Creating flexibility in California's workplaces

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"Workplace flexibility" is often described as a strategic business imperative. Amongst other things, flexibility allows employees greater work-life balance, assists employers with recruiting, and may reduce traffic congestion and commuting times. For these and other reasons, employers and employees already had ample incentive to discuss flexible work options.

However, San Francisco's Family Friendly Workplace Ordinance, which took effect Jan. 1, suggests discussing workplace flexibility may soon be a legal requirement, not simply a good business practice.

This ordinance codifies an employee's "right to request" flexibility and imposes formal response requirements upon employers. Specifically, it requires employers meet with employees within 21 days of a request for a "flexible working arrangement" or a "predictable working arrangement," and to respond in writing within 21 days of the meeting whether the request is approved or denied. If denied, the employer must explain the "bona fide reasons" for the denial and notify the employee of the right to request reconsideration which, if requested, re-triggers the employer's obligations to meet and provide a further written response.

But the ordinance falls short by not providing the actual ability to be more flexible under California's inflexible labor laws. The fact is, overcommitted employees are not simply seeking another meeting, and human resource managers are not seeking more deadlines for written responses; rather, both are seeking the ability to be flexible without breaking the law.

During this legislative session, some open questions are whether the state Legislature will attempt to implement San Francisco's ordinance state-wide and, if so, whether it will, to paraphrase Bonnie Raitt, "give them something to talk about" during these now-mandatory meetings? Unfortunately, the recent quashing along a party-line vote before an Assembly committee of the Workplace Flexibility Act of 2013 (Assembly Bill 907) suggests the Legislature remains more interested in discussion than provision of workplace flexibility. However, a new year brings new opportunities to actually provide flexibility.

Flexible Workweeks

Employees frequently request a schedule other than the standard five-day, 40-hour workweek. The obvious benefits include working fewer days, thus allowing more time for family and personal pursuits, as well as reduced commuting time and child-care costs. Another benefit is "predictability," since employees know in advance their days off and can schedule familial responsibilities or enroll in education courses to further career opportunities. Such scheduling is often impractical under the current "make up" law (Labor Code Section 513) requiring such time be requested and used in the same workweek.

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The biggest initial hurdle is California's requirement that overtime be paid daily for work beyond eight hours (Labor Code Section 510). Opponents cite this law as a fundamental worker protection, yet neither federal law nor 47 other states require daily overtime. Indeed, organized labor is often the most vocal opponent of flexible work legislation, including AB 907, while negotiating such flexible schedules for its members.

Opponents also claim flexible schedules are already available under Labor Code Section 511, authorizing so-called "alternative workweek schedules." But the procedural requirements for implementing such schedules are so stringent and the potential penalties so great for even unintentional errors that very few employers (less than 2 percent) enact such schedules.

AB 907 and San Francisco's ordinance pursue similar public policy goals and need not be mutually exclusive. AB 907 would have retained the eight-hour workday generally for nonexempt employees, while making it easier for employees to choose an individual alternative workweek schedule. Daily overtime would remain for all other employees, and even those opting for individualized schedules would receive overtime for work beyond 10 hours in a day or 40 hours in a week. In this regard, AB 907 and the ordinance share similar goals but different approaches: The ordinance mandates a discussion about flexibility, while AB 907 proposes both discussion and the ability for an employee to work an actual flexible schedule.

In this legislative session, hopefully a similar bill balancing daily overtime, but allowing greater flexibility for individualized schedules, will enjoy greater support. To the extent labor is concerned about "employer coercion," perhaps it might withdraw its opposition if such schedules could only be requested by the employee in writing, with such approved requests then being filed with the labor commissioner. This approach, which the other two states requiring daily overtime (Nevada and Alaska) use, would allow employees to obtain the same scheduling benefits as union employees, while ensuring these requests were employee-initiated and occurring within an agreed-upon framework and with some measure of agency oversight.

Compensatory Time Off

Employee's also request compensatory time off - that is, extra time off after working a long day instead of overtime pay. Many seek to build and access a compensatory time off bank instead of depleting vacation time or taking unpaid leave. Compensatory time off has been generally available to federal and public sector employees for decades. However, federal law limits compensatory time off to the public sector - which could create conflict if state law differs - and it is only nominally available in California to some private sector employees. Fortunately, Congress is presently considering the Workplace Families Flexibility Act of 2013, which would largely resolve the conflict between California and federal law. If enacted at the federal level, the state Legislature should analyze this bill to minimize unnecessary conflict.

Job Sharing

"Job sharing" is another frequent request, whereby two employees perform the full range of duties and responsibilities associated with a single position. This is an attractive option for employees who wish to work fewer hours, such as individuals with considerable family commitments or approaching retirement. One potential limitation, however, is that California does not explicitly recognize a part-time exemption to the salary-basis test for exemption purposes. This means that as of July 1, 2014, a private employer may feel it must pay two full-time equivalents for a single position. The Legislature should consider approving prorated salary-basis for the job-sharing context.

Inefficiencies created by job sharing may present another problem in a position requiring five-days, 40-hours a week. This might make job sharing a less attractive option for employers than a system requiring overtime after 40 hours of work in a week or after 10 hours in a day. A minor exemption from daily overtime, perhaps up to 10 hours, might encourage increased job sharing for nonexempt employees.

Location Flexibility

Employees often request various forms of location flexibility. Yet California does not have any statutes or regulations specifically addressing telecommuting for private employers. One frequently raised issue is how to comply with California's myriad laws requiring notices be posted in a conspicuous place. While these laws do not specifically state employers must post required items in a telecommuting employee's home, neither do they provide an exemption for such. An express exemption or language clarifying that employers need only provide telecommuters with a link to electronic versions of required workplace posters would eliminate risk of lawsuits.

The legal uncertainty concerning workers' compensation liability for telecommuting employees similarly makes it less attractive, especially given the employer's general lack of control of an employee's home environment. The Legislature should consider an

benefit qualified as an implied contract between workers and the county, a 9th Circuit panel ruled Thursday.

Law Practice
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Law Practice
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Labor/Employment
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Managing your dismissive and bully peers

exemption for telecommuters generally, or a more limited exemption covering particular instances (e.g., the coffee shop office).

At its core, workplace flexibility is of mutual interest for employers and employees, and one that can be encouraged with some minor adjustments to California's labor laws. The proposals mentioned above will encourage flexibility while safeguarding employee protections, thus giving employees and employers something to talk about when employees request a meeting about flexibility.

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