

Return-to-Work Series: Will COVID-19 Force a Change in Workplace Flexibility Programs and Expectations?

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With many state and local shutdown and stay-at-home orders poised to sunset over the next few weeks, the expectation at least in those places is that workplaces will begin quickly to wind back up — even as other parts of society are still on pause.

For example, all but a handful of states have canceled school for the remainder of the year — leaving workers with school-age children in a bind: they either locate outside caregivers who not only can attend to their children during the day but also monitor online learning from home, or seek modifications to their work schedules enabling them to manage those family responsibilities. The challenges are not limited to workers with school-age children: in the wake of the COVID-19 crisis, many families also have taken on greater at-home caregiving responsibilities for elderly loved ones or those with disabilities or other special needs.

So as workplaces are gradually reopening, schools and long-term care facilities aren't necessarily doing so at the same pace, causing practical issues especially for “sandwich generation” employees who want and need to get back to work. This stark reality presents an opportunity for companies to revisit and refine their workforce flexibility and other workplace policies to make what may be for some a bumpy return to work a little less so.

Not only may such efforts build goodwill — leading to happier, healthier, and more productive workplaces — they also may help to minimize the risk of worker complaints and lawsuits that could lead to potential legal liability.

Caregiver Bias Can Lead to Viable Workplace Discrimination Claims

Federal workplace anti-discrimination laws do not list “caregiver status” as a legally protected category like, for example, race, age, or disability. But to the extent that caregiving responsibilities may fall more heavily on certain protected groups or perpetuate unfair protected-basis assumptions or stereotypes about them, it is unwise to base an employment decision — like hiring, promotion, or termination, for example — on an individual’s status as a caregiver.

The case law was clear even before the current COVID-19 pandemic that sex stereotyping — acting based on assumptions, stereotypes, or expectations as to how individuals of a certain sex should act or behave — is a form of illegal sex discrimination under Title VII of the Civil Rights Act of 1964 (Title VII bars workplace bias because of race, color, religion, sex, or national origin).

For example, an employer may not deny promotion to a woman on the ground that she is not “feminine” enough or exhibits “masculine” characteristics or behaviors because doing so would be based on stereotypical notions of how women should comport themselves at work, and not on the individual’s job qualifications or abilities. As the U.S. Supreme Court made clear in its landmark 1989 decision in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), Title VII’s sex discrimination clause encompasses “the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.”

Thus, denying promotion to a working mother based on a perception that she will be unable or unwilling to devote sufficient time and attention to work — especially where working *fathers* routinely are promoted without regard to their status as a parent — not only could be considered intentionally discriminatory but also could have an adverse impact on women as a group. In addition, as the EEOC points out in its written guidance on caregiver status discrimination, **working men “may face the mirror image stereotype:** that men are poorly suited to caregiving. As a result, men may be denied parental leave or other benefits routinely afforded their female counterparts.”

Also worth noting is the fact that a lesser-known provision of the Americans with Disabilities Act prohibits employers from taking adverse employment action against an individual based on his or her *association* with a person with a disability. For example, if an employer refused to return an employee to work because the worker has new caregiving responsibilities for a family member whose disability has been exacerbated by COVID-19 infection, which the employer believes will result in an increase to its health insurance premiums and cause the employee to be unacceptably distracted at work, such action could lead to an ADA discrimination claim and eventual lawsuit.

Applying those principles to the COVID-19 context, a practice of disciplining or discharging workers who are unable to return to work immediately (or denying requests to take advantage of flexible work programs) because of caregiving responsibilities could disproportionately adversely affect women, certain racial or ethnic groups, or even employees of a certain age who have both child care and elder care responsibilities. Even absent a standard practice or policy, making decisions that are

rooted in judgment or stereotypical notions about an individual employee's status as a caregiver can place a business on shaky legal ground under workplace EEO laws.

Tips for Avoiding Return-to-Work Caregiver Bias Traps and Other EEO Missteps

How, then, can an employer balance its EEO obligations against other legitimate, nondiscriminatory business considerations — including the need to get some semblance of operations up and running as quickly and efficiently as possible once the COVID-19 crisis subsides?

Before Your Employees Return to the Physical Workplace:

- **Review your EEO policy** and make sure it's up to date and compliant. Consider redistributing it to all employees when business operations fully resume.
- **Ensure that supervisors and managers are aware of any company flexible work policies and procedures** and understand their EEO and nondiscrimination obligations. Make EEO compliance, including as it relates to caregivers, a discussion topic at one or more management team return-to-work planning meetings. As the EEOC recommends in its caregiver guidance, this is especially important for “front-line supervisors, middle management and other managers who regularly interact with employees or who are responsible for assignments, leave approval, schedules, promotions and other employment terms, conditions and benefits.”
- **Consider extending COVID-19-related emergency workplace flexibility programs** — including work-from-home options, extended paid and/or unpaid leave, or relaxing attendance policy requirements — to any post-crisis transition period, i.e., as business and other regular activities resume.
- **Consider expanding existing, or implementing new, permanent flexible work arrangements.** Your organization may already have formal or informal work-from-home programs in place aside from those implemented on an emergency basis or altered (such as by relaxing eligibility requirements) in response to COVID-19. They may include one or more types of telework, which may be enhanced or made more widely available on a permanent basis, such as preapproved work-from-home under which the employee works remotely from home on a set schedule (i.e., every Tuesday and Thursday) or work-from-home that may be requested and approved periodically or on an as-needed basis.

The EEOC's caregiver best practices guidance document includes additional examples, such as implementing **flextime programs** that allow employees to vary their work start and end times, depending on the nature of the employee's job, work supervision limitations, and the like, or **flexible**

week opportunities, such as compressed workweeks consisting of, for instance, four 10-hour workdays.

After Your Employees Return to the Physical Workplace:

- **Communicate, communicate, and communicate.** In addition to all the social distancing protocols and other safety- and process-related communications that invariably will occur, make a point of talking to employees about the company's ongoing commitment to treating them fairly and with respect, and describe what it's doing to ease some of the COVID-19-related pressures and demands they may be grappling with outside of work — such as through new or enhanced flexible work programs.
- **Consider assigning a point of contact** to manage post-COVID-19-related work-life questions and requests. That person should be well versed in company flex and leave policies, as well as procedures for handling requests for disability accommodations and/or protected leave under state, local, or federal laws.
- **Schedule EEO compliance training.** Even if you had a regular training schedule in place before the COVID-19 crisis, we now are in uncharted waters, and all workers — managers and employees alike — may benefit from a timelier refresher that emphasizes EEO issues that may have become more prominent in the wake of COVID-19. Anti-harassment and unconscious bias training may be especially important as employees return to work possibly in vastly different environments.
- **Respond promptly** to employee complaints of unfair treatment, bias, harassment, or retaliation. It is reasonable to assume that many employees will return to work already feeling stressed and anxious. If they believe they've been mistreated on the job, handling their complaints with the care, efficiency, and seriousness called for not only may help boost employee morale, productivity, and commitment to the company but also may minimize the risk of potential future claims and litigation.

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