

PREVENTING DISCRIMINATION AGAINST EMPLOYEES WITH FAMILY RESPONSIBILITIES

A Model Policy For Employers

Introduction

Family responsibilities discrimination, which is discrimination against employees based on their responsibilities to care for family members such as children or aging parents, is a growing area of liability for employers. Employees and applicants are successfully suing because they have been rejected for employment, passed over for promotion, subjected to hostile work environments, and terminated based solely on employers' negative assumptions about the value and performance of employees who have care obligations outside of work. For example:

A woman won a \$3 million verdict against her employer after proving that she was passed over for promotions because she was a mother. She had been warned that she would have to choose between the career track and the mommy track, and she was asked, "Do you want to have babies or do you want a career here?"

A man won an \$11.65 million verdict against his employer after his supervisors retaliated against him for taking leave to care for his aging and ill parents.

A woman won a \$656,526 verdict because she had been subjected to a hostile work environment by a supervisor because she was a new mother. The supervisor made negative comments about the worker and her child, treated the worker less favorably than other workers, and even threw a phone book at her.

A male state trooper won \$665,000 in damages after he was told "God made women to have babies" and "his wife would have to be dead or in a coma" before he would be allowed time off for care giving responsibilities.

A woman who worked in sales was fired after she became a mother because her supervisor believed she would not be able to cover her sales territory now that she had a baby – despite the fact that she was consistently one of the company's top performers. The supervisor told her, "Look at this as your opportunity to stay home with your new baby."

Stereotyping is a key feature in most family responsibilities cases. Employers in these cases have made outdated and incorrect assumptions about how a parent or other caregiver will act or should act and then made personnel decisions based on those stereotypes (*e.g.*, a man should not care for his infant, or a woman who is a mother won't be able to concentrate on her job). Even in cases where employees have had superior records, supervisors have wrongly assumed that employees will have productivity or attendance problems because of their family responsibilities. Supervisors have also downgraded or harassed employees who have become parents or taken family related leave, sometimes in an effort to make them quit.

Employees have successfully used at least five federal statutes in lawsuits against employers in this growing area of discrimination law: Title VII of the Civil Rights Act of 1964, Pregnancy Discrimination Act, Family Medical Leave Act, Americans with Disabilities Act, and the Equal Pay Act. Although no one federal statute expressly forbids family responsibilities

discrimination, some state and local laws do expressly include discrimination based on “parental status” or “family responsibilities” among other prohibited forms of discrimination. In addition, employees have sued and won on claims of wrongful discharge, breach of contract, infliction of emotional distress, and tortious interference with business relations.

Employers can reduce their likelihood of being sued for family responsibilities discrimination by taking a look at their personnel policies and practices to ensure that this type of discrimination does not occur. Supervisors should be trained to spot and prevent family responsibilities discrimination, and employers should be proactive when problems or complaints of family responsibilities discrimination occur.

Employers who want to stay on top of this developing area of liability can adopt and implement a policy that prohibits discrimination based on family responsibilities. Two approaches toward an effective policy are presented here:

Approach No. 1: Add to an existing anti-discrimination policy

Employers who have existing anti-discrimination policies can amend the policies to add family responsibilities discrimination to the other types of unlawful discrimination prohibited by those policies. Anti-discrimination policies, such as harassment, anti-retaliation, reporting and investigation, and training may also have to be amended. Employers who are in states or localities that prohibit family responsibilities discrimination* should use the language directly from the applicable statute or ordinance in amending their policies.

Example:

(existing policy) It is the Company’s policy not to discriminate against any employee or applicant for employment because of race, color, religion, age, sex, national origin or ancestry, marital status, veteran’s status, or disability in accordance with applicable federal, state, and local law. If an employee believes that he or she has been involved in any incident that was discriminatory, he or she should report the incident immediately to management.

(revised policy) It is the Company’s policy not to discriminate against any employee or applicant for employment because of race, color, religion, age, sex, national origin or ancestry, marital status **or family responsibilities**, veteran’s status, or disability in accordance with applicable federal, state, and local law. If an employee believes that he or she has been involved in any incident that was discriminatory, he or she should report the incident immediately to management.

