

What Do You Do When You're Not in the Room Where It Happened? *Managing to Protect Your Assets*

Lack of policies and failure to follow existing policies costs firms **\$MONEY\$**

A major consulting firm analyzed employment practices liability claims filed against its law firm clients from 2005-2017. There were *1,315* charges of wrongful conduct (including retaliation, wrongful termination and discrimination based on disability, gender, age and race). The firms and their insurers paid a total of *\$91,101,674* in judgments and settlements and spent in excess of *\$44,000,000* in defense costs.

Pamela M. Harper, *The Anniversary of #METOO: A Time of Reckoning for Law Firms*, 2018-OCT Bus. L. Today 1

In 2018, the ABA found that :

- 45% of women lawyers reported that they had been denied proper access to business development opportunities because of their gender
- 58% of women lawyers reported that they had experienced demeaning comments, stories or jokes
- 60% of women lawyers reported that they had been mistaken for a lower level employee
- 30% of women lawyers reported that their gender affected their ability to achieve salary increases or bonuses, desirable assignments and access to sponsors

Hilarie Bass, *IT WAS A VERY GOOD YEAR: Research on Long-Term Careers for Women Tops President Bass' Achievements*, 104-AUG ABA J. 8

Women leave the practice of law because:



- 60% of women have caretaking commitments (compared to 46% of men)
- 39% of women cook their families' meals (compared to 11% of men)

- 54% of women handled child care arrangements (compared to 1% of men)
- 34% of women prioritize their childrens' needs (compared to 5% of men)

Liane Jackson, *Why do experienced female lawyers leave? Disrespect, social constraints, ABA survey says* (Aug. 3, 2018), www.abajournal.com/news/article/why_do_experienced_female_lawyers_leave_disrespect_social_constraints_ABA

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Harassment and Discrimination are Ethical Problems

Managing a firm that permits or conducts harassment and discrimination of its employees is a mire of ethical problems. An Ohio Attorney was suspended due to his harassment of his staff. <https://www.supremecourt.ohio.gov/rod/docs/pdf/0/2018/2018-Ohio-2990.pdf>.

The Code of Judicial Conduct and Rules Governing Standard of Conduct of Magisterial District Judges requires judicial officers to perform their duties without bias or prejudice, including the treatment of staff, and to require lawyers in their courtrooms do the same. The PA Rules of Professional Conduct Preamble a requires lawyers to conform to the law, which would include federal laws prohibiting sexual harassment. The American Bar Association has amended the Model Rules to include a provision on harassment as an ethical violation if lawyers “engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law.” The ACBA has also taken a stand and the ACBA Code of Professional Conduct speaks against discriminatory behavior by members of the profession.

Code of Judicial Conduct

Rule 2.3. Bias, Prejudice, and Harassment.

(A) A judge shall perform the duties of judicial office, including administrative duties, without bias or prejudice.

(B) A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, or engage in harassment, including but not limited to bias, prejudice, or harassment based upon race, sex, gender identity or expression, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, and shall not permit court staff, court officials, or others subject to the judge’s direction and control to do so.

(C) A judge shall require lawyers in proceedings before the court to refrain from manifesting bias or prejudice, or engaging in harassment, based upon attributes including but not limited to race, sex, gender identity or expression, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, against parties, witnesses, lawyers, or others.

Rule 2.8. Decorum, Demeanor, and Communication with Jurors.

(B) A judge shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, court staff, court officials, and others with whom the judge deals in an official capacity, and shall require similar conduct of lawyers, court staff, court officials, and others subject to the judge's direction and control.

Rules Governing Standard of Conduct of Magisterial District Judges

Rule 2.3 Bias, Prejudice, and Harassment

(A) A magisterial district judge shall perform the duties of judicial office, including administrative duties, without bias or prejudice.

(B) A magisterial district judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, or engage in harassment, including but not limited to bias, prejudice, or harassment based upon race, sex, gender identity or expression, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, and shall not permit court staff, court officials, or others subject to the magisterial district judge's direction and control to do so.

(C) A magisterial district judge shall require lawyers in proceedings before the court to refrain from manifesting bias or prejudice, or engaging in harassment, based upon attributes including but not limited to race, sex, gender identity or expression, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, against parties, witnesses, lawyers, or others.

Rule 2.8 Decorum, Demeanor, and Communication in an Official Capacity

(B) A magisterial district judge shall be patient, dignified, and courteous to litigants, witnesses, lawyers, authorized representatives, court staff, court officials, and others with whom the magisterial district judge deals in an official capacity, and shall require similar conduct of lawyers, court staff, court officials, and others subject to the magisterial district judge's direction and control.

