

Working Parents and Other Caregivers – How to Address Challenging Situations That Arise for Employees and Employers

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Working parents and other caregivers often deal with competing obligations for their time and energy. Other stressors associated with parenting and caregiving can bleed into work. Employers want to strike a balance between being a welcoming and accommodating work environment, and getting their business done. The Global Pandemic has changed how many companies are doing business, how many parents and caregivers are evaluating priorities and their schedules, and how people treat being sick.

As an employee, what rights do you have to take time off to care for your children or family? Can your employer count time off against your performance? What rights do you have as a nursing mother? As an employer, what do you do when an employee is not completing their work because they're taking time off to care for their children or family or for other legally protected reasons? How do you evaluate an employee's performance who has taken leave or otherwise utilized protected time off? What accommodations do you need to provide for nursing mothers and other employees with caregiving responsibilities?

Scenario One: A new parent/caregiver takes what the employer considers to be “excessive” sick days to care for child who is in daycare, despite flexible PTO policy. What rights does an employee have? What can an employer lawfully do?

Employer’s Checklist:

- What is the PTO Policy?
- Has employee exceeded PTO?
- Are absences impacting performance?

Applicable Laws:

1. [Minnesota Sick and Safe Leave¹](#)

Minn. Stat. § 181.9413 provides (in relevant part):

An employee may use personal sick leave benefits provided by the employer for absences due to an illness of or injury to the employee’s child . . . for reasonable periods of time as the employee’s attendance may be necessary, on the same terms upon which the employee is able to use sick leave benefits for the employee’s own illness or injury.

* * *

(d) For purposes of this section, “personal sick leave benefits” means time accrued and available to an employee to be used as a result of absence from work due to personal illness or injury, but does not include short-term or long-term disability or other salary continuation benefits.

(e) For the purpose of this section, "child" includes a stepchild and a biological, adopted, and foster child.

* * *

(h) An employer shall not retaliate against an employee for requesting or obtaining a leave of absence under this section.

¹ Minnesota sick and safe leave applies to employees who have worked for the employer at least 12 months; employees who worked at least half-time during the past 12 months; employers that have 21 or more employees at one site; and employers who offer personal sick leave benefits for absence from work due to an employee’s illness or injury.

2. [Family and Medical Leave Act \("FMLA"\)](#)

The FMLA applies to employers with at least 50 employees. Employees are eligible for FMLA if they have worked for the employer at least 12 months and have worked 1,250 hours in the 12 months before taking leave.

The FMLA gives eligible employees the right to take up to 12 weeks of unpaid leave per year to care for a seriously ill family member (including child) or bond with a new child.

3. [Pregnancy and Parenting Leave](#)²

Smaller employers in Minnesota with at least 21 employees must also provide unpaid leave as provided in the Parenting Leave and Accommodations statute. An employee entitled to leave, under this statute, is anyone performing services for hire for an employer for at least 12 months prior to the leave request, and is working at least half-time³ for the 12-month period immediately preceding the leave.⁴ See Minn. Stat. § 181.940, subd. 2. Minn. Stat. § 181.941 (a) provides (in relevant part): “An employer must grant an unpaid leave of absence to an employee who is: (1) a biological or adoptive parent in conjunction with the birth or adoption of a child; or (2) a female employee for prenatal care, or incapacity due to pregnancy, childbirth, or related health conditions.” Subdivision 3 contains a no employer retribution provision: “An employer shall not retaliate against an employee for requesting or obtaining a leave of absence as provided by this section.”

4. [Minneapolis](#), [Saint Paul](#), [Duluth](#) Ordinances

Minneapolis Sick and Safe Leave⁵

Employers with six or more employees must provide paid sick and safe time. Employers with five or fewer employees must provide sick and safe time, but they may choose to provide it unpaid.

² Minnesota's pregnancy and parenting leave law does not address whether parents may take their leave intermittently. However, the law does state that employees may return to work part time during the leave period without forfeiting their right to return to their former position when their leave is over.

³ Note: half-time = one half of how employer's policies' define full-time.

⁴ Minnesota Parenting Leave does not apply to independent contractors.

⁵ Minneapolis Sick and Safe Time is available for:

- Treatment, recuperation, or preventative care for a medical or mental health condition, illness, or injury of the employee (or a covered family member)
- To seek law enforcement, counseling, or other services for domestic abuse, sexual assault, or stalking suffered by the employee or covered family member
- Care for family member during emergency closure of school or place of care, including for inclement weather

Until July 1, 2022, new employers (in their first year of operations) may provide sick and safe time as unpaid.