Employers who add family responsibilities discrimination to existing policies should be sure to notify employees of the amendment as they would any change to existing policies. When employers hold anti-discrimination and anti-harassment training sessions for workers and supervisors, family responsibilities discrimination should be included in the training.

* A partial listing of these states and localities is included at the end of these materials.

Approach No. 2: Create as a stand-alone policy

Employers may wish to have a stand-alone policy prohibiting discrimination based on family responsibilities. A stand-alone policy emphasizes a company's commitment to eliminating discrimination and also provides an opportunity to explain family responsibilities discrimination to employees and supervisors. Two examples follow:

Example A:

The Company does not discriminate against employees and applicants for employment based on their family responsibilities. This means that personnel decisions relating to hiring, terms and conditions of employment, advancement, and termination will not be affected by parental or other family care giving obligations. Anyone who believes he or she has been the subject of a discriminatory action because of his or her family responsibilities should immediately report the matter to Human Resources. The matter will be investigated and corrective action will be taken if appropriate. There will be no retaliation for reporting discrimination or cooperating with an investigation of a report of discrimination.

Example B:

An essential business objective of the Company is to recruit and retain talented, experienced, and productive employees. Employees who are able to meet their family responsibilities obligations are more productive and satisfied with their work, and as a result they are less likely to leave the company. Accordingly, the Company prohibits discrimination against employees and applicants for employment based on their family responsibilities.

An employee has "family responsibilities" when he or she is obligated to take care of a family member. "Family member" includes an employee's spouse or partner, children under the age of majority, children who have reached the age of majority who have physical or mental conditions that impair their ability to care for themselves, siblings, parents, and grandparents.

The Company will not consider family responsibilities in making any personnel decision. This means that personnel decisions relating to hiring, terms and conditions of employment, advancement, and termination will not be affected by parental or other family responsibilities. This also means that the Company will not tolerate harassment or retaliation of any type against employees based on their family responsibilities.

Nothing in this policy changes the obligations of employees to perform their job duties in accordance with the performance objectives of their positions. All employees, regardless of their family responsibilities, are expected to comply with the Company's attendance policy and other related procedures.

Any person who believes he or she has been the subject of family responsibilities discrimination or who has witnessed possible family responsibilities discrimination, or any other form of unlawful discrimination, should report the matter immediately to his or her supervisor or to Human Resources. All reports will be promptly and thoroughly investigated, and corrective action will be taken if appropriate. The Company will not tolerate any form of retaliation against anyone making a report of discrimination or participating in an investigation.

Employers who add a stand-alone policy to an existing policy handbook should be sure to notify employees of the addition as they would with any change to existing policies. When employers conduct anti-discrimination and anti-harassment training for workers and supervisors, family responsibilities discrimination should be included in the training.

Frequently Asked Questions

Q: Who is considered “an employee with family responsibilities” under the policy?

A: “An employee with family responsibilities” is an employee who has responsibilities for caring for a family member such as a spouse or partner, children under the age of majority, children who have reached the age of majority who have physical or mental conditions that impair their ability to care for themselves, siblings, parents, and grandparents. The model policy does not require that the employee be the sole caregiver or even the primary caregiver for the family member and does not require that the employee be legally related to the family member (*i.e.*, the policy would apply when an employee is responsible for caring for an unmarried partner or is raising grandchildren without formal adoption proceedings.).

Q: Won't adopting a family responsibilities discrimination policy create resentment from non-parents?

A: No. The policy is written broadly to apply to males and females, and parents and non-parents alike. Moreover, nothing in the policy creates rights or preferences for employees with family responsibilities compared to other employees that could be perceived as favoritism or that could cause resentment or complaints of unfair treatment.

Q: What impact would adopting a family responsibilities discrimination policy have on my company's flexible work arrangement policies?

