

Family Responsibilities 2.0: Workplace Issues Beyond the FMLA



Presentation Materials

In addition to the attached presentation, Schiff Hardin has made available a complimentary and secured on-demand connection of the May 19 **Family Responsibilities 2.0: Workplace Issues Beyond the FMLA** webinar which may be accessed and viewed at a participant's convenience until **September 10**. New webinar participants must register by **August 27** to obtain a PIN code. After August 27, please visit Schiff Hardin's events page at <http://www.schiffhardin.com/Events.htm> for availability instructions.

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Family Responsibilities 2.0
Workplace Issues Beyond the FMLA

Presented to You by the Schiff Hardin Labor and Employment Group



SCHIFFHARDIN_{LLP} Webinar

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Family Responsibilities 2.0
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Family Responsibilities Discrimination:
An Emerging Trend

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Women Working Outside the Home



- Since the 1960's, increase in percentage of women working outside the home
- Almost 60% of all women work
- AFL-CIO , Professional Women: Vital Statistics (2006), www.pay-equity.org/PDFs/ProfWomen.pdf

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Men Are Taking on the Role of the Caregiver



- Men are spending more time on childcare duties and household chores
- Fathers are increasingly taking on the role of the *primary* caregiver

Work - Family Conflicts



- Both father and mother work full-time
- Inability to afford childcare, couples work opposite shifts to watch children
- Lack of flexibility to work mandatory overtime or catch up on projects
- Family crises cause workers to violate employer policies on attendance leading to discipline or discharge

Caregiver Responsibilities



- Childcare
- Eldercare (parents, in-laws and spouses)
- Caring for individuals with disabilities

Laws Protecting Caregivers



- Passage of numerous laws providing protections for caregivers
 - Title VII (1964)
 - Americans With Disabilities Act (1991)
 - State and local laws

An Emerging Trend



- Lawsuits that are geared toward protecting the rights of individuals with caregiving responsibilities
- Family Responsibility Discrimination (FRD) lawsuits are on the rise

Federal and State Lawsuits



- The number of FRD cases has grown almost 400%
- Center For WorkLife Law, Employer Alert (2010), <http://www.worklifelaw.org>

What is the Protected Category?



- The common denominator in family responsibility discrimination is that the conduct must be based on the individual's protected characteristic (sex, race, relationship with a disabled individual) which gives rise to caregiving responsibilities

Are "Family Responsibilities" a Protected Status?



- Federal statutes have been interpreted to protect caregivers even though "family responsibilities" is not a protected category
- Some state and local laws have made "family responsibilities" a protected category

Family Responsibility Claims



- Disparate treatment based on:
 - Female caregivers
 - Pregnant workers
 - Male caregivers
 - Women of color
 - Caregivers of individuals with disabilities
- Harassment against workers with caregiving responsibilities
- Retaliation for opposing unlawful activity

Gender-Based Stereotyping



- Women are often perceived as:
 - More committed to caregiving than to their jobs
 - Less competent than other workers, regardless of how their caregiving responsibilities affect their work
- Men are often perceived as poorly suited to caregiving

Examples of Gender-Based Stereotyping



- Refusing to hire a young married woman based on assumptions she will have children
- Denying female caregivers a promotion based on assumptions about how they might balance work and family responsibilities or whether they are interested in a more demanding position

Examples of Gender-Based Stereotyping



- Considering female caregivers who adopt part-time or flexible work schedules as “homemakers” who are less committed to the workplace than full-time colleagues

Disparate Treatment of Pregnant Workers



- Assumptions that pregnant women will be absent more from work due to their pregnancy
- Refusing to modify duties for a pregnant worker if past practice shows modification of duties for non-pregnant workers with work restrictions

Disparate Treatment of Male Caregivers



- Denying male caregivers a leave of absence that has been provided to working women

Disparate Treatment of Women of Color



- Race-Based - Displayed through less favorable treatment of a race protected (e.g. African-American, Latina) working mother compared to Caucasian working mothers

Disparate Treatment of Caregivers of Individuals with Disabilities



The ADA prohibits:

- Discrimination against a qualified worker because of the disability of an individual with whom the worker has a relationship or association, such as a child, spouse or parent
- Making stereotypical assumptions about the worker's ability to perform job duties satisfactorily while also providing care to a relative or other individual with a disability

Example of Unlawful Stereotyping Based on a Disability



- An employer may not refuse to promote a worker whose husband has cancer because the employer assumes that the worker would have to use frequent leave and arrive late due to her responsibility to care for her husband