PA Rules of Professional Conduct

The Rules of Professional Conduct Preamble (5)

A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs. A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process.

<https://www.padisciplinaryboard.org/for-attorneys/rules/rule/3/the-rules-of-professional-conduct>

ACBA Code of Professional Conduct

A. A lawyer should strive for equal opportunity for members and prospective members of the legal profession and understand that there is no place in the profession for any form of bigotry, discrimination, or prejudice.

B. A lawyer should understand that the best interests of the profession and the clients that he or she serves depend, in substantial part, on the judgments and divergent experiences of lawyers that are drawn from a diverse pool of individuals.

C. A lawyer should strive for the full and equal participation of lawyers of all races, colors, ages, religions, genders, minorities, and national origins, lawyers with disabilities, and those with differing sexual orientations or gender identities, and individuals in any other groups historically disenfranchised.

D. Every lawyer should have an equal opportunity to succeed in the profession and be compensated according to his or her abilities, without regard to that person's race, color, age, religion, gender, status as a minority, national origin, disability, sexual orientation, gender identity, or as a member of any other group historically disenfranchised.

E. A lawyer should refrain from engaging in conduct that exhibits or is intended to appeal to or engender bias against a person on the basis of that person's race, color, age, religion, gender, status as a minority, national origin, disability, sexual orientation, gender identity, or as a member of any other group historically disenfranchised, whether that bias is directed to clients, prospective clients, other counsel, court personnel, witnesses, parties, jurors, judges, judicial officers, or any other participants in the legal process.

<http://www.acba.org/Code-of-Professionalism>

Is My Firm Too Small to Worry About Discrimination?

Before dismissing your firm as too small to be concerned about discrimination or a hostile work environment you should consider the effect on your reputation, practice and the costs associated with training and establishing new employees that leave due to discrimination.

A major consulting firm analyzed employment practices liability claims filed against its law firm clients from 2005-2017. There were 1,315 charges of wrongful conduct (including retaliation, wrongful termination and discrimination based on disability, gender, age and race). The firms and their insurers paid a total of \$91,101,674 in judgments and settlements. They also spent in excess of \$44,000,000 in defense costs. Pamela M. Harper, [The Anniversary of #METOO: A Time of Reckoning for Law Firms](#), 2018-OCT Bus. L. Today 1.

Morrison Foerster is facing a potential nationwide class action for discriminatory treatment of women who become pregnant or have children and punishing those women for using leave policies. <https://news.bloomberglaw.com/us-law-week/morrison-foerster-sued-for-pregnancy-bias>

Many Federal Laws apply to firms with 15 or more employees, PA State Law under the Pennsylvania Human Relations Act, applies to employers with 4 or more employees and the City of Pittsburgh Municipal Ordinance does not require a threshold number of employees.

See the following links to articles discussing the impact of discrimination and harassment in the workplace.

- a. <https://hbr.org/2017/11/training-programs-and-reporting-systems-wont-end-sexual-harassment-promoting-more-women-will>
- b. <https://www.floridabar.org/the-florida-bar-news/why-are-women-lawyers-leaving-the-profession/>
- c. <https://www.americanbar.org/content/dam/aba/administrative/women/you-cant-change-what-you-cant-see-print.pdf>

Federal Law

Laws Enforced by the EEOC

[Title VII of the Civil Rights Act of 1964 \(Title VII\)](#)

Makes it illegal to discriminate against someone on the basis of race, color, religion, national origin, or sex.

[The Pregnancy Discrimination Act](#)

Makes it illegal to discriminate against a woman because of pregnancy, childbirth, or a medical condition related to pregnancy or childbirth.

[The Equal Pay Act of 1963 \(EPA\)](#)

This law makes it illegal to pay different wages to men and women if they perform equal work in the same workplace.

[The Age Discrimination in Employment Act of 1967 \(ADEA\)](#)

This law protects people who are 40 or older from discrimination because of age.

[Title I of the Americans with Disabilities Act of 1990 \(ADA\)](#)

This law makes it illegal to discriminate against a qualified person with a disability in the private sector and in state and local governments.

[The Genetic Information Nondiscrimination Act of 2008 \(GINA\)](#)

Makes it illegal to discriminate against employees or applicants because of genetic information. Genetic information includes information about an individual's genetic tests and the genetic tests of an individual's family members, as well as information about any disease, disorder or condition of an individual's family members (i.e. an individual's family medical history).

