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Beyond Strict Compliance: Addressing the Needs of Workers with Younger Children in the COVID- 19 Era

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- New York's School Reopening Plan
- The Law (the ABCs of the 2020 back to school issues)
- Practical Challenges (the gym class hurdles)
- Possible Solutions (the cheat sheets)

New York State's School Reopening Plan

Last Friday, Governor Cuomo Announces New York Schools Can Open This Fall

- Every Region's Infection Rate Is Below the Threshold Necessary By The State's Standards To All Schools To Reopen Based on Strict Department of Health Guidelines
- ***In-Person vs Partial Reopening to Be Determined Locally By Each Individual School District***
- Department of Health Will Review Submitted Reopening Plans From School Districts And Notify Districts of Their Status on Monday
- School Districts Must Have Three-Five Public Meetings with Parents Prior to August 21

The State Will Review School District Re-Opening Plans

- New York State reviewing school district re-opening plans
- Of 749 total districts, 127 districts have not submitted plans, and 50 district submitted deficient plans
- School district to decide how to open – in-person or hybrid – within Department of Health guidelines

DOH Guidelines For Re-Opening Schools

- Covers each school district, private school, and charter school in state, and sets standards for:
 - (1) Reopening of school facilities for in-person instruction,
 - (2) Monitoring of health conditions,
 - (3) Containment of potential transmission of COVID-19, and
 - (4) **Closure** of school facilities and in-person instruction, if necessitated by widespread virus transmission.

From the “Core Principles” of the DOH Re-Opening Guidance:

- ***“In-Person Instruction:*** To ensure equity in education, ***[schools] should prioritize efforts to return all students to in-person instruction at this time. However,*** based on the dynamic nature of local community transmission of the COVID-19 virus, ***a phased-in approach or hybrid model combining in-person instruction and remote/distance learning may be necessary at various times through the 2020-2021 school year.*** In planning for these approaches and models, school plans should indicate if certain students will be prioritized to return to in-person instruction first or more frequently based on educational or other needs (e.g., early grades, students with disabilities, English language learners), given requirements for equity, capacity, social distancing, PPE, feasibility, and learning considerations.

Other Factors

- “Vulnerable populations”: District plans must recognize that some students at increased risk of COVID-19 who may not be comfortable returning to school should be accommodated – including by remote work.

How do you socially distance 60 six-year-olds on a bus?

- **Transportation:** “[I]ndividuals must wear acceptable face coverings at all times on school buses (e.g., entering, exiting, and seated), and that individuals should maintain appropriate social distancing, unless they are members of the same household. Protocols and procedures should include how school buses will be adapted to keep students and staff safe (e.g., how face coverings will be provided to students in need, how members of the same household will be seated together, how social distancing will be conducted on buses, whether bus schedules will be adapted to accommodate reduced capacity, whether any health screening will be conducted at home before students board buses, how parents/legal guardians will be encouraged to drop off or walk students to reduce density on buses)

Plans must address when schools close

- **Closure** includes contingency plans, protocols, and procedures for decreasing the scale or scope of in-person education, and/or closing the school. At a minimum, plans must incorporate the following:
 - Closure triggers:** Identification of the conditions that may warrant reducing in-person education or closing the school, in consultation with state and local health departments, and plan for an orderly closure;
 - Operational Activity:** Determination of which operations will be decreased, or ceased and which operations will be conducted remotely; include process to conduct orderly closures which may include phasing, milestones, and involvement of key personnel; and
 - Communication:** Plan to communicate internally and externally throughout the closure process
 - Schedules** Schools should consider ***staggered arrival and pick-up times*** to facilitate proper social distancing.

In-Person instruction encouraged, but . . .

- While the goal is to return all students to in-person instruction, schools should prepare for a combination of in-person instruction and remote learning to facilitate a phased-in approach or hybrid model, which may be necessary at various times throughout the 2020-2021 school year.
- If COVID-19 cases develop, schools may consider restricting access within school facilities and across school grounds. In such instances, schools may choose to temporarily move classes where an individual has tested positive for COVID-19 to remote/virtual format.
- To maximize in-person instruction, Responsible Parties should consider measures that can be implemented to decrease density such as:
 - o adjusting class or work hours, where appropriate and possible;
 - o staggering schedules and allowing more time between classes

How could this possibly go wrong for employers?