Sick and safe time accrues, at a rate of one hour every thirty hours worked.⁶ An employer can cap an employee's accrual at 48 hours per year. An employer may also limit the total amount of unused sick and safe time in an employee's "bank" to 80 hours during subsequent years.

An employer's PTO policy can satisfy the Sick and Safe Leave Ordinance requirements.

Saint Paul Sick and Safe Time Ordinance⁷

All Saint Paul employers with employees working in Saint Paul must provide Earned Sick and Safe Time (ESST) to their employees. ESST can be used for an employee's absence from work due to their own or a family member's illness, medical appointments, or critical safety issues, including domestic violence, sexual assault or stalking. All employees working in the City of Saint Paul, for employers located in the City of Saint Paul, are eligible for the benefit, including full time, part-time and temporary workers.

⁶ Employees may access Mpls. Sick and Safe time after the first 90 calendar days of employment.

⁷ Similar to the Minneapolis Ordinance, employees may access Saint Paul Sick and Safe time starting on the 90th calendar day of employment. The Saint Paul Ordinance provides employees are entitled to use accrued sick and safe time for any of the following purposes:

1. For an employee's, or an employee's family member's, mental or physical illness, injury, or health condition, or when an employee or his or her family member needs to obtain medical diagnosis, care, treatment, or preventive care;
2. For an absence due to domestic abuse, sexual assault, or stalking of the employee or the employee's family member, provided the absence is to seek medical attention, obtain services from a victim services organization, obtain psychological or other counseling, seek relocation, or seek legal advice or take legal action;
3. When an employee's place of business is closed by order of a public official to limit exposure to an infectious agent, biological toxin or hazardous material or other public emergency;
4. To care for a family member whose school or place of care has been closed by order of a public official to limit exposure to an infectious agent, biological toxin or hazardous material or other public emergency; or
5. To care for a family member whose school or place of care has been closed due to inclement weather, loss of power, loss of heating, loss of water, or other unexpected closure.

The Saint Paul Ordinance provides broader coverage than the Minneapolis Ordinance, defining “family member” to mean the employee’s child, step-child, adopted child, foster child, adult child, spouse, sibling, parent, step-parent, mother-in-law, father-in-law, grandchild, grandparent, registered domestic parent, and any individual related by blood or affinity whose close association with the employee is the equivalent to a family relationship.

Duluth Sick and Safe Leave⁸

This ordinance requires that all employers of five or more employees provide certain leave benefits to employees who work in Duluth. The ordinance does not apply to government employers.

An employee would have to spend 50% of their working time in Duluth to be eligible. Employees would accrue one hour of sick and safe time for every fifty hours of work. This accrual would start the first day of employment. An employee would be allowed to accrue up to 64 hours per year and could carry over 40 hours to the next year if unused. Any unused hours over 40 would be paid to the employee. Alternatively, an employer could front load the employee with 40 hours of sick and safe time at the inception of employment and in every subsequent year and avoid the accrual calculations. Under either scenario, sick and safe time would not be available to be used until the employee completed 90 days of employment.

Sick time would be available for loss of time from work for the employee’s own medical issue or to care for a family member.

Additional Considerations:

- These leaves can run concurrently, if the employer reserves the right to do so in its policies
 - FMLA can run concurrently with Mpls. sick and safe time and Minnesota Parenting Leave – if the leaves are for the same reason
 - Employers should give employees notice they are running concurrently
- Employers (and employees) should track the time
- What is “excessive” time off should be clearly defined in written policies communicated to employees. Any protected time cannot count towards any absence consideration
- MUST consider consistency. What about other employees who have been away from work due to a heart attack or cancer?
- Employers may require reasonable documentation for time off of 3 consecutive days or greater under the Mpls. and Saint Paul ordinances (likely under other laws as well).

⁸ Safe time, under the Duluth ordinance, refers to paid time off that employees may use due to absences resulting from sexual assault, domestic abuse, or stalking. Employees may use safe time for their own care or for the care of a family member. An employer may limit an employee’s use of ESST to 90 days after the start of employment. There is no leave for emergency school closure. <https://duluthmn.gov/city-clerk/earned-sick-safe-time/frequently-asked-questions/>

- Violations of the Mpls. and Saint Paul ordinances can result in an award of damages; 1 year statute of limitations
- Additional information on Minnesota's sick and safe leave law can be found on the Minnesota Department of Labor and Industry website: [Sick and safe leave | Minnesota Department of Labor and Industry \(mn.gov\)](#)

Scenario Two: A father plans to take advantage of gender-neutral parental leave policy. He reports that a colleague or supervisor has ridiculed his decision and shared that it will hurt his promotion chances. What should the employee do? What should the employer do?