<https://www.eeoc.gov/laws/statutes/index.cfm>

Commonwealth Law

Pennsylvania Human Relations Act

The act prohibits certain discrimination because of race, color, religious creed, ancestry, age or national origin by employers and empowers the PA Human Relationships Commission in the Governor's office to provide for procedures and enforcement including civil penalties.

[https://govt.westlaw.com/pac/Browse/Home/Pennsylvania/UnofficialPurdonsPennsylvaniaStatutes?guid=N781396C074434D1E97EBBFAD0A588893&originationContext=documenttoc&transitionType=Default&contextData=\(sc.Default\)](https://govt.westlaw.com/pac/Browse/Home/Pennsylvania/UnofficialPurdonsPennsylvaniaStatutes?guid=N781396C074434D1E97EBBFAD0A588893&originationContext=documenttoc&transitionType=Default&contextData=(sc.Default))

Local Ordinances

Pittsburgh, PA, Title 6, Article V, Chapter 651, Discrimination Policy

“It shall be the public policy of the City to prohibit discrimination because of race, color, religion, ancestry, national origin, place of birth, sex, sexual orientation, familial status, age, nonjob related handicap, or disability in employment.” §651.02. The ordinance goes on to establish The Human Relations Commission and empowers the commission to study, investigate, and enforce the article. §653.05. There is no minimum number of employees required to permit relief under the Pittsburgh Ordinance.

http://apps.pittsburghpa.gov/redtail/images/5012_02_26_19_Pregnancy_Discrimination_Legislation_FINAL.pdf

Correcting Culture to Discourage Bias and Harassment

The first step toward building a better firm is to take a close look at your culture.

- Identify your personal and firm leadership's unconscious biases. Refer to the Implicit Bias Section of these materials.
- Consider, does the firm have equal opportunities for advancement?
- Is the firm's leadership a diverse group of individuals?
- Do you have events/client meetings/networking options for only a select portion of your workforce?
 - Are these events primarily attended by a particular demographic (i.e. unmarried, childfree employees, persons of a certain age, men or women)
 - Do the events exclude those with religious or personal dietary restrictions? (i.e. surrounding alcohol or seafood)
- Does your firm suffer from any of the symptoms discussed in the toolbox?
- What policies does your firm have to address discrimination and harassment?
 - How are those policies enforced?
- Does your firm have policies for leave and work schedules to accommodate family and health related problems?
 - Are your staff able to make use of leave policies?
 - Does your firm culture discourage the use of leave?
- Where does your firm succeed in building a positive culture?

After you have identified places where your firm could improve and where the firm excels, refer to the guides on Implicit Bias, Key Considerations for Harassment, and the Toolbox. Check out the model policies or additional resources when developing your own policies and considerations.

Essential Elements of Implicit Bias (IB) Training in Continuing Judicial Education

A. DEFINITION OF IMPLICIT BIAS (aka unintended bias, unconscious bias)

From The Kirwan Institute for the Study of Race and Ethnicity, Ohio State University
<http://kirwaninstitute.osu.edu/research/understanding-implicit-bias/>

“Defining Implicit Bias

Also known as implicit social cognition, implicit bias refers to the attitudes or stereotypes that affect our understanding, actions, and decisions in an unconscious manner. These biases, which encompass both favorable and unfavorable assessments, are activated involuntarily and without an individual’s awareness or intentional control. Residing deep in the subconscious, these biases are different from known biases that individuals may choose to conceal for the purposes of social and/or political correctness. Rather, implicit biases are not accessible through introspection.

The implicit associations we harbor in our subconscious cause us to have feelings and attitudes about other people based on characteristics such as race, ethnicity, age, and appearance. These associations develop over the course of a lifetime beginning at a very early age through exposure to direct and indirect messages. In addition to early life experiences, the media and news programming are often-cited origins of implicit associations.

A Few Key Characteristics of Implicit Biases

- *Implicit biases are **pervasive**. Everyone possesses them, even people with avowed commitments to impartiality such as judges.*
- *Implicit and explicit biases are **related but distinct mental constructs**. They are not mutually exclusive and may even reinforce each other.*
- *The implicit associations we hold **do not necessarily align with our declared beliefs** or even reflect stances we would explicitly endorse.*
- *We generally tend to hold implicit biases that **favor our own ingroup**, though research has shown that we can still hold implicit biases against our ingroup.*
- *Implicit biases are **malleable**. Our brains are incredibly complex, and the implicit associations that we have formed can be gradually unlearned through a variety of debiasing techniques.”*

B. BRAIN SCIENCE AND DECISION-MAKING

Numerous studies have examined the **brain science** related to decision-making, one accessible overview can be found in the **video** produced by the California Courts entitled, **The Neuroscience & Psychology of Decisionmaking, Part 3: Dismantling and Overriding Bias**, Kimberly Papillon.