HELP!

The Law (the ABCs of the 2020 Back to School Issue)

Overview of the Law: Alphabet Soup

- FFCRA
- PSL
- FMLA
- ADA
- FRD
- ADEA

Overview of the Law: FFCRA

Families First Coronavirus Response Act

1. Emergency Paid Sick Leave
2. Emergency Family and Medical Leave

Both provide coverage for COVID-19 childcare-related reasons

FFCRA

- Applies to:
 - Private employers with **fewer than 500 employees**
 - Certain public employers
- Exceptions for:
 - Certain health care providers
 - Certain emergency responders
 - Certain small employers (less than 50 employees)

FFCRA

Qualifying reason for emergency paid sick leave or emergency FMLA:

Employee is unable to work (or telework) due to a need to care for the employee's son or daughter under 18 years of age if the **child's elementary or secondary school or place of care has been closed**, or the **childcare provider is unavailable**, due to a public health emergency/COVID-19

FFCRA

For childcare related reasons:

- EPSL: 80 hours/2 weeks
 - Paid at 2/3 of employee's regular rate of pay
 - Cap: \$200 per day and \$2,000 in the aggregate
- EFMLA: 12 weeks (10 weeks paid)
 - Paid at 2/3 of employee's regular rate of pay
 - Cap: \$200 per day and \$10,000 in the aggregate

FFCRA – Recent NY Decision – NYS v. US DOL (S.D.N.Y. August 3, 2020)

The “Work Availability” Rule - Going forward, employers must now provide both expanded FMLA leave and EPSL to eligible employees who have been furloughed for business reasons, as well as employees who may not have been working due to a state or local closure order requiring closure of the business.

Intermittent Leave - Now, employees are permitted to take expanded FMLA leave and EPSL for reasons unrelated to the public health need to quarantine intermittently, without first securing their employer’s consent. This aspect of the ruling has potentially huge implications going into the new school year. As many school districts are opting for full or partial remote education, this ruling suggests that parents may now take FFCRA leave intermittently if they need to care for a child in one of these schools.

Documentation Requirements- Employers must grant leave as long as the employee qualifies and provides the requisite notice set forth in the statute; the employer can require certain documentation at the time the notice is given but cannot require that documentation before the periods set out by the FFCRA itself.

New York State Quarantine Leave, Paid Family Leave, and Disability Laws

- All employees potentially are eligible for leave under the New York State Quarantine Leave law. Leave rights are triggered if employees are unable to work due to “a mandatory or precautionary order of quarantine or isolation due to COVID-19” when that order is issued by the State of New York, New York Department of Health, Local Board of Health, or any governmental entity duly authorized to issue a mandatory or precautionary order due to COVID-19.
- An employee may obtain an order if his or her child is under an order.
- If employees are not entitled to or exhaust paid Quarantine Leave, and they remain on unpaid leave, the law expands rights to benefits for many employees under New York’s statutory disability and paid family leave laws. These expansions appear to apply only to employees who work for employers with fewer than 100 employees.

New York State Quarantine Leave, Paid Family Leave, and Disability Laws

- If the law permits employees to apply for expanded NYPFL benefits, they must establish leave was needed because they: (1) are subject to a mandatory or precautionary order of quarantine or isolation; or (2) need to provide care for a minor or dependent child of an employee who is subject to a mandatory or precautionary order of quarantine or isolation. Short-Term Disability Benefits will be available to employees unable to work due to a mandatory or precautionary order of quarantine or isolation.
- Through these expansions, employees may be eligible for NYPFL benefits concurrently with Short-Term Disability benefits; typically, employees cannot receive both benefits at the same time. The 7-day waiting period for disability benefits also is eliminated for this special benefit expansion. Employees may prove disability by producing a mandatory or precautionary order of quarantine or isolation.
- The potential combined STD/PFL benefit is significant. Eligible employees collecting both Short-Term Disability Benefits and Paid Family Leave Benefits may be entitled to as much as \$2,884.62 per week (approximately \$150,000 annually). The NYPFL cap is \$840.70 per week while disability benefits are capped \$2,043.92 per week.

