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Employment Law Alert

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San Francisco's Family Friendly Workplace Ordinance: Answers to Employers' Common Questions

Citing the myriad challenges facing employees who have caregiving responsibilities, including lengthy commutes and rigid work schedules, San Francisco's Board of Supervisors adopted the Family Friendly Workplace Ordinance (FFWO)[1], which took effect on January 1, 2014. The FFWO, which covers employers with 20 or more employees (anywhere), allows eligible employees working in San Francisco to ask their employers for a "flexible" or "predictable" working arrangement to care for a child, parent or sick family member. The FFWO lays out detailed timing and process requirements for responding to employee requests, and imposes new posting and recordkeeping obligations on employers. The FFWO is enforced by San Francisco's Office of Labor Standards Enforcement (OLSE).

The FFWO is riddled with traps for unsuspecting employers -- and potentially expensive consequences for violations. To assist employers with compliance, we've compiled answers to the common questions employers have been asking about this new ordinance.

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QUESTIONS AND ANSWERS

What is the basic requirement under the new FFWO?

The FFWO allows certain employees working in San Francisco to request a flexible or predictable working arrangement to care for a child, parent or sick family member. Employers must consider any requests and may not retaliate against an employee for making a request under the ordinance or based on the employee's caregiver status.

Which employers are subject to the FFWO?

The ordinance covers any employer that regularly employs 20 or more employees, regardless of the work location of those employees. "Employer" includes any agent of the employer, corporate officers or executives who directly or indirectly employ or exercise control over the wages, hours or working conditions of any employee. "Employer" also

[1] SF Admin. Code, Ch. 12Z; added by Ord. 209-13, File No. 130785, App. 10/9/2013, Eff. 11/8/2013, Oper. 1/1/2014; amended eff. 2/14/2014.

includes any successors in interest to an employer, but does not include a state, federal or local government entity other than San Francisco.

Who is eligible to request a "flexible or predictable working arrangement" for caregiving purposes?

An eligible employee is someone who is employed within the geographic boundaries of San Francisco, regularly works at least eight hours per week, and has been employed by the employer for at least six months. An employee is a "caregiver" if he or she is "a primary contributor" to the ongoing care of: one or more children under age 18 for whom the employee has parental responsibility; the employee's parent(s) aged 65 or older; or a person who has a "family relationship" with the caregiver/employee and suffers from a serious health condition. Employees who perform public health or safety functions may be exempted.

Our employees are subject to a collective bargaining agreement – does the FFWO apply to them?

Yes, unless the requirements of the ordinance are expressly waived in "clear and unambiguous terms" in the collective bargaining agreement.

What is a "flexible" working arrangement?

A "flexible" working arrangement is a change to the employee's terms and conditions of employment that gives the employee flexibility to assist with caregiving responsibilities.

What is a "predictable" working arrangement?

A "predictable" working arrangement is a change to the employee's terms and conditions of employment that provides scheduling predictability so that the employee can assist with caregiving responsibilities.

What are some examples of flexible or predictable working arrangements that an employee may request?

The employee's request for a flexible or predictable working arrangement may include (but is not limited to) a change in the number of hours the employee is supposed to work, the employee's work times and work location, work assignments "or other factors," or even predictability in a work schedule. The employee may seek, for example: 1) a modified work schedule; 2) changes in start and/or end times; 3) part-time employment; 4) job-

sharing arrangements; 5) telecommuting; 6) a reduction or change in work duties; or 7) part-year employment. Note that the FFWO defines a "work schedule" as those days and times within a work period that the employer requires the employee to perform the employment duties for which the employee receives compensation.

What activities are considered "caregiving" responsibilities?

The employee's need to provide care to children under age 18, a person or persons with a "serious health condition" who is in a "family relationship" with the employee, or a parent of the employee age 65 or older. A child includes a biological, adopted or foster child, a stepchild, a legal ward, or a child of a person standing *in loco parentis* to the child.

Who is considered to be in a "family relationship" with the employee?

The employee/caregiver has a "family relationship" to another person if they are related by blood, legal custody, marriage, or domestic partnership, as a spouse, domestic partner, child, parent, sibling, grandchild or grandparent.

What constitutes a "serious health condition"?

"Serious health condition" is defined as an illness, injury, impairment, or physical or mental condition that involves either inpatient care in a hospital, hospice or residential care facility or involves continuing treatment or supervision by a health care provider.

What does an employee have to do to request a flexible or predictable working arrangement under the FFWO?

The employee's request for a flexible or predictable working arrangement must be in writing and specify the working arrangement requested, the date on which the employee wishes to start the arrangement and the duration of the arrangement, and must explain how the request is related to caregiving.

