

# Working parent discrimination may be the newest legal headache for employers



Working parent discrimination may be the newest legal headache for employers. Working parents with children under 14 constitute about one-third of the workforce, approximately 50 million workers. A Washington Post survey showed that women lose their jobs due to childcare at twice the rate of men. Researchers are now also examining the long-term effects on female employment as well. Some are claiming the COVID conundrum, balancing telework with home schooling, may set working women back for a generation. Employers who fire women with childcare responsibilities more often than similarly situated men may violate the Civil Rights Act. Title VII of the Civil Rights Act protects employees from discrimination based on race, color, sex, religion, or national origin.

## The COVID conundrum

In response to the pandemic, government officials urged employers to allow employees to work from home. At the same time, schools and daycare facilities closed. Employees with school age children now had to manage online schooling and their own workload. Employees who were considered essential, often lacked the telework option. Many had to choose between daycare and work.

## Pandemic productivity

Early research shows that productivity for male employees has increased during the pandemic. The opposite has occurred for women. Many believe this results from women often bearing more childcare responsibilities than men. While working from home, children will go to mom more often than dad for assistance with schooling or other matters. Women report rising early to get work done before children wake. As the pandemic drags on, the schedule takes its toll. Terminating workers based solely on productivity may reinforce already existing discrimination.

## The plaintiffs' lawyer's view

Even for businesses only slightly impacted by COVID, some belt tightening may be in order. The temptation may be to ax employees with other needs competing for their time. That mindset can result in terminating women in disproportionate numbers.

That's where the plaintiffs lawyer comes in. The lawyer will be looking for patterns. For example, productivity falls for a male and female employee. The employer fires the female and places the male on a performance improvement plan. Such a scenario does not play well with the Equal Employment Opportunity Commission (EEOC) or a jury.

In another scenario, the complaint is filed as systemic discrimination. Systemic gender discrimination is where a pattern of discrimination plays out against women over time. One fired female could trigger a discovery process

that reveals pay and benefit discrimination as well. One disgruntled employee becomes a class action lawsuit.

## Factoring in race

Essential workers, those who do not have the option of telecommuting, tend to be women of color. Traditionally, these jobs, cashiers, stock clerks, delivery drivers, have been low-paying. Childcare concerns are particularly acute for this group.

Essential workers who are parents will have more scheduling conflicts affecting their ability to arrive at work on time, or at all. Where possible employers should try to find flexible solutions that allow workers to perform their jobs safely and take care of their children. Disproportionately disciplining workers at the bottom of the pay scale could add a count of racial discrimination to any suit.

## Taking a rational view

We are all reading breathless headlines of rising infection and death rates coupled with economic contraction. It's easy to panic and look for short-term solutions. However, going back to a calmer time may be the best approach. Looking at the criteria your company used during previous reductions in force may be helpful. Assuming those are not discriminatory, using the same framework now could be helpful.

Of course, there are many new twists to the current situation. Productivity may be measured very differently in the telework age. If you haven't already, update job descriptions to match the current reality. Any reduction in force should be reviewed by counsel to ensure it does not violate federal or state law.

## Watch out for FFCRA violations

In April, Congress passed the Families First Coronavirus Response Act (FFCRA). Before terminating employees make sure other less draconian options aren't available. For example, employers with fewer than 500 employees must provide two weeks of emergency paid sick leave (EPSL) to all employees. Employers with fewer than 50 employees may request a waiver under certain circumstances. EPSL is only available under specific conditions such as:

- **The employee is subject to a quarantine or isolation order.** The employer must have work for the employee to perform. An employee who can telework, similarly, is not eligible for EPSL because the employee can work from home and still be paid normal pay.
- **The Employee is advised by a health care provider to self-quarantine.** The employee is eligible for EPSL under this provision if a health care provider has advised the employee to self-quarantine because:
  1. The employee has COVID-19; or
  2. The employee may have COVID-19; or
  3. The employee is particularly vulnerable to COVID-19.
- **The employee is experiencing symptoms and seeking a medical diagnosis for COVID-19.** Employees are eligible for paid leave for time spent making, waiting for, or attending an appointment for a test for COVID-19.
- **The employee is caring for an individual who has been quarantined or been advised to self-quarantine.** Individual, in this sense, is defined more broadly than the Family and Medical Leave Act's immediate family member. Sick children definitely qualify.

Employers contemplating furloughing or terminating a working parent should ensure they are not caring for sick children. In most cases, employers can get reimbursed for at least part of the EPSL cost. Currently, these benefits sunset at the end of the year.

## **The daycare crisis**

Daycare in the U.S. is largely operated by a number of very small businesses operating on thin margins. The COVID crisis has been devastating for them. Social distancing, to the extent it can be done with young children, means fewer spots available. Most centers lack the resources to reconfigure their space and perform the deep cleaning necessary to safety. The result has been fewer spots open and higher per child costs. For many childcare facilities, closing will be the only choice leaving few options for working parents.

Because older people are at greater risk, asking grandparents to assist with childcare is not always an option. Many working parents have little choice but to keep kids at home.

Whether schools open in the fall is still very much an open question. Congress is currently debating aid to states and schools. A Senate Republican proposal would tie aid to having at least some in-person schooling. School districts are examining various hybrid methods where students attend school on an intermittent schedule. Others are opting for totally online schooling. Parents and employers face a patchwork or possible scenarios.

## **Long-term considerations**

Although we are clearly in a crisis, it will not last forever. When your business emerges, it will need a diverse pool of talented people to move forward. Many studies show that women who leave the workforce for childcare are far less likely than males to return to the workforce. Those that do return after a long absence find their skills are outdated and now suffer from both gender and age discrimination.

For employers, investing money in training a worker only to have them walk away is not cost effective. Accommodating valuable workers through a reduction in hours may make more sense than a furlough. Once children are back in day care and school, business conditions will likely be better as well. An employee who has stayed connected to the workforce will be able to ramp up faster than a new hire.