



Southern California Office
1400 N. Harbor Boulevard | Suite 410 | Fullerton, CA 92835
Office: (714) 772-7400 | Fax: (714) 333-4943

Northern California Office
4695 Chabot Drive | Suite 104 | Pleasanton, CA 94588

THAKUR LAW FIRM, APC

Childcare Options for Health Care Provider Employers in the COVID-19 Pandemic

- Thakur Law Firm, APC

As we enter the school year and the COVID-19 pandemic continues to change the way we work and live, employers will be confronted with the need to support employees without childcare options. For medical practices and other employers in the health care industry, matters can become even more complicated by the fact that employees of such businesses, including “health care providers” and “emergency responders,” qualify as some of the most essential personnel for the response to COVID-19.

It is, therefore, of the greatest importance for health care employers to be well informed and equipped to address the childcare issues faced by their employees in the COVID-19 pandemic. According to a May survey by the Society for Human Resource Management (SHRM), 42% of companies that called their employees back to the office did not have a plan to help with childcare. Almost 60% said that they would handle childcare issues on a case-by-case basis. By having a practical and realistic strategy and plan in place, employers can signal stability and support to their employees. At this point, we have all come to realize that there may not be one perfect solution. However, employers do have a variety of options to help their employees through the challenges of balancing childcare and work.

The following are some of the most frequently asked questions by health care employers regarding what solutions might exist for their employees’ childcare issues during the COVID-19 pandemic:

Does it make sense to allow certain employees to work from home?

Allowing employees to work remotely whenever possible has been one of the most popular solutions during the pandemic. According to SHRM, 71% of employers offered full-time remote work. Although working from home with young children to supervise is still difficult, this approach can be effective in providing employees with flexibility. This is particularly true for workplaces that may not be able to financially afford providing childcare benefits. And for medical practice, it would apply to telehealth or telemedicine, but the reimbursements are much less so it may not be as practical to have non-physician staff work remotely, unless for billing and collection.



If allowing certain employees to work from home makes sense for your medical practice, it is helpful to consider ways to make remote work manageable with children. It is recommended to have a Remote Work Policy as part of your Employee Handbook that addresses issues such as eligibility, working expectations, legal considerations and technology issues. Remote workers are entitled to the same legal protections that in-office workers have. One of the most obvious compliance areas to address with remote employees is recording the hours of workers not exempt from state and federal overtime requirements. In addition, Employers need to be clear about what equipment and resources they will provide, whether laptops and videoconferencing tools.

Would allowing more flexible work schedules help employees meet childcare needs?

Flexible work hours are another way employers can ease the burden on caregivers. Allowing employees the freedom to decide when it is most feasible for them to work gives them control over their own schedules and allows them to prioritize caring for children during a typical workday while making up the time during nontraditional hours. BCG's survey found that 82% of employees said employers are trying to help them manage work and caregiving, including flexible hours and deadlines. SHRM puts the percentage of employers offering flexible work hours at 86%.

Do new federal leave laws require providing paid leave to employees impacted by remote schooling or childcare unavailability?

Employees with a qualifying childcare need have a right to take emergency sick leave or emergency family and medical leave under the Families First Coronavirus Response Act (FFCRA). On August 27, 2020, the U.S. Department of Labor's Wage and Hour Division (WHD) and Employment and Training Administration (ETA) both published guidance related to the reopening of schools. WHD has released Frequently Asked Questions (FAQs) for workers and employers about qualifying for paid leave under the Families First Coronavirus Response Act (FFCRA).

The new FAQs explain eligibility for paid leave relative to the varied formats and schedules schools have announced as they plan to reopen, including blending in-person with distance learning. WHD is providing this information to explain the benefits and protections available under both the paid sick leave and the expanded family and medical leave provisions of FFCRA, which revises the prior carte blanche paid leave for any virtual instruction to the following: incentivizing parents to elect sending their students to school



for in person classes a few days a week qualifying for paid leave when a child attends a school operating on an alternate day basis and disqualifying employees from paid leave when a parent chooses remote learning when in-person instruction is available.

Thus, employees may have a right to take leave to care for their children if they are attending school remotely or they have other childcare needs. Congress guaranteed two weeks of paid sick leave at two-thirds of the employee's regular pay for employees who do not have childcare. However, this only applies to certain companies, which according to data from the Bureau of Labor Statistics, CNBC estimates is about 27% of the workforce. And it does not apply to medical practices or its employees that are considered "health care providers" unless the medical practice decides to provide this benefits of the FFCRA anyway as a perk to its employees.