Is there a certain form an employee must use to make the request?

The OLSE has prepared a model FFWO request form that may be used, or the employer may prepare its own form that complies with the ordinance.

What is the employer's responsibility if the employee makes an oral request for a changed working arrangement?

If the employee makes an oral request, the employer, either orally or in writing, must refer the employee to the posted FFWO notice, and instruct the employee to prepare and submit a written request for the desired flexible or predictable working arrangement.

Can the employer ask for verification of the employee's caregiving responsibilities?
Yes. The employer may ask the employee to provide information about his or her caregiving responsibilities as part of the employer's consideration of the request.

What steps must the employer take after receiving an employee request for a changed working arrangement?
Within 21 days of the employee's request, the employer must meet with the employee regarding the request. Then, the employer must consider the request and respond to the employee in writing within 21 days of that initial meeting (although the employee and employer may agree to extend this deadline.)

What happens if the employer grants the employee's request?
If the employer grants the employee's request, the employer must confirm its agreement in writing to the employee. There is no particular form that the employer is required to use for this purpose. Note that if the employer grants a request for a predictable working arrangement, the FFWO does not require the employer to compensate the employee if there is insufficient work for the employee during the period of the predictable working arrangement.

What happens if the employer denies the request?
If the employer denies the employee's request, the employer must provide the employee with a written response containing a bona fide business reason for the denial. The employer must also inform the employee of his or her right to request reconsideration of the denial under Section 12Z.6 of the FFWO, and include a copy of the text of that section in the employer's written response. In particular, Section 12.Z.6 states:

> *(a) An Employee whose request for Flexible or Predictable Working Arrangement has been denied may submit a request for reconsideration to the Employer in writing within 30 days of the decision.*

(b) If an Employee submits a request for reconsideration under this Section, the Employer must arrange a meeting to discuss this request to take place within 21 days after receiving the notice of the request.

(c) The Employer must inform the Employee of the Employer's final decision in writing within 21 days after the meeting to discuss the request for reconsideration. If the request for reconsideration is denied, this notice must explain the Employer's bona fide business reasons for the denial.

What are the employer's obligations if the employee asks for reconsideration of a denied request?

If the employee submits a written request for reconsideration to the employer within 30 days of the denial of the *original* request, the employer must meet with the employee within 21 days, and within another 21 days after that meeting the employer must inform the employee of its final decision, in writing. If the employer denies the request for reconsideration, the employer must explain its bona fide business reasons for the denial.

What constitutes a "bona fide business reason" for denying an employee's request for a changed working arrangement?

Bona fide business reasons for an employer's denial of a request include, but are not limited to: 1) the identifiable cost of the change in a term or condition of employment, including the cost of productivity loss, retraining or hiring employees, or transferring employees from one facility to another facility; 2) a detrimental effect on the employer's ability to meet customer or client demands; 3) the inability to organize work among other employees; and 4) insufficiency of work to be performed during the time the employee proposes to work. (Note that the OLSE *may not* challenge the validity of the employer's bona fide reason for denying an employee's request for a flexible or predictable working arrangement or use the employer's bona fide reason as the basis for finding a violation of the FFWO, as discussed below.)

How often can an employee ask the employer for a changed working arrangement?

Generally, an employee may make a request for a flexible or predictable working arrangement twice every 12 months. However, if the employee experiences a "major life event" – the birth of a child, the placement of a child with the employee through adoption or foster care, or an increase in the employee's duties caring for a person with a serious

health issue – the employee may make one additional request, which the employer must consider.

If circumstances change, can an agreement for a changed working arrangement be revoked?

Yes. On 14 days' written notice to the other, either the employer or the employee may revoke a flexible or predictable working arrangement. If *either party* revokes, the employee may request a different arrangement, and the employer must consider the new request and respond as described above. If the *employer* revokes the arrangement, the employee may make an *additional* request, over and above the two (or three – see above) allowable requests in a 12-month period.

What employee rights are protected under the FFWO?

Generally the FFWO prohibits the employer from taking any adverse employment action against the requesting employee for exercising rights under the ordinance or on the basis of the employee's caregiver status. Specifically, the FFWO provides that it is unlawful for the employer or any other person to interfere with, restrain, or deny the exercise of, or the attempt to exercise, any right protected by the ordinance, and for the employer to discharge, threaten to discharge, demote, suspend, or otherwise take adverse employment action against any person on the basis of caregiver status or in retaliation for exercising rights protected by the ordinance. The rights protected by the ordinance include, but are not limited to: requesting a flexible or predictable working arrangement; filing a complaint with the OLSE alleging a violation; informing any person about an employer's alleged violation; informing any person of his or her rights under the ordinance; cooperating with the OLSE or other person in the investigation or prosecution of any alleged violation; or opposing any policy, practice or act that is unlawful under the ordinance.

