Childcare Accommodations and Legal Ramifications during Covid-19

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Childcare Accommodations and Legal Ramifications During COVID-19

By David E. GottliebThe coronavirus pandemic has rapidly created new and previously unforeseen childcare issues for an untold number of employees. Almost overnight, millions of employees are now working remotely from their homes—at least for those who are fortunate to be in professions where that is a viable option. At the same time, childcare options have become more limited, if available at all—schools are shuttering, childcare facilities are closing and domestic workers such as nannies are appropriately cautious about leaving their homes. As a result, many parents find themselves abruptly thrust into handling two full-time jobs at the same time: their usual day jobs and, now, childcare. Among the numerous legal questions this unprecedented situation presents is whether, and to what extent, working parents are entitled to accommodations to handle these circumstances, and whether they are protected against discrimination in the event of layoffs or otherwise.

Consider the following scenario: Maya is an investment banker in New York City and typically works a 10-hour day. Maya has a nanny care for her infant daughter while she is at the office. During this pandemic, Maya is forced to work at home and her nanny is unable to help. Maya now has to handle a 10-hour/day job using less-than-ideal remote access technology—her remote desktop does not operate as smoothly as her office computer; she has one screen on her home computer as opposed to three in her office; she does not have direct access to her assistant or her other staff; she does not have the full panoply of office supplies and other corporate-level printing and copying, etc. With all these hindrances, Maya must work 12 hours to accomplish the same work she previously did in 10. On top of that, she must care for her infant daughter all day, which conservatively involves approximately eight hours of direct, hands-on attention. For Maya to cover her responsibilities (minus *any* time for even a short break), she must work a 20-hour day. And, she must do this every day, indefinitely, until the circumstances of this pandemic change. Maya needs an accommodation to handle all of these responsibilities, but she is worried her employer will not look kindly upon such a request. Moreover, she expects her employer may soon downsize and is concerned the accommodation request could increase the likelihood she will be let go. What are Maya's legal rights in this scenario?

Caregiver and Parental Status Are Protected Categories in New York

The primary New York laws addressing employment discrimination are the state and City Human Rights Laws (NYSHRL and NYCHRL, respectively). In 2015, the NYSHRL was amended to include "familial

status," including that of being a parent, to its list of protected categories. See N.Y. Exec. L. §292(26). Even more directly on point, in 2016 the NYCHRL was amended to include "caregiver status," as a protected category, with "caregiver status" defined to include those who "provide direct and ongoing care for a minor child." See N.Y.C. Admin. Code §8-107(1)(a).

Under both laws, if an employer is motivated in any way—even in small part—to take an adverse action against an employee for a prohibited reason, it is unlawful. Employees—such as Maya—would certainly have a viable discrimination claim if they are terminated (or otherwise treated adversely, such as harassed, given a reduced bonus or passed over for promotion) due to their need to care for a child or due to a request for child caregiving accommodations. For instance, if Maya's employer engages in layoffs and decides to terminate her—due in large part to the business need to reduce headcount/payroll but also because they perceive her to be more difficult to work with compared to employees without caregiver responsibilities—Maya's termination would be unlawful under state and city law.

Federal law does not *expressly* provide for protection against caregiver discrimination, but mistreatment against parent-employees is often a proxy for gender discrimination—which is, of course, unlawful under Title VII of the Civil Rights Act of 1964 (for all private employers with 15 or more employees) and under the Equal Protection Act (for employees of public entities). See, e.g., *Back v. Hastings on Hudson Union Free School District*, 365 F.3d 107 (2d Cir. 2004) (affirming that "stereotyping about the qualities of mothers" can be "a form of gender discrimination"); *Phillips v. Martin Marietta*, 400 U.S. 542 (1971) (finding impermissible a policy of rejecting female applicants with young children while it accepted applications from men with children of the same age).

The law is more uncertain surrounding the rights of employees to seek reasonable accommodations for child caregiving responsibilities. The NYSHRL and NYCHRL both stop short of creating an express statutory right to caregiving accommodations; however, it is clear that employers cannot treat those requesting caregiving accommodations differently than others, as that would constitute discrimination. For instance, if an employer provides a non-caregiving employee with an accommodation it cannot treat a caregiving employee different—i.e. refuse a similar accommodation. See, e.g., *Meagher v. State Univ. Constr. Fund*, No. 1:17-CV-0903 (GTS) (CFH), 2018 WL 3069192, at *9 (N.D.N.Y. June 21, 2018) (denying motion to dismiss where plaintiff alleged that her employer created a hostile work environment and engaged in discriminatory conduct by denying a parenting-related accommodation). Moreover, the bar to establish a discrimination claim is liberal under both laws—an employee need only establish that she was treated "in some way "less well" or had any "inferior terms, conditions or privileges of employment" for an impermissible reason. See N.Y. Exec. L. §296(1)(h); *Mihalik v. Credit Agricole Cheuvreux*, 715 F.3d 102, 110 (2d Cir. 2013) (NYCHRL plaintiff must only establish that she was treated "less well" for a discriminatory reason).

Reasonable Accommodations for the Remote Workforce

In the current environment, the workplace is quickly adjusting to employees working remotely, staggered in-office schedules, social distancing practices and other innovative working solutions. Employers, in a state of flux, are implementing various work-related modifications to assist employees' various needs—this includes accommodating employees for reasons protected by law as well as

accommodating employees for numerous discretionary business concerns. In fact, working remotely as a general concept has long been considered a common accommodation to address a variety of employee needs. In that light, the broad current shift to remote working is, in a very real sense, a largescale work accommodation.

Other accommodations during this time may include modified working hours, designated breaks, extended deadlines, providing additional work supplies (computers, printers, etc.), and the like. Technological advancements and a constantly changing workplace allow for numerous creative solutions to employee concerns, and employees should think critically about modifications that may help, rather than expecting employers to figure out solutions. The more workable proposals an employee can offer, the more difficult it will be for an employer to deny such a request, and the stronger it could make any discrimination claim if the employer reacts adversely. Given the scope of accommodations many employers are now providing to employees across the board, combined with the level of creativity being undertaken to operate businesses remotely, any refusal to accommodate an employee with caregiving responsibilities could be looked at with a high degree of skepticism.

In times like these, when companies may be considering layoffs, employees who have sought accommodations might be feeling particularly vulnerable. To that end, in addition to providing protection against discrimination, the NYSHRL and NYCHRL also protect employees from retaliation if they complain that an employer's refusal to provide accommodations is discriminatory. See N.Y. Exec. L. §296(7); N.Y.C. Admin. Code §8-107(7). For instance, if Maya is denied a requested accommodation or modification, and then complains that such denial is harassment or is discriminatory because others who are not parent-caregivers are receiving similar assistance, it would be unlawful for her employer to take any adverse action against her for having raised such a complaint.

Ultimately, whether an employer's refusal to accommodate constitutes unlawful discrimination requires thoughtful legal analysis and a deep look into the circumstances of each situation. Employees and employers alike must be particularly vigilant in this time of uncertainty to ensure that the rapid changes taking place in the workplace are still executed with careful deliberation to ensure that it does not result in unlawful, discriminatory or retaliatory conduct.

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