In the event that an employee takes leave under the FFCRA, the employer is eligible for a refundable tax credit to reimburse them for the cost of providing wages during the leave period. Similarly, the CARES Act offers tax credits to eligible employers whose businesses have been impacted by COVID-19 but elect to retain and pay their employees.

Do new federal leave laws necessarily apply to your "health care provider" and "emergency responder" employees?

The FFCRA also allows employers to exclude otherwise eligible employees from its paid leave provisions, who are "health care providers" or "emergency responders." For purposes of the FFCRA, "health care providers" includes "anyone employed at any doctor's office" and, therefore, most employees of small medical practices may be excluded from the FFCRA at the choice of their employers. Additionally, this protection expires at the end of the year.

As the Pew Research Center pointed out in a report in March 2020, approximately a quarter of Americans work in the private sector or for state and local governments and do not have access to paid sick leave to use for childcare purposes.

Is unpaid leave an option your medical practice can provide for employees who are not eligible or have been excluded from paid leave under new federal leave laws?



Employers may choose to provide unpaid personal leave to their workforce or allow employees to use their Paid Time Off, although they are not legally required to do so. If an employer elects to provide unpaid leave, they should document the requirements or restrictions in their employment policy and apply it consistently across the workforce to avoid allegations of discrimination. Employers may also wish to allow employees facing childcare issues to voluntarily go on furlough or temporarily work a reduced schedule. These employees may be eligible to receive unemployment benefits while on leave or working few hours to care for their children.

Can your medical practice assist employees with childcare expenses?

Providing direct subsidies for childcare costs is a much less popular option, SHRM found that the amount of employers either providing or considering providing subsidies was a mere 9%.

Employers who provide or who have considered providing onsite childcare was even lower, at 7%. Although this option was popular among employees pre-pandemic, caregivers are now less excited about options that take the children out of the house and thus increase the possibility that they are exposed to the virus. Additionally, workplaces may be concerned about liability with onsite options.

Would allowing certain employees to work reduced schedules help solve childcare issues?

Although reducing hours comes with the obvious downside of lost income for the employee and lost productivity for the employer, it is another option that SHRM says that 63% of employers have utilized. In dual income households, this may be a more doable option that allows some flexibility for caregivers to take turns caring for children. However, employers still suffer from the loss of hours.

How can you help employees find viable childcare solutions?

There are several options for employers to provide, or at least subsidize, at-home childcare options. This may be the best option for many companies and families, if it is financially feasible.

Care.com, for example, has an employee benefits division called Care@Work. This allows employees to hire caregivers through their employer. According to CEO Tim Allen, over 200,000 employers have joined



since the coronavirus shutdowns. Another option is concierge services, like Cariloop or Wellthy, which provide more in-depth services - pairing employees with coordinators to help find childcare providers. Other companies have chosen to provide backup care or pay for several days of care a week.

What other benefits do employers offer to help employees with childcare needs?

Looking to the future, a long-term option could be paid family and medical leave insurance. A program of this type would allow employers and employees to pay into a fund that would then provide financial assistance to employees who need to take time off for caregiving. Programs like this have started in several states as well, including California, which allows employers to join an existing state program rather than creating their version.

In the event an employer is simply unable to retain an employee who cannot meet workplace demands due to childcare needs, the employer should be aware of their legal obligations to the employee before letting them go and we strongly advise consulting legal counsel before taking such action. First, if the employee to be laid off is currently on leave, the employer must be careful not to violate any employment restoration provisions under state and federal law. While employees are generally not protected from employment actions (such as layoffs or furloughs) which would have affected them had the employee not taken leave, employers are prohibited from firing, disciplining, or otherwise discriminating against an employee *because* that employee has taken leave. Additionally, employers of 25 or more employees must provide employees with up to 40 hours of leave per year for specific school-related emergencies, such as closure of a child's school or day care by civil authorities and they are prohibited from discharging or discriminating against employees for taking leave. (Labor Code section 230.8.)

In these challenging times, health care employers must be especially creative, compassionate, and flexible when providing childcare options for their employees. Employers should be prepared to engage in active dialogue with their employees about reasonable workforce accommodations and clearly communicate expectations with respect to availability and absences. Although it won't be easy, there are tools and creative options that can help employers and employees function and even thrive in a rapidly changing world.



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For specific advice about how the law applies to a particular employee or employment situations, health care employers are encouraged to contact Thakur Law Firm, APC to speak with one of our experienced employment attorneys.