40 weeks of continuous employment with the same employer. This leave will be paid at four-fifths' the average daily wage for private-sector workers.

When debating the issue, the board considered whether it should only apply to births in wedlock and decided it should apply to all births.

Why give paternity leave to unmarried fathers?

Under the SDO, treating an employee less favourably because of his or her marital status is prima facie unlawful.

The impact of this legislative provision is that offering paternity leave benefits only to married male employees would constitute unlawful direct discrimination against an employee who became the father of a child out of wedlock on the grounds of marital status. While the SDO specifies certain circumstances in which married people can be treated differently from unmarried persons (primarily certain allowances), paternity leave is not one of those exclusions.

In addition to the SDO, the FSDO could also provide ammunition for attacking any paternity leave provision that favoured married over unmarried fathers - or vice versa.

Does this matter for employers?

Yes it does. Obviously it increases the potential number of employees who may get paternity leave. It also means that employers need to be careful when deciding to increase paternity leave. Many employers provide full pay for maternity leave - above the 80 per cent statutory maternity allowance. This could be the same for paternity leave. But because of the potential difficulty in proving paternity, it is possible that employers might seek to restrict such "top-up" benefits to married fathers. This is unlawful and should be avoided.

In light of these potential discrimination claims, employers should prepare, review and amend their internal paternity leave policies to ensure that the same paternity leave benefits are available to both married and unmarried eligible male employees.