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Bay Area takes lead on family friendly work

By Kari Erickson Levine

Once again, San Francisco is at the forefront of enacting new rights intended to protect workers. On Oct. 1, San Francisco's board of supervisors adopted the "San Francisco Family Friendly Workplace Ordinance," which Mayor Edwin Lee signed into law Oct. 9. The new ordinance, which is effective Jan. 1, 2014, aims to "reduc[e] family flight" from San Francisco. Along with the state of Vermont, which enacted similar legislation this past summer, the San Francisco ordinance is the first "right to request" law in the country.

Under the new San Francisco "right to request" ordinance, after six months or more of employment, an employee who works at least eight hours per week on a regular basis has the right to request a "flexible" or "predictable working arrangement." The ordinance applies to any employer who regularly employs 20 or more employees. The law defines "employee" as any person who is employed within the geographic boundaries of the city and county of San Francisco. "Employment" includes any work activity that would be considered "employment" under the federal Fair Labor Standards Act. 29 U.S.C. Section 201 et. seq., and U.S. Department of Labor Guidelines. "Employer" means any person or company who regularly employs 20 or more people. The term "employer" includes the city and county of San Francisco, but it does not include the state or federal government or any other local government entity.

Under the ordinance, a San Francisco employee may make a request for a modified work schedule in order to assist the employee with caregiving responsibilities for (i) a child or children for whom the employee has assumed parental responsibility, (ii) a person or persons with a serious health condition in a family relationship with the employee — spouse, domestic partner, parent, child, sibling, grandparent, or grandchild, or (iii) a parent age 65 or older of the employee. The request may include, for example, a change in the number of hours or times the employee is required to work, where the employee is required to work, work assignments, or predictability in work schedule. Examples include a change in start/end times, part-time schedules, telecommuting, job sharing and part-year schedules. Predictability in scheduling envisions advance notice regarding scheduled work days/times to allow workers to make caregiving arrangements for dependent family members.

The ordinance contains detailed requirements for both employers and requesting employees. Employers are required to post a notice of rights under the ordinance in English, Spanish, Chinese and any language spoken by at least 5 percent of the employees at the workplace or job site as well as to maintain records regarding compliance. Employees are required to make requests in writing and provide an explanation regarding how the request is related to caregiving as well as the effective date and requested duration of the arrangement. The employer must consider each request, meet with the employee within 21 days to discuss the requested arrangement, and provide a decision in writing within 21 days of the meeting. A denial must be in writing and set forth a "bona fide business reason" in support. Bona fide business reasons for a denial may include, among other things, "undue hardship" factors such as the cost of the change (e.g., the cost of productivity loss, retraining or hiring as a result, effect upon ability to meet customer or client demands, or the effect upon the remainder of the workforce). An employee must request reconsideration of a denial within 30 days as a prerequisite to reporting an alleged violation.

The ordinance prohibits adverse employment actions based upon caregiver status. In addition, the ordinance makes it unlawful to interfere with, restrain, deny the exercise of, or attempt to exercise any rights granted under the ordinance or to retaliate against an employee for exercising those rights. The city's Office of Labor Standards Enforcement is charged with administration and enforcement of the law, similar to enforcement of other local labor laws (e.g., health care security, minimum wage, paid sick leave). The office may investigate possible violations, order any appropriate temporary or interim relief, and conduct a full investigation or hearing. The office's review is limited to an employer's adherence to procedural, posting, and documentation requirements as well as the validity of employment discrimination or retaliation claims. During 2014, if a violation is found, only warnings and notices to correct can be issued. Beginning in 2015, the office may impose on a violating employer an administrative penalty of up to $50 per day per employee for each day or portion thereof that the violation occurred or continued.

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Supporters of the new ordinance have expressed the belief that it helps both employees and employers, pointing to studies showing how flexible work arrangements reduce absenteeism, help recruitment and retention, and increase productivity. Opponents focus on the administrative burden and expense of compliance and express fears that the law will deter businesses from remaining or choosing to operate in San Francisco.

In some respects, the "arrangements" promoted by the ordinance are similar to the types of "reasonable accommodations" employers must provide to disabled workers under the Americans with Disabilities Act and the Fair Employment and Housing Act. However, the obligations created by the ordinance are considerably broader in at least certain respects. First, the right to request a workplace arrangement under the ordinance applies to all employees working in San Francisco, not only those who meet the statutory definition of being "disabled" under the state and federal laws. In addition, while employers are not obligated to modify essential job functions as a reasonable accommodation under the ADA and the FEHA, covered "arrangements" under the ordinance may result in changes to the terms and conditions of employment. Indeed, many of the listed "arrangements" — including, most notably, working from home, telecommuting, reduction of or change in work duties, and part-year employment — might not qualify as "reasonable" accommodations at all.

Significantly, the ordinance gives covered employers flexibility in determining whether to grant or deny a requested "arrangement." For example, the ordinance gives employers the right to "require verification of care giving responsibilities as part of the request," which presumably gives employers the ability to deny requested arrangements when verification is not forthcoming. In addition, and more importantly, the ordinance does not provide a limited list of "bona fide business reasons" for denying a requested "arrangement." Instead, the ordinance provides only examples of several "bona fide business reasons." Employers should be free under the ordinance to respond to requests for work schedule changes based on their own specific and legitimate business reasons.

Kari E. Levine *is a partner in the Labor & Employment practice of Jones Day, resident in the San Francisco office. She focuses her practice on the representation of employers in all aspects of labor and employment law and litigation, including state and federal employment discrimination, wrongful discharge, FMLA, CFRA, ADA and Title III ADA access. She can be reached at (415) 875-5812 or kelevine@jonesday.com.*

KARI E. LEVINE
Jones Day