Overview of the Law: FMLA

Family and Medical Leave Act

- Applies to employers with 50+ employees
 - Employee must have been employed for 12 months
 - Employee must have worked 1250 hours in last 12 months
 - Employee must work at location with 50+ employees in 75-mile radius

FMLA

12 weeks of leave for:

Care for a family member with a serious health condition

Overview of the Law: ADA

Americans With Disabilities Act

- Cannot discriminate against employee because associated with disabled individual
- But no obligation to accommodate medical conditions of family members

Overview of the Law: FRD

Family Responsibilities Discrimination

- EEOC 2007 Enforcement Guidance:

“Although the federal EEO laws do not prohibit discrimination against caregivers per se, there are circumstances in which discrimination against caregivers might constitute unlawful disparate treatment.”

- Supreme Court in 2003:

“the faultline between work and family [is] precisely where sex-based overgeneralization has been and remains strongest.”

- Title VII does not prohibit discrimination based solely on parental or other caregiver status, so an employer does not generally violate Title VII’s disparate treatment proscription if, for example, it treats working mothers and working fathers in a similar unfavorable (or favorable) manner as compared to childless workers.

Overview of the Law: FRD

Family Responsibilities Discrimination risk:

- Women with caregiving responsibilities may be perceived as more committed to caregiving than to their jobs and therefore less competent.
- Male caregivers 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.

FRD: Risky Business

- Asking females, but not males, about their childcare and other caregiving responsibilities;
- Stereotypical or derogatory comments about female caregivers;
- Less favorable treatment soon after learning of caregiving responsibilities;
- Female workers without children or other caregiving responsibilities received more favorable treatment than female caregivers;
- Steering or assigning women with caregiving responsibilities to less prestigious or lower-paid positions;
- Males with caregiving responsibilities received more favorable treatment than females;
- Statistical evidence of disparate treatment against female caregivers;
- Deviating from workplace policy.

FRD

- The EEOC “strongly encourages employers to adopt best practices to make it easier for all workers, whether male or female, to balance work and personal responsibilities. There is substantial evidence that workplace flexibility enhances employee satisfaction and job performance.”

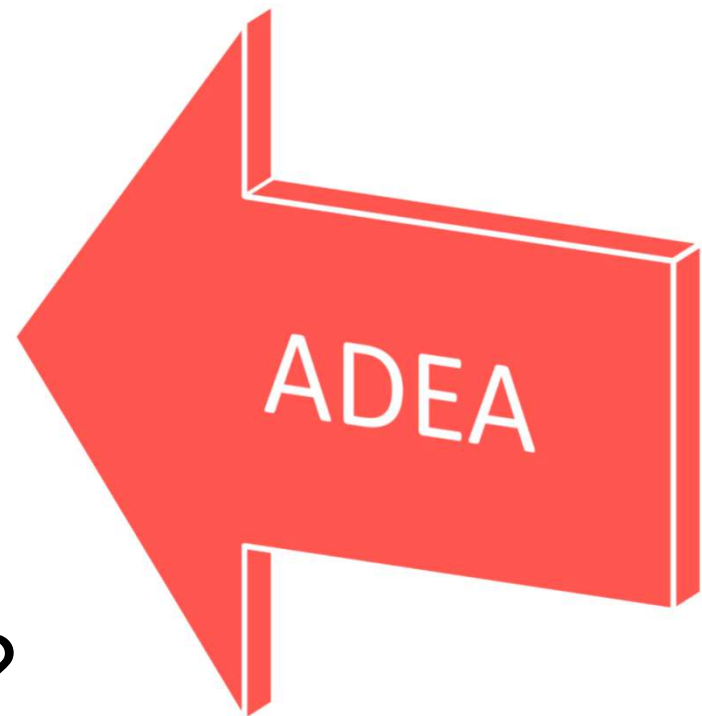
Overview of the Law: ADEA

Age Discrimination in Employment Act

- Cannot discriminate against employees because of their age (over 40)



So,
Who
Works?