Harassment of Worker With Caregiving Responsibilities



- Offensive comments made because of a worker's caregiving responsibilities, gender, race, pregnancy, or association with an individual with a disability where the conduct is sufficiently severe or pervasive to create a hostile work environment

Examples of Harassment



- Inappropriate comments - "Pregnant workers hurt the company's bottom line"
- Inappropriate requirements - Asking for advance notice of medical appointments from a worker who cares for an older parent when the same request was not made of non-caregiver

Retaliation



- Do not take adverse action against an individual who complains of disparate treatment or harassment due to pregnancy or caregiving responsibilities
 - e.g. changing someone's schedule or job duties because he has requested time off to attend a children's doctor's appointment

Best Practices



- Train supervisors
- Develop a non-harassment policy that incorporates protections for caregiving responsibilities
- Develop flexible workplace policies
- Respond to complaints promptly and appropriately
- Prohibit retaliation against caregivers



Fair Labor Standards Act Concerns in Telecommuting

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Telecommuting is Here to Stay



- Work-life balance
- Improved connectivity (Virtual workplaces & PDAs)
- Fuel costs
- Green workplace
- Traffic congestion



Nonexempt Jobs Where Telecommuting is Common



- IT Professionals
- Internet Experts, including Web Designers
- Copywriters
- Financial and Business Analysts
- Service Technicians/Troubleshooters



Heightened Risk of Misclassification



- “Independent Contractors”
 - Work location is one factor, but not most important
- More significant factors
 - Degree of control: hours, quality control, duties
 - Type of work: essential to business
 - Permanency of relationship
 - Other clients of contractor

Compensable-Time Rules



- Employers have an independent duty to record working time for nonexempt personnel. 29 C.F.R. Sec. 516.2(a)(7).
- All time the employee works, regardless of location, is compensable. 29 C.F.R. Sec. 785.12.
- Time is compensable if the employer knows or has reason to know the employee is working. 29 C.F.R. Sec. 785.12.
- An employer may discipline for unauthorized work, but may not refuse to pay.

Methods To Control Time When Away From Office



- Telecommuting agreement:
 - Employer defines employee's schedule
 - Supervisor and employee agree to certify the time and attendance at least biweekly
 - Overtime must be preapproved
 - Employee agrees to perform only work duties
- Telework software
 - Manage time tracking, breaks

Other Key Telecommuting Agreement Terms



- Adherence to company's leave requirements
- IT security expectations
- Explain cost sharing on home equipment
- Workers' compensation
- Disclaimer that program can be cancelled without notice

Waiting-Time Liability



- Waiting time
 - Employees who are “waiting to be engaged” are not entitled to pay
 - Employees who are “engaged to wait” are entitled to pay

Commute Time



- Normally, commute time is not compensable 29 C.F.R. Sec. 785.35
- However, if travel occurs after the employee's first principal activity, the “continuous workday” makes the time compensable 29 C.F.R. 790.6(a)

Travel Time: Examples



- Retail Specialist:
 - Arranged retail displays
 - Checked email and sales reports before first visit
 - Court held travel to first store of the day was not compensable
 - *Kuebel v. Black and Decker* 2009, WL 1401694 (W.D.N.Y.)

Travel Time: Examples




- Insurance adjusters
 - Visit claimants and assess property/vehicle damage
 - Before visit, they check email, plan the day's work, review reports
 - Court held the time was "integral and indispensable" to principal activity of insurance adjustment; thus, compensable
 - *Dooley v. Liberty Mutual Ins. Co.*, 307 F. Supp. 2d 234 (D. Mass., 2004).

Abnormal Travel




- If an employer requires an employee to travel to a different city for a special assignment, that time (less normal commute time) is compensable. 29 C.F.R. 790.6(a)
- Companies often require telecommuters to attend semi-regular trainings or meetings
 - Telecommuters may claim travel time to visit corporate office is "abnormal" and thus compensable

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Federal Health Care Reform and Employers

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37


Labor and Employment Perspective



- Comments as a labor and employment attorney and employee benefits litigator
- Schiff Hardin “task force” of employee benefits attorneys, employee benefits litigators and tax attorneys
- First client update provided in webinar materials




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38


Federal Health Care Reform Acts



- Patient Protection and Affordable Care Act (PPACA), enacted March 23, 2010, as amended by
- Health Care and Education Affordability Reconciliation Act (HCEARA), enacted March 30, 2010



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39

"Grandfathered Plan"



- Any "group health care plan" or individual coverage in effect on March 23, 2010 grandfathered indefinitely
- Retaining grandfathered status:
 - Unclear when plan change might alter grandfathered status
 - Proceed cautiously and await regulatory guidance