A: A family responsibilities discrimination policy should have little or no impact on flexible work arrangement (FWA) policies. Companies would continue to consider FWA requests based on whether the employee's job can be accomplished on a non-standard schedule and whether providing an FWA would make business sense. FWA policies that limit non-standard schedules only to mothers of young children may need to be changed, but that is true regardless of whether a family responsibilities discrimination policy is in place because such a company leaves itself open to legal liability if it refuses, for example, to consider requests for FWAs from fathers.

Q: What other personnel policies should be examined for possible family responsibilities discrimination?

A: Your HR department should examine its policies relating to attendance and leave. For example, it is unlawful discrimination to allow only women to take leave for family illness or after the birth or adoption of a child. Other policies to scrutinize include hiring and promotion (criteria should be related to business needs and not based on outdated and false assumptions about commitment or productivity); work assignments (employees with family responsibilities should have the same opportunity to do high profile work or travel, etc. as other employees); performance reviews, bonuses and raises (criteria should be related to business needs such as rewarding productivity, and pro-rate criteria to take periods of leave for family responsibilities into consideration); and pay policies (pay scales should be equal). It should be noted that these policies should be reviewed regardless of whether your company adopts a family responsibilities

discrimination policy; your company can be sued for having discriminatory policies and practices even if it does not have a policy that prohibits family responsibilities discrimination.

Q: Should I be concerned that adopting a family responsibilities discrimination policy will make it more likely that my company will be sued by its employees for discrimination?

A: No. The policy does not create rights that do not already exist under statute or case law. If your company discriminates against any employee with family responsibilities, it is already subject to being sued. Moreover, by making sure supervisors are trained to recognize and prevent family responsibilities discrimination, adopting a family responsibilities discrimination policy in fact decreases the likelihood that your company will engage in activity that could lead to a lawsuit.

Q: If my company can be sued for family responsibilities discrimination whether it has a policy or not, why should we have a policy?

A: Adopting a family responsibilities discrimination policy is a good first step toward preventing this type of discrimination in your company. It informs supervisors and managers about assumptions and actions that could lead to legal liability, puts your Human Resources department on notice to be vigilant when addressing situations that could lead to liability, and creates an environment where discriminatory incidents can be resolved before they blow up into a lawsuit. In addition, although there is as yet no law on point, having a policy that a company enforces may reduce or eliminate punitive damages if the company is sued for discrimination, much in the same way that companies can avoid punitive damages in certain sexual harassment cases.

Q: Where can I find more information about family responsibilities discrimination?

A: For additional resources and information helpful to employers, please visit our website at www.worklifelaw.org.

Applicable Statutes and Case Law

A. Federal Law

The following federal statutes have been used to address family responsibilities discrimination:

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e - 2000e-16 as amended. *See, e.g., Gallina v. Mintz, Levin, Cohn, Ferris, Glovsky & Popeo*, 2005 US App LEXIS1710 (4th Cir. 2005) (disparate treatment); *Lust v. Sealy, Inc.*, 383 F.3d 580 (7th Cir. 2004) (promotion); *Santiago-Ramos v. Centennial P.R. Wireless Corp.*, 217 F.3d 46 (1st Cir. 2000) (discharge); *Trezza v. Hartford Inc.*, 1998 LEXIS US Dist. 20206 (S.D. N.Y. 1998) (promotion); *Walsh v. National Computer System, Inc.*, 332 F.3d 1150 (8th Cir. 2003) (hostile work environment; retaliation); *Moore v. Alabama State University*, 980 F. Supp. 426 (M.D. Ala 1997) (promotion); *Sigmon v. Parker, Chapin, Flattau & Kimpl*, 901 F.Supp 667 (S.D.N.Y. 1995) (discharge); *EEOC v. Warshawsky & Co.*, 768 F. Supp. 647 (N.D. Ill. 1991) (disparate impact); *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971) (hiring).

Pregnancy Discrimination Act of 1978 (PDA), 42 U.S.C.S. § 2000e *et seq.* *See, e.g., Laxton v. Gap, Inc.*, 333 F.3d 572 (5th Cir. 2003) (discharge); *Bergstrom-Ek v. Best Oil Co.*, 153 F.3d 851 (8th Cir. 1998) (discharge); *Sheehan v. Donlen Corp.*, 173 F.3d 1039 (7th Cir. 1999) (discharge); *Templet v. Hard Rock Construction Co.*, 2003 US Dist Lexis 1028 (E.D. La. 2003) (demotion).

Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2601 *et seq.* *See, e.g., Lui v. Amway Corp.*, 347 F.3d 1125 (9th Cir. 2003)(interference); *Knussman v. Maryland*, 65 F. Supp. 2d 353 (D. Md. 1999), 272 F.3d 625 (4th Cir. 2001) (denial of leave); *Schultz v. Advocate Health and Hospitals Corp.*, No. 01 C 702, 2002 U.S. Dist. LEXIS 9517 (N.D. Ill. May 24, 2002) (retaliation).

Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101, *et seq.* (association clause). *See, e.g., Abdel-Khalek v. Ernst & Young, LLP*, No. 97 Civ. 4514 (JGK), 1999 WL 190790 (S.D.N.Y. April 7, 1999) (applicant with disabled baby not hired); *McGrenaghan v. St. Denis School*, 979 F. Supp. 323 (E.D. Pa. 1997) (mother removed from job and not rehired because she had a disabled son).

Section 1983, 42 U.S.C. § 1983/Equal Protection Clause. *See, e.g., Back v. Hastings on Hudson Union Free School District*, No. 03-78058 (2d Cir. 2004) (stereotyping).

Equal Pay Act of 1963, 29 U.S.C. § 206(d). *See, e.g., Lovell v. BBNT Solutions, LLC*, 295 F. Supp. 2d 611 (E.D. Va. 2003) (EPA violated where part-time employee was paid less per hour than male who did same work but was employed full-time).

Employee Retirement Income Security Act of 1974, 29 U.S.C. §1001, *et seq.* *See, e.g., Fleming v. Ayers & Associates*, 948 F.2d 993(6th Cir. 1991) (ERISA violated where applicant was not hired because employer expected high medical costs for applicant's sick child).

B. State Law

Alaska and the District of Columbia statutorily prohibit discrimination against parents or employees with family responsibilities. Alaska, Sec. 18.80.220 (“parenthood”); District of Columbia, D.C. Code, § 2-1402.11 (“family responsibilities”).

Localities (counties, cities, or towns) that have laws prohibiting employment discrimination against parents and other family caregivers include Atlanta, Georgia, Ord. No. 2000-79, § 1, 12-12-00 (“familial status”); Milwaukee, Wisconsin, Ord. ch. 109 (“familial status”); Tampa, Florida, Human Rights Ordinance Chapter 12, Section 12-26 (“familial status”); Cook County, Illinois, Human Rights Ordinance (“parental status”); Howard County, Maryland, section 12.208 (“familial status”).

In addition, employees have used state anti-discrimination or human rights statutes to address family responsibilities discrimination. *See, e.g., Sivieri v. Massachusetts*, 2003 Mass. Super. LEXIS 201 (Superior Court of Mass. June 26, 2003); *Neis v. Fresenius USA, Inc.*, 219 F. Supp. 799 (E.D. Mich. 2002); *Pullar v. Independent School District No. 701*, 582 N.W.2d 273 (Ct. App. Minn. 1998); *New York City Transit Authority v. State Division of Human Rights*, 573 N.Y.S.2d 49 (1991).

Employees have also used state common law to bring actions against their employers for family responsibilities discrimination. *See, e.g., Zimmerman v. Direct Federal Credit Union*, 262 F.3d 70 (1st Cir. 2001)(tortious interference); *Bailey v. Scott-Gallaher, Inc.*, 480 S.E.2d 502 (Va. 1997) (wrongful discharge); *Grigsby v. Universal Foods Corp.*, 1993 U.S. App. LEXIS 16948 (9th Cir. 1993) (breach of contract, breach of implied covenant of good faith and fair dealing); *Kuest v. Regent Assisted Living, Inc.*, 43 P.3d 23 (Wash. 2002) (wrongful discharge).