Employer’s Checklist:

- Investigate report and address with colleague or supervisor.
- Employers Should Look to the EEOC Guidance on Best Practices for Employees with Caregiving Responsibilities. <https://www.eeoc.gov/laws/guidance/employer-best-practices-workers-caregiving-responsibilities>⁹
- What no retaliation policies or laws are in play?

Applicable Laws:

1. [Family and Medical Leave Act \("FMLA"\)](#)

The FMLA applies to employers with at least 50 employees. Employees are eligible for FMLA if they have worked for the employer at least 12 months and have worked 1,250 hours in the 12 months before taking leave.

The FMLA gives eligible employees the right to take up to 12 weeks of unpaid leave per year to care for a seriously ill family member (including child) or bond with a new child.

2. [Pregnancy and Parenting Leave](#)

Smaller employers in Minnesota with at least 21 employees must also provide unpaid leave as provided in the Parenting Leave and Accommodations statute. Minn. Stat. § 181.941 (a) provides (in relevant part): “An employer must grant an unpaid leave of absence to an employee who is: (1) a biological or adoptive parent in conjunction with the birth or adoption of a child; or (2) a female employee for prenatal care, or incapacity due to pregnancy, childbirth, or related health conditions.” Subdivision 3 contains a no employer retribution provision: “An employer shall not retaliate against an employee for requesting or obtaining a leave of absence as provided by this section.”

⁹ The EEOC, for 15 years, has been encouraging employers to be flexible with workers with caregiver responsibilities, advocating that mistreatment can amount to a violation of various federal laws. See, e.g., <https://www.eeoc.gov/laws/guidance/enforcement-guidance-unlawful-disparate-treatment-workers-caregiving-responsibilities>; <https://www.eeoc.gov/questions-and-answers-about-eeocs-enforcement-guidance-unlawful-disparate-treatment-workers>. The COVID pandemic has generated renewed interest from the EEOC on this topic. <https://www.eeoc.gov/laws/guidance/covid-19-pandemic-and-caregiver-discrimination-under-federal-employment>

3. [Minnesota Human Rights Act – Sex Discrimination](#)

Minn. Stat. § 363A.08, subd. 2, provides (in relevant part)

Except when based on a bona fide occupational qualification, it is an unfair employment practice for an employer, because of . . . sex . . . to:

(1) refuse to hire or to maintain a system of employment which unreasonably excludes a person seeking employment; or

* * *

(3) discriminate against a person with respect to hiring, tenure, compensation, terms, upgrading, conditions, facilities, or privileges of employment.

4. [Minnesota Human Rights Act – Reprisal](#)

Minn. Stat. § 363A.15 provides (in relevant part):

It is an unfair discriminatory practice for any individual who participated in the alleged discrimination as a perpetrator [or] employer . . . to intentionally engage in any reprisal against any person because that person:

(1) opposed a practice forbidden under this chapter or has filed a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter; or

(2) associated with a person or group of persons who are disabled or who are of different race, color, creed, religion, sexual orientation, or national origin.

A reprisal includes, but is not limited to, any form of intimidation, retaliation, or harassment. It is a reprisal for an employer to do any of the following with respect to an individual because that individual has engaged in the activities listed in clause (1) or (2): refuse to hire the individual; depart from any customary employment practice; transfer or assign the individual to a lesser position in terms of wages, hours, job classification, job security, or other employment status; or inform another employer that the individual has engaged in the activities listed in clause (1) or (2).

5. [Minnesota Whistleblower Act](#)

Minn. Stat. § 181.932, subd. 1 provides (in relevant part):

An employer shall not discharge, discipline, threaten, otherwise discriminate against, or penalize an employee regarding the employee's compensation, terms, conditions, location, or privileges of employment because:

(1) the employee, or a person acting on behalf of an employee, in good faith, reports a violation, suspected violation, or planned violation of any federal or state law or common law or rule adopted pursuant to law to an employer or to any governmental body or law enforcement official;

* * *

(3) the employee refuses an employer's order to perform an action that the employee has an objective basis in fact to believe violates any state or federal law or rule or regulation adopted pursuant to law, and the employee informs the employer that the order is being refused for that reason;

Additional Considerations:

- The discrimination laws apply to men as well as women. *See, e.g., Knussman v. Maryland*, 272 F.3d 625, 630 (4th Cir. 2001) (rejecting male plaintiff's request for leave to care for his wife and newborn baby, defendant declared that plaintiff would qualify as a primary caregiver only if his wife were "in a coma or dead.") Minnesota law is even stronger on this issue.
- Parents working for the same employer only get a *total* of the maximum leave.

