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Work-life balance is a relatively new and hot topic in the workplace. The primary purpose of work-life balance programs is recognition and resolution of employee stress resulting from the lack of time and scheduling conflicts created by competing work and family obligations. There are many examples of work-life balance initiatives, all of which are designed to alleviate and accommodate employee stress, leading to happier, more productive, and more loyal employees. However, employers must be conscientious of the legal pitfalls presented by the implementation of these initiatives.

This article focuses on some of the legal implications presented when implementing five popular work-life balance initiatives: (I) Flex Time, (II) Remote Work (Telecommuting), (III) Parental and Other Family Leave, (IV) Onsite Childcare, and (V) Wellness Programs.

I. Flex Time

A flexible work arrangement, or "flex time," typically refers to any customized work schedule that deviates from the traditional "9 to 5" schedule. For example, an employee may work from 6 a.m. until 2 p.m. to accommodate his or her afternoon and evening caretaker responsibilities. Employees may work four 10-hour shifts to accommodate a regular three-day weekend. Or an employee may work through their lunch hour so that they can leave early for a family appointment or engagement. Another option employers may consider is job sharing, where two part-time employees share one job. Compensatory time (often referred to as "comp time") allows public sector employers to compensate employees with paid time off instead of overtime; however, comp time is not allowed in the private sector.

The obvious implication of flexible work arrangements involves wage and hour laws. The federal Fair Labor Standards Act ("FLSA") and comparable state wage and hour laws (i.e. the

West Virginia Wage Payment and Collection Act) create many challenges for employers offering flexible work arrangements. It is critical for employers offering flexible work arrangements to properly classify their employees as exempt or non-exempt from the FLSA. For employees who are not exempt from the minimum wage and overtime requirements of the FLSA, accurate timekeeping for employees with flex time is essential to ensure their actual hours worked do not exceed the 40-hour limit. The time worked by non-exempt employees should not be tracked, and they should not be given a regular, or even flexible, work schedule to avoid any implication that they are hourly, non-exempt employees.

Another serious implication of flex time arises when employers create employee-specific work schedules without a formal, written and objective policy for flexible work arrangements. Certainly, employee-specific work arrangements are necessary in some circumstances. For example, flex time can be a reasonable accommodation under the Americans with Disabilities Act. In other circumstances, however, flexible work arrangements may be perceived as a reward, and, consequently, employees who are not granted the same accommodations may view that as an adverse employment decision. This creates fertile ground for discrimination claims.

One last observation regarding flexible work arrangements involves employee benefits. Many benefit plans require an employee to work a minimum number of hours each week. Employers should be sure to review an employee's benefit plans and ensure that a flexible work arrangement will not interfere with those benefits.

II. Remote Work

Many employers now allow employees to work remotely or "telecommute" either on a full-time or part-time basis, which has both benefits as well as legal implications. Some concerns of employers involve productivity of remote employees, collaboration, and monitoring of work

hours. While these are valid concerns, studies show that telecommuting results in more productive and happier employees. Also, employees that telecommute are often better collaborators because they will productively utilize interactions with fellow employees without being bothered with the daily distractions that come with typical office "water cooler" communication.

Working remotely can also improve employee morale. Employees that telecommute spend less time traveling, which frees up time for employees to get work accomplished and focus on other important aspects of their life. Telecommuters are more likely to find time to exercise and focus on their health, which results in lower healthcare insurance costs for employers. Flexible work solutions also reduce employee turnover and increase the recruiting pool. When an employer has technology in place that will allow an employee to work remotely, the areas from which an employee can recruit are endless.

One obvious concern for employers offering remote work opportunities involves workers' compensation. Employers do not control home-based worksites, but may still be liable for work-related injuries of telecommuters. In West Virginia, an employer is responsible for injuries that occur "in the course of" and "as a result of" covered employment, and this standard is the same for employees working from home. When it comes to an injury in the home, the line is obviously blurred between what might have been related to the employee's work and what was personal. Additionally, the concern for employers is that there are no witnesses to injuries that may occur at home, and the employee's "word" is likely all that will be available regarding an injury at home. Employers should ascertain which employees are suited to telecommute and ensure that their offices are set up keeping safety in mind. Furthermore, if telecommuting is permitted, employers should educate employees about the proper way to record hours.

A telecommuting program that is set up and monitored appropriately can benefit employers and employees alike. Employees will have more free time due to reduction in commuting and employers will benefit from happier and more productive employees.

III. Parental and Other Family Leave

Family leave comes in many forms. Employees who are welcoming new children may need maternity or paternity leave. Employees who return to work after welcoming a new child may need leave to help balance childcare responsibilities. And some employees need leave to accommodate caretaker responsibilities for parents or other adult family members. Each kind of family leave offered by employers has legal implications, some of which overlap, and some of which are unique to the type of leave provided.

A. Maternity/Paternity Leave

The federal Family Medical Leave Act ("FMLA") applies to employers with 50 or more employees within a 75-mile radius of the worksite, and it guarantees up to 12 weeks of unpaid leave to employees who worked for the employer at least 1,250 hours during the 12 months prior to the start of FMLA leave. The leave may be taken for the birth and care of a newborn child or placement of a child for adoption or foster care, in addition to other reasons outlined in Section III(B) below.