"Grandfathered Plan"



- Cost analysis to weigh benefit of plan amendment versus cost of losing grandfathered status
- Still subject to certain insurance market reforms, employer mandates and excise taxes

Collectively Bargained "Health Insurance Coverage"



Special rule for:

- 1) "Health insurance coverage"
- 2) "Maintained" pursuant to one or more CBAs between employee representatives and one or more employers AND
- 3) Ratified before PPACA date of enactment (March 23, 2010)

Collectively Bargained "Health Insurance Coverage"



PPACA § 1251(a)(2) and (d) special rule:

- "...the provisions of this subtitle [C] and subtitle A (and the amendments made by such subtitles) shall not apply until the date on which the last of the [CBAs] relating to the coverage terminates."

Key Requirements: If Not Grandfathered



- Required preventative service coverage with no cost-sharing
- Internal *and* external appeal process
- Same payment for emergency care in- and out-of-network
- New rules on deductible maximums
- New rules on out-of-pocket maximums
- No prior authorization for OB/GYN visits
- Non-discrimination rules for insured plans

2010: Dependent Child Coverage



- Effective for plan years beginning on or after September 23, 2010 (January 2011 for calendar plan years, but as early as October 1, 2010 for other plans)
- Dependent coverage for adult child until child attains age 26, based *solely* on age and status as "child" of participant and *no other criteria* (e.g., financial dependency, shared residency, student or employment or marital status)

2010: Dependent Child Coverage



- Until 2014, coverage not required in grandfathered plans if dependent has access to other employer-sponsored coverage
- Coverage not required for child of child

2010: Dependent Child Coverage



- May not vary "terms of the plan or health insurance coverage" based on child's age until 26 and older
- May not charge more for coverage solely based on child's age (no "premium surcharge")

2010: Dependent Child Coverage



- *Special Open Enrollment Opportunity* (2010 Transition Rule)
 - Must be offered no later than the first day of the first plan year beginning on or after September 23 (even if no other open enrollment opportunity)
 - Must provide written notice of special enrollment opportunity (if included with other open enrollment materials, must be "prominent")

2010: Dependent Child Coverage



2010 Transition Rule for unamended cafeteria plans:

- Employers may permit employees to make pre-tax contributions for dependent child affected by new coverage requirement IF
- Plan amended no later than December 31, 2010 to cover such child retroactively back to first deduction date in 2010

2010: Dependent Child Coverage



- IRS Notice 2010-38, issued April 27, 2010
 - Employer may rely on employee representation of child's date of birth
 - Coverage and amounts paid or reimbursed for medical expenses anticipated to be excepted from employee's income

2010: Dependent Child Coverage



- IRS Notice 2010-38, issued April 27, 2010
 - Expect to extend mid-year election change rules for cafeteria plans to include new coverage eligibility to age 26 as "change in status" event

2010: Dependent Child Coverage



- “Child” receiving COBRA coverage permitted to re-enroll (has special enrollment option)
- IRS Notice appears to suggest that “child” moving from COBRA coverage to parent’s plan may receive another 36 months of COBRA upon aging out at 26

2010: Preexisting Condition Exclusion for Child under 19



- No pre-existing condition exclusion for children under age 19
- Effective for first plan year after September 23, 2010 (January 1, 2011 for calendar year plans; as early as October 1, 2010 for other plans)

2010: Adoption Tax Credit and Adoption Assistance Exclusion



- Employer adoption assistance exclusion from income increased by \$1,000
- Effective taxable years beginning after December 31, 2009
- Extends tax credit through 2011

2010: Employees with Disabled Persons Concerns



- Temporary high-risk health insurance pool established for eligible individuals with pre-existing conditions without health care coverage
- Effective 90 days after PPACA enactment (June 21, 2010)
- Available until 2014

2010: Employees with Disabled Persons Concerns



- Employer and insurer prohibited from offering incentive to encourage employee to drop employer-sponsored coverage in favor of enrollment in high-risk pool
- Employer or insurer found by Secretary to have done so must reimburse pool for its expenses for participant's medical claims

2010: Employees with Elder Care Concerns or Early Retirees



- HHS to establish temporary program to reimburse plan sponsors for claims of non-Medicare eligible early retirees, effective June 1, 2010, ahead of required June 21 date
- HHS to stop accepting applications once projected claims reach \$5 billion

2010: Employees with Elder Care Concerns or Early Retirees



- HHS to provide application form by June 30, 2010
- Approval on a "first come, first serve" basis in order of HHS receipt of complete and accurate application (*defective applications rejected; must file new application*)
- Reimbursements from government must be used to reduce the costs of the plan (may not become "general revenues" of plan sponsor)