Scenario Three: After announcing her pregnancy, an expecting mom experiences isolation and a reduction of responsibilities. The woman's manager states that the soon to be mother shouldn't consider a promotion right now because it'd be too much for the new mom. What should an employee do? What should an employer do?

Employer's Checklist:

- Evaluate stereotypes versus performance.
- Educate managers about responsibilities and individual liability.
- What no retaliation policies or laws are at play?

Applicable Laws:

1. [Minnesota Human Rights Act – Sex Discrimination](#)

Minn. Stat. § 363A.08, subd. 2, provides (in relevant part)

Except when based on a bona fide occupational qualification, it is an unfair employment practice for an employer, because of . . . sex . . . to:

(1) refuse to hire or to maintain a system of employment which unreasonably excludes a person seeking employment; or

* * *

(3) discriminate against a person with respect to hiring, tenure, compensation, terms, upgrading, conditions, facilities, or privileges of employment.

2. [Family and Medical Leave Act \("FMLA"\)](#)

The FMLA applies to employers with at least 50 employees. Employees are eligible for FMLA if they have worked for the employer at least 12 months and have worked 1,250 hours in the 12 months before taking leave.

The FMLA gives eligible employees the right to take up to 12 weeks of unpaid leave per year to care for a seriously ill family member (including child) or bond with a new child.

3. [Pregnancy and Parenting Leave](#)

Smaller employers in Minnesota with at least 21 employees must also provide unpaid leave as provided in the Parenting Leave and Accommodations statute. Minn. Stat. § 181.941 (a) provides (in relevant part): “An employer must grant an unpaid leave of absence to an employee who is: (1) a biological or adoptive parent in conjunction with the birth or adoption of a child; or (2) a female employee for prenatal care, or incapacity due to pregnancy, childbirth, or related health conditions.” Subdivision 3 contains a no employer retribution provision: “An employer

shall not retaliate against an employee for requesting or obtaining a leave of absence as provided by this section.”

Great Resources:

- <https://www.eeoc.gov/laws/guidance/enforcement-guidance-unlawful-disparate-treatment-workers-caregiving-responsibilities>;
- <https://www.eeoc.gov/questions-and-answers-about-eeocs-enforcement-guidance-unlawful-disparate-treatment-workers>.
- <https://www.eeoc.gov/laws/guidance/employer-best-practices-workers-caregiving-responsibilities>

Additional Considerations:

- May also have federal claims, such as claims under the Pregnancy Discrimination Act, Title VII. See, generally, <https://www.eeoc.gov/laws/guidance/covid-19-pandemic-and-caregiver-discrimination-under-federal-employment>
- Minnesota Human Rights Act also requires employers to accommodate pregnancy the same as it would accommodate a similarly limited person with a disability.
- When it comes to pregnancy accommodations, employers always have to ask themselves, what have they accommodated historically for the most sympathetic health situation for long term employees. Inconsistency = successful employee lawsuits!

Scenario Four: A new mom returns to work after having her first child. Her baby typically nurses three times during her work hours. The woman works in a cubicle in a private area of the office. Employer has a nursing mothers' room, but it is located in a different building that would take employee 10-15 minutes to walk to. What should employee do to request accommodations to pump at work? What accommodations should the employer provide?

Employer's Checklist:

- Evaluate spaces available.
- Consider additional nursing mothers' rooms
- Balance business needs versus cost of retrofitting new space to accommodate nursing mom.
- Remember – NO RETALIATION

Applicable Laws:

1. [Nursing Mother Laws](#)

Minn. Stat. § 181.939, subd. 1, provides (in relevant part):

(a) An employer must provide reasonable break times each day to an employee who needs to express breast milk for her infant child during the twelve months following the birth of the child. The break times must, if possible, run concurrently with any break times already provided to the employee. An employer is not required to provide break times under this section if to do so would unduly disrupt the operations of the employer. An employer shall not reduce an employee's compensation for time used for the purpose of expressing milk.

(b) The employer must make reasonable efforts to provide a room or other location, **in close proximity to the work area**, other than a bathroom or a toilet stall, that is shielded from view and free from intrusion from coworkers and the public and that includes access to an electrical outlet, where the employee can express milk in privacy. The employer would be held harmless if reasonable effort has been made.

(c) For the purposes of this subdivision, "employer" means a person or entity that employs one or more employees and includes the state and its political subdivisions.

(d) An employer shall not retaliate against an employee for asserting rights or remedies under this subdivision.

2. [Section 7\(r\) of the Fair Labor Standards Act](#)

Section 7 of the Fair Labor Standards Act of 1938 (29 U.S.C. 207) also provides an employer shall provide “reasonable break time for an employee to express breast milk for her nursing child for 1 year after the child’s birth each time such employee has need to express the milk.” An employer

must provide “a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public, which may be used by an employee to express breast milk.”