Does the employer have to post a notice about the FFWO?

Yes. The OLSE has created a multi-lingual notice that must be posted in the workplace. Every employer is required to post the notice in a conspicuous place at any workplace or job site where any employee (who is employed within the geographic boundaries of San Francisco) works. The notice must be in English, Spanish, and Chinese, as well as translated into any language spoken by at least 5% of the employees at the workplace or job site. If the employer has not already posted the notice, the employer should do so immediately.

Does the employer need to retain documentation regarding the employee request?

Yes. Employers must retain all required documentation for three (3) years from the date of the employee's request for a flexible or predictable working arrangement. The employer must allow the OLSE access to the documentation, on reasonable notice, to monitor the employer's compliance with the FFWO. In the event that the employer fails to maintain or retain the required documentation, or fails to permit reasonable access to the documentation, it will be presumed that the employer violated the FFWO, in the absence of clear and convincing evidence showing otherwise.

Who is responsible for administering and enforcing the FFWO?

Administrative enforcement is handled by San Francisco's Office of Labor Standards Enforcement. Significantly, the OLSE's authority is limited to determining whether the employer has met the FFWO's procedural, posting and recordkeeping requirements, as well as determining whether an employer has discriminated against an employee on the basis of caregiver status, or has retaliated against an employee for exercising the rights protected by the ordinance or for cooperating with an investigation or enforcement action. In addition, the City of San Francisco may pursue enforcement of the FFWO through the civil courts.

What happens if the employer fails to comply with the FFWO?

The OLSE may investigate possible violations, order violators to pay penalties, commence an administrative action, or initiate (through the City) a court action. However, the OLSE *may not* base a finding of violation on the validity of the employer's bona fide reason for denying an employee's request for a flexible or predictable working arrangement. In addition, the City may pursue a legal action in civil court for violations of the FFWO.

What are the penalties for violating the FFWO?

In 2014, the OLSE will only issue a warning and correction notice to any non-complying employer for violation. Starting on January 1, 2015, an employer's failure to comply with the procedural, posting and documentation requirements of the FFWO may trigger administrative penalties up to $50 paid to each employee whose rights were violated, for each day or portion of a day that the violation occurred or continued. If the employer fails to promptly comply with the FFWO, the OLSE may order the employer to pay to the City an

additional $50 per employee per day of violation, to offset the cost of implementing and enforcing the ordinance.

If the City chooses to file a civil action, the City may seek appropriate legal and equitable relief to remedy the violation, including but not limited to: injunctive relief, reinstatement of a wrongfully terminated employee and back pay, any benefits and pay wrongfully withheld, liquidated damages of $50 to each employee whose rights were violated, for each day of violation, and reasonable attorneys' fees and costs.

Where can I find the FFWO and pertinent materials?

The OLSE's website contains a copy of the ordinance and related materials. Go to http://sfgsa.org/index.aspx?page=6305.

What should an employer do to comply with the new FFWO?

Recommended steps include:

- Promptly post in the workplace the required FFWO poster, if the employer has not already done so. The poster may be downloaded from the OLSE's website at http://sfgsa.org/modules/showdocument.aspx?documentid=11256.

- Review and update employee handbooks and other personnel policies to ensure compliance with the ordinance. Miller Law Group has prepared a sample employee handbook policy addressing employee rights and employer responsibilities under the FFWO. Click here to download the sample policy.

- Prepare a form for employees to make requests for flexible or predictable working arrangements. A sample request form may be downloaded at http://sfgsa.org/Modules/ShowDocument.aspx?documentID=11319.

- Develop a means to track employee requests and employer responses in light of the FFWO's specific deadlines, and consider designating a single individual tasked with oversight of the request and response deadlines and process.

- Update recordkeeping procedures to ensure compliance with the specific timing and record retention requirements of the FFWO.

- Train supervisors and managers regarding the FFWO, so that they adhere to company practice and protocols in the event an employee directs a request to them.

- If applicable, seek to amend any collective bargaining agreements to include an express waiver of the FFWO for bargaining unit employees.

- Review any applicable agreements with staffing and temporary employment agencies to confirm their compliance with the FFWO.

Miller Law Group exclusively represents business in all aspects of California employment law, specializing in litigation, wage and hour class actions, trials, appeals, compliance advice and counseling. If you have questions about the Family Friendly Workplace Ordinance or other workplace obligations, please contact us at (415) 464-4300.

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