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Plaintiffs Benefit From San Francisco Workplace Ordinance

Law360, New York (March 07, 2014, 5:20 PM ET) -- Each year ushers in a wave of new California employment laws, but this year San Francisco has taken center stage. San Francisco has just become the first municipality in the country to require employers to consider requests by working parents and caregivers for flexible or predictable work arrangements. San Francisco previously waded into employee entitlements by setting its own minimum wage and mandating paid sick leave as well as employer-provided health and transit benefits.

Family Friendly Workplace Ordinance

The Family Friendly Workplace Ordinance is intended to address the challenges of a modern workforce often faced with conflicting family and work responsibilities. Although this law may have been inspired by the best of intentions, it has created a myriad of procedural and compliance obligations to the dismay of employers. The ordinance took effect on Jan. 1, 2014.

The ordinance allows San Francisco-based employees, after completing six months of employment, to request flexible or predictable working arrangements so that they can assist with caregiving responsibilities for: (1) a child, (2) a parent 65 years or older, or (3) a spouse, domestic partner, parent, child, sibling, grandparent or grandchild with a serious health condition. The ordinance also prohibits employers from retaliating against any employee for requesting a flexible or predictable work schedule.

The ordinance applies to employers with 20 or more employees. On Jan. 14, 2014, the ordinance was amended to clarify that employers with 20 or more employees anywhere are covered by it.

A Procedural Labyrinth

Procedurally, any employee requesting this flexible or predictable work arrangement must do so in writing, and specify the arrangement applied for, the date on which the arrangement becomes effective, the duration of the arrangement and how the request is related to caregiving. The employer may require verification of the caregiving responsibilities. Under the ordinance, the arrangement may include modified or predictable work schedules, change in start and end times, working from home and telecommuting. San Francisco's Office of Labor Standards Enforcement has published a sample request form that employees may use in seeking such arrangements.

Under the ordinance, the employer must meet with the employee within 21 days of receiving the request and respond in writing 21 days thereafter. The employer may deny the request for a "bona fide business reason," such as identifiable costs, inability to meet customer demands and insufficiency of work.

Any denial must: (1) explain the bona fide business reason for the denial, (2) notify the employee of his or her right to request reconsideration and (3) provide a copy of the ordinance's provision on the process for requesting reconsideration.

An employee whose request has been denied may submit a written request for reconsideration to the employer within 30 days of the decision. If the employee submits a request for reconsideration, the employer must again meet with the employee. That meeting must occur within 21 days after receipt of the request and the employer must inform the employee of its final decision and the underlying reason in writing within 21 days of that meeting.

Enforcement: Form Over Substance

Significantly, there is no mechanism under this ordinance for an employee to challenge the employer's explanation for denying a flexible or predictable work arrangement. The law makes clear that the San Francisco Office of Labor Standards Enforcement, which is responsible for enforcing compliance with the ordinance, does not have authority to issue findings regarding the validity of the employer's bona fide business reason for the denial.

Instead, the Office of Labor Standards Enforcement is tasked with securing compliance with the ordinance's "procedural, posting and documentation requirements." Principally, the agency investigates and adjudicates procedural errors in the employer's response to employee requests. Additionally, it may compel employer compliance with requirements to post notice of rights under this ordinance and retain documentation.

Within 12 months of the ordinance taking effect, the Office of Labor Standards Enforcement will issue warnings and notices to correct. After this initial grace period, the agency may impose administrative penalties of up to $50 for each day that the violation has occurred, payable to the employee. Where prompt compliance is not achieved, the agency may file a civil action against the employer. In that action, the agency may seek legal and equitable remedies including reinstatement, back pay, and penalties, and an award of attorneys' fees and costs.

One-Size-Fits-All Ordinance

A troublesome aspect of this ordinance is that it is a one-size-fits-all approach to addressing workplace accommodations on account of employees' family responsibilities, without regard to the nature of the business or the position.

Some businesses already allow telecommuting or flexible work schedules or can provide these arrangement with little burden. However, most employers cannot afford the luxury of those flexible arrangements and the value of requiring those employers to comply with the layered procedural requirements of the ordinance on an employee-by-employee basis is questionable. For example, a technology company may on a regular basis allow exempt outside salespersons to telecommute, but a retail employer, on the other hand, is unlikely to consider any such arrangement for its store clerks.

Adverse Ramifications

An obvious downside of this new law is that businesses with only a fraction of their workforce in San Francisco will need to navigate the procedural landmines of this ordinance to ensure compliance. The

net has been widely cast since the amendment requires compliance by any employer with 20 or more employees, regardless of location. Thus, an employer with only one or two employees in San Francisco may need to become familiar with the nuances of the procedural requirements of this ordinance. An employer can simply miss a step in what is effectively an interactive process similar to that required for disability issues and find itself being investigated by the Office of Labor Standards Enforcement for tardy or inadequate responses.

This ordinance also has the potential of spurring private litigation by employees for wrongful termination based on an alleged violation of this ordinance. California recognizes a common law claim for wrongful termination in violation of an important public policy embodied in any constitutional or statutory provision. While the ordinance does not provide a private right of action, foreseeably the plaintiffs bar will attempt to package retaliation claims under this ordinance within the wrongful termination framework. This may be the most significant, long-term impact of the new law.

What Employers Should Do

Employers with a workforce in San Francisco should consider updating their employee handbooks to include a policy detailing their San Francisco employees' rights and obligations under this ordinance. Employers will also need to ensure that the required notice is posted and that recordkeeping and procedural requirements are followed.

It is advisable that businesses designate a human resources professional, or some other appropriate personnel, to become familiar with the ordinance and ensure a proper timely response to an employee's request for a flexible or predictable work arrangement which, given how the law is written, may be legally more significant than the decision of whether to grant the request.

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