Breaks may be unpaid. This provision does not apply to employers that employ less than 50 employees “if such requirements would impose an undue hardship by causing the employer significant difficulty or expense when considered in relation to the size, financial resources, nature, or structure of the employer’s business.”

Additional Considerations:

- Note the Minnesota law is broader than the federal law.
- Document reasonable efforts to comply with the law.
- There does not appear to be any case law on how “unduly disrupt the operations of the employer” is interpreted pursuant to Minn. Stat. § 181.939. However, the “unduly disrupt” language appears in other statutes regarding leave. For example, 29 CFR § 553.25 (which applies to employees of state and local governments) provides that “[m]ere inconvenience to the employer” is insufficient to satisfy the “unduly disrupt” standard. Rather, there must be an “unreasonable burden on the [employer’s] ability to [run its business].”
- Additional resource information for employees and employers can be found on the Minnesota Department of Labor and Industry website: [Pregnant workers and new parents | Minnesota Department of Labor and Industry \(mn.gov\)](#)

Scenario Five: Employee with high risk, unvaccinated child requests an accommodation to work from home. What rights does an employee have? What can an employer lawfully do?

Employer’s Checklist:

- Consider historical practice and consistency
- Practical considerations regarding retention and performance
- Be aware of the City of Mpls. COVID-19 FAQ’s/Guidance

Applicable Laws:

1. [Family and Medical Leave Act \("FMLA"\)](#)

The FMLA applies to employers with at least 50 employees. Employees are eligible for FMLA if they have worked for the employer at least 12 months and have worked 1,250 hours in the 12 months before taking leave.

The FMLA gives eligible employees the right to take up to 12 weeks of unpaid leave per year to care for a seriously ill family member (including child) or bond with a new child.

2. [Minnesota Human Rights Act \(“MHRA”\)](#)

Minn. Stat. § 363A.08, subd. 2 provides (in relevant part):

Except when based on a bona fide occupational qualification, it is an unfair employment practice for an employer, because . . . status with regard to . . . familial status, . . . disability . . . to:

- (1) refuse to hire or to maintain a system of employment which unreasonably excludes a person seeking employment; or
- (2) discharge an employee; or
- (3) discriminate against a person with respect to hiring, tenure, compensation, terms, upgrading, conditions, facilities, or privileges of employment.

Additional Considerations:

According to the City of Minneapolis COVID Guidance:

An employee's accrued sick and safe time hours are legally protected for their use due to Coronavirus symptoms, testing, infection, or vaccine. Protection extends to the employee and the employee's care of a covered family member. Ordinance protection includes, but is not limited to: •

- Coronavirus vaccine or its side effects; •
- Coronavirus screening; •

- Care or quarantine due to Coronavirus symptoms or infection; •
- Testing or quarantine following close personal contact with a Coronavirus infected or symptomatic person; •
- Covered family members' school or place-of-care closure due to Coronavirus; and •
- Workplace closure by order of a public official due to Coronavirus.

However, employers have some protection from abuse.

FAQ NO 7.) Q. May an employee use accrued Sick and Safe Time to preemptively self-quarantine?

A: Preemptive self-quarantine (i.e., without reason to believe the employee has contracted an illness) is not covered by the Sick and Safe Time ordinance.

http://sicktimeinfo.minneapolismn.gov/uploads/9/6/3/1/96313024/covid-19_and_sst_final_6_18_21.pdf

Similarly, according to the Minnesota Department of Labor guidance:

Under a state health law, if you have contracted or been exposed to COVID-19 and the Minnesota Department of Health (MDH) recommends you stay home (isolate or quarantine yourself), your employer may not discharge, discipline or penalize you for missing work. This protection also applies if you need to care for a minor or adult family member for whom MDH recommends isolation or quarantine. (The adult family member must have a disability or be a vulnerable adult.)

[Worker protections related to COVID-19 \(mn.gov\)](#)

Additional Considerations:

- Note the Minnesota law is broader than the federal law.
- Document reasonable efforts to comply with the law.
- There does not appear to be any case law on how “unduly disrupt the operations of the employer” is interpreted pursuant to Minn. Stat. § 181.939. However, the “unduly disrupt” language appears in other statutes regarding leave. For example, 29 CFR § 553.25 (which applies to employees of state and local governments) provides that “[m]ere inconvenience to the employer” is insufficient to satisfy the “unduly disrupt” standard. Rather, there must be an “unreasonable burden on the [employer’s] ability to [run its business].”