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Pending SB836 Adds "Familial Status" to Protected Class

EMPLOYMENT LAW

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California employers must abide by a stringent set of federal and state guidelines outlawing workplace discrimination on the basis of race, color, age (over 40), gender, religious creed, ancestry, pregnancy, physical or mental disability, medical condition (cancer or related illnesses) national origin, sexual orientation and gender identity.

Businesses and individuals that don't comply face expensive and time-consuming lawsuits for job bias which carry the potential for ruinous damage claims.

If the state legislature has its way, the list of reasons to be sued will get even longer.

Senate Bill 836 (Kuehl), which has passed the Senate and is pending before the Assembly, would amend California's Fair Employment and Housing Act to add "familial status" as yet another so-called protected classification under the state's job bias statute. Since Governor Schwarzenegger has indicated that he will sign this new law when it reaches his desk, here is a primer on this far-reaching legislation.

California's Fair Employment and Housing Act prohibits discrimination in hiring, job assignment, pay, firing etc., on any of the aforementioned bases. It also outlaws harassment on any basis protected by law, and retaliation against those that challenge employer actions thought to be discriminatory.

SB 836 will provide sweeping new protections to workers that have "family care responsibilities." The new law will require businesses with more than five employees to reasonably accommodate caregivers that need time away from work to manage these responsibilities.

This means that employers will have to provide time off when caregivers need to attend to a long list of family responsibilities, though the statute is silent on precisely when or how much time off is mandated. It also means that supervisors and managers will need to be educated not to discipline or otherwise give employees a hard time (harassment) if they take advantage of this new right.

Like all laws, the devil is in the details. The bill bars discrimination against an employee on the basis of "familial status," which is defined to mean "an individual who is or will be caring for or supporting a family member." The bill defines the term "family member" very broadly to include a child, parent, spouse, domestic partner, parent-in-law, sibling, grandparent or grandchild.

Some of these terms are even more complex that they appear at first blush.

For example, the term child not only includes biological children, but also those who are adopted, foster children, step-children, grandchildren, legal wards, sons or daughters of a domestic partner and those with whom the employee stands *in loco parentis*.

The term "parent" includes most legally recognized parenting relationships, but also includes a legal guardian or any person who stood *in loco parentis* to the employee when the employee was a child.

The term "spouse" includes a partner by lawful marriage or a registered domestic partner.

The phrase "caring for or supporting a family member," which is at the heart of the new legislation, is defined even more broadly to mean any one of the following acts: "providing supervision or transportation; providing psychological or emotional comfort or support; addressing medical, educational, nutritional, hygienic or safety need; or attending to an illness, injury, or mental or physical disability of a family member."

Here is a tricky example. An aunt who takes over the care of a niece or nephew, but has not yet taken steps to be appointed a legal guardian, would be protected from discrimination under the new law if she takes time off work to care for the child. This is because the aunt is standing *in loco parentis*.

This expansive definition could wreak havoc in the workplace. It means that employers will need to be very careful in analyzing time-off requests, especially where employees claim to have extended families and the employer is told that the child of another relative has been left in their care.

Most of the trouble is going to come as employees get creative in seeking time off for the protected "caring for or supporting" activities covered by the legislation.

Taking mom shopping or to a hair appointment would likely fall under the protected activity of "transportation."

Accompanying a sister to visit a doctor would fall under the protected activity of "providing emotional comfort and support."

Running home to make lunch for a child easily fits the protected activity of "attending to the nutritional needs of a child," as could the act of leaving work early to cook dinner for a spouse.

Driving a child to soccer practice is "providing transportation" to a child.

You'd expect (or at least hope for) some sanity and order as the new law is rolled out. However, that is not likely to happen for years to come. The terms of the law are mandatory to be sure, but they are also vaguely defined and susceptible to a wide array of interpretations.

Unfortunately, lawmakers have not seen fit to define these terms with any more precision, opting instead to leave that task to the state's Fair Employment and Housing Commission and the courts. In the meantime, employers will have to slog through what may be years of expensive and unnecessary legal actions as the courts define the contours of these obligations.

At the federal level, job bias regulation has been left to the Equal Employment Opportunity Commission. There is no outright ban on family responsibility discrimination to protect caregivers.

Thus, EEOC and the federal courts have been inventing theories to cover these issues under the guise of existing laws barring pregnancy and gender discrimination, discrimination against those with a disabled family member (under the Americans with Disabilities Act) and family leave laws.

Existing EEOC pronouncements urge employers to avoid practices that adversely impact caregivers and to adopt best practices that make it easier for all workers, whether male or female, to balance work and family responsibilities.

The agency also points out that there is substantial evidence that workplace flexibility enhances employee satisfaction and job performance and suggests that employers can directly benefit by adopting such practices, hereby saving millions on retention costs.

EEOC has weighed in on the matter by issuing guidelines illustrating the circumstances under which an employer may be unlawfully discriminating against an employee on the basis of familial responsibility. These include such diverse situations as refusing to hire pregnant women or women with children; not promoting mothers of young children; disciplining male employees for taking time off to care for their children; rejecting a job applicant because he is a single father with sole custody of a disabled child; and giving negative performance evaluations to employees who take leave to care for aging parents.

While these are only guidelines and lack the force of law, they do provide guidance to courts, litigants and employers in this new area. It's also an indication of how the EEOC will look at various situations when investigating a charge of discrimination.

At a minimum, forward thinking employers will want to take care to be proactive. Here is a list of risk management measures to consider:

1. Have your labor counsel update current employment manuals or handbooks to address this issue.

2. Train the company's supervisors and senior management about the do's and don'ts of the new legislation. Disabuse them of stereotypes and other archetypal concepts, such as "employees must choose between work and family life;" "mothers with small children are not committed to their careers;" "pregnant women usually quit after giving birth;" and "employees with sick or disabled relatives cannot concentrate on their jobs." Such training can be incorporated in diversity or harassment training.

3. Add family responsibilities to your existing anti-discrimination policy or create a stand-alone policy. Should SB 836 pass the state Assembly, you will be mandated to do so anyway.

4. Review existing personnel policies and procedures. For example, attendance and absenteeism policies may be facially neutral, but discriminatory nonetheless. The same goes for promotions, compensation, performance evaluations, and scheduling.

5. When you do make an employment decision, take care to ensure that you use well-documented, performance-based criteria.

6. If you get a complaint about family responsibilities harassment or discrimination, treat it seriously and make sure you and your supervisors do not retaliate against the employee who has made a complaint.

To be sure, no one can credibly argue that working parents don't need a break. That's especially so with the so-called sandwich generation that is simultaneously caring for aging parents and young children.

However, work still needs to be done and smaller employers often cannot afford the absence of key personnel who must interrupt work to attend to family responsibilities.

As with all other social development, everyone will need to adjust their expectations. Human resources executives often say that work-life balance creates more productive and loyal employees. Only time will tell.

In the meantime, this will be fertile ground for those that seek to take advantage of the system and for the contingency lawyers who will take on these cases.

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