2010: Employees with Elder Care Concerns or Early Retirees



- Plan must implement cost-savings programs and procedures for "chronic and high-cost conditions"
- Reimbursements for portion of actual medical costs of claims of non-Medicare eligible early retirees between 55 and 65 years of age (retired, not active) and their spouses or surviving spouses and dependents of any age
- Reimbursement for 80% of net claims cost, indexed for medical inflation, between \$15,000 and \$90,000 of a participant paid by plan, insurer and early retiree

2010 Reporting Concern: Medicare Part D Subsidy



- For taxable years beginning after December 31, 2012, deduction for providing benefits actuarially equivalent to Medicare Part D benefits disallowed to extent of 28% federal subsidy
- Possible immediate accounting impact

2010 (IRS Notice): Small Employers' Tax Credit



- "Qualified small employer"
 - No more than 25 FTE employees for the taxable year
 - Whose average annual wage of employees does not exceed \$50,000
- Phase I small business tax credit for two years of up to 35% (sliding formula) of premiums paid in 2010 by businesses in 2010 or 25% of premiums paid by tax-exempt groups



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2011 Provisions



- Must disclose value of aggregate employer-provided health benefits on employee W-2s
- Small Employer Simple Cafeteria Plan (with exemption from non-discrimination requirements for HCEs and key employees)



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2013 Provisions



- Effective January 1, 2013, employee contributions to health care reimbursement FSAs limited to \$2,500, subject to COLA adjustment
- Tax deduction eliminated for provision of retiree prescription drug benefits actuarially equivalent to Medicare Part D benefits to extent of federal subsidy



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2013 Provisions



- Effective March 13, 2013, employer must provide notice to employees and new hires of:
 - Existence of state health care exchange
 - Employer's paying of less than 60% of the total cost of benefits under its group health care plan
 - Loss of employer contribution (except for free voucher) if employee purchases policy through exchange

2014 Individual Mandate



- Every U.S. citizen and legal resident to obtain qualified health care coverage or pay tax penalty
- Exceptions: religious objectors; persons not lawfully present; incarcerated persons; members of Indian tribes; persons with no income tax liability or with income under 100% FPL; persons with hardship waiver

2014 Individual Mandate



- Individual penalty, greater of:
 - Fixed dollar amount or percentage of income (each increasing by year) up to a cap of bronze level insurance premium
 - Penalties for children are 50% per child up to a cap per family

2014 Free Vouchers



- Employer to provide two free vouchers if:
 - Employee forced to contribute between 8% and 9.8% of family income to employer-provided health care coverage
 - Employee's family income less than 400% FPL
 - Employee not enrolled in employer plan
- Voucher amount equal to amount employer would have provided toward employee's coverage under employer plan with greatest employer contribution

2014 Free Vouchers



- Voucher amount excluded from employee income
- Employer receives tax deduction for voucher amount
- No free rider penalties because employee unable to afford employer plan and receives voucher

2014 State Exchanges



- Small employer may offer employees coverage through state exchange, beginning in 2014
- If state permits, large employer may offer employees coverage through state exchange, beginning in 2017

2014 Group Health Plan Mandates



- No pre-existing condition exclusions or limitations (regardless of age)
- Grandfathered plan must offer dependent coverage for child to age 26 (regardless of whether child has access to other coverage)
- No waiting period in excess of 90 days
- No discrimination based on health status



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2014 Large Employer Mandates



- No requirement to provide health care coverage, but free rider penalty on *monthly basis* for large employers (those with an average of 50 or more FTEs during preceding calendar year)
- Full-time = working at least 30 hrs/wk
 - Part-time employee hours of service in month divided by 120
 - Seasonal workers included only if they work more than 120 days in a calendar year



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2014 No-Coverage Large Employer



- If one employee with no free voucher purchases subsidized coverage on exchange, then employer must pay excise tax equal to 1/12 of \$2,000 for each full-time employee in excess of 30 employed during that month



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2014 Low-Value or High-Cost Large Employer



- Employer plan deemed not to offer minimum essential benefits if:
 - Employer covers less than 60% of actuarial value of cost of health care insurance (low value)
 - Employer charges employee more than 9.5% of employee's household income for coverage (high cost)

2014 Low-Value or High-Cost Large Employer



- If one such low-income employee with no free voucher purchases subsidized coverage on exchange, then employer must pay excise tax, for that month, equal to the lesser of:
 - The "no-coverage employer" penalty described above, or
 - 1/12 of \$3,000 for each such employee enrolled in a state exchange

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Questions and Answers Session

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