Although the FMLA only guarantees ***unpaid*** leave to employees welcoming new children, many employers have implemented ***paid*** maternity and paternity leave policies in an effort to accommodate work-life balance for their employees. Such policies should be consistently and fairly applied in the workplace to avoid potential discrimination claims. In fact, in 2014 West Virginia enacted the Pregnant Workers Fairness Act, which applies to employers with 12 or more employees and prohibits discrimination and harassment against women affected by pregnancy,

childbirth, and related medical conditions in the workplace. Thus, employers cannot deny employment opportunities to pregnant women and should be prepared to offer accommodations for pregnant women and mothers who recently gave birth. Likewise, if an employer offers paid leave to workers for some medical conditions, they should be prepared to offer paid leave to women with medical conditions related to pregnancy and childbirth.

Notably, there has been significant discussion at the United States Equal Employment Opportunity Commission ("EEOC") regarding the equality of policies granting paid maternity and paternity leave. In 2017, the EEOC sued Estee Lauder for sex discrimination based on the company's policy of providing paid leave and flexible return-to-work benefits for the purposes of bonding with a new child. Mothers were provided six additional weeks of paid leave beyond the six weeks of paid leave provided for childbirth recovery. Fathers were provided with two weeks of paid leave for child bonding, implicitly labeling fathers as "secondary" caregivers. The EEOC considered the difference in paid leave provided to mothers and fathers discriminatory. The EEOC and Estee Lauder reached a tentative settlement in February, 2018; however, the terms of the settlement have not been disclosed. Regardless, employers may consider taking steps to equalize the paid maternity and paternity leave provided to employees.

B. Other Caretaker Leave

The FMLA also entitles eligible employees to take unpaid, job-protected leave to care for the employee's spouse, child, or parent who has a serious health condition. The FMLA does not apply to situations where an employee needs to attend a parent-teacher conference, or to provide assistance to aging parents who are not suffering from a serious health condition. Employers can adopt paid-leave or flexible work policies to address those situations; however, those policies should be consistently applied.

IV. Onsite Childcare

As stated by President John F. Kennedy, “children are the world's most valuable resource and its best hope for the future.” Two working parents is the norm today, and childcare decisions can be all-consuming. Many working parents struggle with the guilt associated with taking their infants to a daycare setting where they are unable to see them during the work day. Additionally, daycare is expensive, with studies showing that the average annual cost of daycare exceeds the average annual cost of college tuition. On-site childcare programs offered by employers could alleviate these burdens and many more.

For employers, it is a powerful recruitment tool to tell potential employees that on-site childcare is provided. Having on-site childcare may give working parents peace of mind, knowing that they are easily accessible if there is an issue with their child. Nursing mothers can visit their children at lunch time and on breaks, and travel time for parents is lessened by bringing their children to the jobsite. However, on-site childcare also has some drawbacks.

One such drawback is potential liability for the employer. Children are accident-prone and will often suffer minor injuries. Additionally, in order to provide such programs, there are state licensing requirements. In West Virginia, there are requirements to conduct criminal background checks on all employees in daycare centers and have a full-time director who is at the center 35 hours a week or half the hours that it is open, whichever is less. Many other states have similar requirements which cause administrative burdens. With the liability and licensing issues, providing an employer-sponsored daycare service can be costly to employers. However, there is a potential tax benefit. Employers that create qualified on-site child care centers may claim a tax credit of up to 25% of the facility expenditures, plus 10% of any resource and referral expenditures

in a calendar year, up to a limit of $150,000. In order to be eligible for this credit, the employer must maintain the center for at least 10 years or the credit can be recaptured.

Some alternatives to providing a fully subsidized on-site daycare service are available to employers who are dedicated to provide good work-life balance for its employees. One such option would be to provide employees with a cash subsidy to pay for childcare, which is a tax deduction to the employer up to a certain dollar amount. Employers could also work with local centers to reserve spots for employees at a discounted rate with the employer guaranteeing a portion of the difference. Any assistance that an employer can give employees for childcare options will create satisfied and more productive employees, which is a long-term benefit for the employer as well.

V. Wellness Programs

Wellness programs help employees achieve balance by giving them the opportunity to focus on their personal well-being as part of their employment. Studies show that effective workplace wellness programs improve turnover rates, lower employee absenteeism, increase productivity, and increase job satisfaction. Workplace wellness programs can include a wide variety of offerings, including educational programming, onsite exercise opportunities, and health screenings. However, no good deed goes unpunished, and many of the wellness initiatives offered by employers come with legal implications. Privacy issues and lifestyle or health-status discrimination are two implications that employers should keep in mind.

First, employers must be careful when asking employees to provide private health information. The federal Americans with Disabilities Act and the Genetic Information Nondiscrimination Act limit the information that employers can obtain about their employees, and those laws have strict confidentiality requirements regarding the health information that is

provided. Thus, if an employer wants to include a health questionnaire as part of its wellness programs, the employer should take care to comply with all privacy laws. Second, many wellness programs include outcome-based incentives (also known as "health-contingent" programs) involving rewards for achieving certain health goals, such as losing weight, lowering blood pressure, or quitting smoking. Health-contingent programs are subject to strict non-discrimination rules under the federal Affordable Care Act. On the other hand, employers are not prohibited from rewarding employees for ***participating*** in wellness programming. Therefore, many employers focus their wellness programs on participation instead of measurable outcomes. Either way, wellness programs that are properly implemented and administered demonstrate an employer's commitment to helping its employees achieve work-place balance.

In sum, work-life balance programs in the workplace are lofty and beneficial for both employers and employees. As with all employment programs, careful thought and consultation regarding the development, implementation, and administration of policies designed to facilitate work-life balance initiatives is the key to success.