The Practical Challenges (the Gym Class Hurdles)

COVID-19 Alert: What you need to know about your workplace rights & ongoing legislative action. [Click here >>](#)



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The correct answer is...They both matter

Which matters more: your job or your family?

No one should have to choose.

We all hope we can care for our loved ones when they need us the most. Yet for many workers, especially those with the fewest resources, a new baby or seriously ill family member can spell financial ruin. Gaps in our laws leave too many women and families on the brink. It doesn't have to be this way. A Better Balance leverages the power of the law to ensure that no worker has to make the impossible choice between their job and their health or their family. When all working parents and caregivers have a fair shot in the workplace, our families, our communities, and our nation are healthier and stronger.

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Absence Management: 3 Questions To Determine How Much Time Off You Are Required To Provide Remain The Same

Is the employee “**entitled**” to be absent with job protection?

- FFCRA, FMLA, NYS Paid Sick Leave and Other NYS Entitlements

Has Company “**committed**” to providing additional job-protected leave?

- Collective Bargaining Agreement
- Your policies and past practices

Is additional leave required as a **reasonable accommodation** for employees with disabilities?

- ADA
- PDA
- NYS pregnancy accommodation laws

Do you have to provide leave because of school/childcare issues?

Outside of the FFCRA and some NYS laws (and assuming the child is healthy), generally...

NO

But...

Practical Challenges

- Economic struggles for employers
- Productivity still important
- Limited in ability to pay for no work
- Not the only reason employees are requesting leave
- Is there a qualified market to fill the roles?
- Will you lose talent (that you have already invested in)?
- Morale
- Retention
- Reputation: Female/Family Friendly?
- Future Recruitment Concerns

Creative Solutions



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FLEXIBILITY

Try Something New

**"We can't do
that..."**

**"We've never done it
like that before!"**



A year ago most of you were opposed to allowing employees to work from home...

Possible Solutions

- Create or expand permanent remote work roles
- Create temporary “transitional” remote work opportunities
- Enhance flexible scheduling
- Expand onsite childcare and tutoring benefits
- Support home childcare and tutoring
- Create a resource board where your employees with school age children can connect with your employees with college and older children who are interested in childcare or tutoring on an individual or pod-basis
- Adjust FSA benefit plans
- Modify FTE Status
- Create temporary unpaid leave programs
- Explore temporary or permanent transfers

Communicate trial basis



Address Remote Work Challenges



Address Remote Work Challenges

- If remote work is going to continue, make sure you have a plan in place that addresses your employee's unique circumstances and your need to get the job done.
- It may be time for a re-set.
- Set forth the expectations for the job.
- Talk to employees about performance issues that have arisen with any previous flexibility.
- Communicate that while you are willing to work with them during this difficult time, and want them to succeed, ultimately, it will require effort on their part to ensure that the job gets done.

Address Remote Work Challenges

- Lower work life balance: unplugging
- More distractions
- Communication/collaboration
- Reliability/accountability
- Increased security challenges
- Harder to manage
- Loneliness/less social interaction
- Less feeling of belonging/employee engagement
- Maintaining motivation

Final Cheat Sheet

Final Cheat Sheet

- Consider how to make flexibility work for you.
- Don't be afraid to try something new.
- Keep in mind that while solutions may be unique to each employee's situation, you need to be consistent in your position that whatever solution is in place, it must satisfy the Company's needs.
- Avoid assumptions about who in a family acts as the primary caregiver.
- Communicate temporary or trial basis of any solution.
- Set expectations/guidelines for remote work or other solutions.
- Handle each request in a thoughtful, deliberate manner, even if it cannot be granted.

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Thank **you.**