<http://www2.courtinfo.ca.gov/cjer/864.htm>

From **Psychology Today**, April 7, 2016, *MRIs Reveal Unconscious Bias in the Brain* by Bernard J. Luskin, Ed.D, LMFT

“Neuroscience has now proven that people were not falsely claiming to believe in equality. Instead, neuroimaging shows that decision-making automatically triggers

specific regions of the brain responsible for unconscious processing, including those measured by the Implicit Association Test. MRI imaging showing which regions of the brain are activated during biased responses, allow us, i.e., you, to see the occurrence of biased associations, increasing our ability to counter or diminish them. Again, the point is that bias is in place whether you are aware of it or not and it can be measured.

The amygdala is an almond-shaped set of neurons deep in the temporal lobe. The amygdala has emerged as a key region of the brain in MRI bias research. The amygdala is the “emotional” center of the brain that reacts to fear and threat and other senses. Scientists have found a measurable correlation between amygdala activity and implicit racial bias. The point again is that research shows a visual brain response even though an individual may not be conscious of it.

The amygdala isn't the only part of the brain involved in unconscious bias. The frontal cortex is also identified as important in forming impressions of others and in measuring empathy. Memories such as dates and facts, also subconsciously steer people toward choosing one option over another. Understanding the implications of widespread automatic biases has begun to change diversity programs within education and corporate America. Seeing the results in an MRI takes subjective judgment off the table. One goal, therefore, is to educate people about basic forms of bias that may hinder their judgment so that they can recognize and discard their bias in the interest of achieving equity through knowledge and understanding.”

C. WHY UNDERSTANDING IB IS IMPORTANT FOR JUDGES

- Members of the judiciary are in a unique position to set the tone and standards for interactions between court staff, legal counsel, litigants, and witnesses.
- Displays of bias whether overt or implicit, i.e., intended or unconscious, by any participant in any judicial proceeding against any individual or group of people based on gender, race, sexual orientation, gender identity, national origin, ethnicity, English language proficiency, religion, disability or age diminish the public's trust in the integrity of the justice system, and conflict with commonly understood concepts of professionalism and civility.

D. HOW MIGHT IB IMPACT DECISION-MAKING IN THE COURTROOM?

1) Judges make numerous decisions during the course of any proceeding over which they preside. Implicit bias may be a factor in any procedural matter, including:

- Voir Dire
- Admissibility of evidence
- Qualifications of expert witness
- Credibility of Witness
- Jury Instruction
- Damages/Sentencing

- 2) Like all human beings, judges make associations about people or situations including during proceedings over which they preside. Common associations are not always negative or blaming:

COMMON ASSOCIATIONS

CHARACTERISTIC	COMMON NEGATIVE ASSOCIATION	ALTERNATIVE ASSOCIATION
Fat	Lazy, undisciplined, undesirable	Health issue; secure in self; lacks access to good nutrition
Old	Frail, slow, forgetful	Wise, mature, knowledgeable
Tells a story to make a point	Can't get to the crux of a matter	Comes from an oral tradition or one that values storytelling
Steelers jersey is formal wear	A "yinzer" (unsophisticated, restricted world view)	Is showing respect by wearing their most prized clothing; is loyal to all things Pittsburgh
Speaks Pittsburghese	Undereducated, unsophisticated, not smart	Accessing terms that express their thoughts and feelings
Speaks with a Southern drawl	Politically conservative, racist	Comes from the Deep South
Shorter than average	Napoleon complex (male), girlish (female)	Overcoming a common bias
Not a homeowner	Poor	May have been "redlined" out of homeownership
Drives a BMW	Materialistic Yuppie	Feels safest in that vehicle
Drives a Hummer	Gangster, drug dealer	Loves big cars
Carries large amounts of cash on person	Thief, dealer, show-off	Doesn't use banks due to inaccessibility or past negative experience; pays bills in cash
Won't look you in the eye	Untrustworthy	Cultural tradition disfavors eye contact with authority figures or members of opposite sex
Soft spoken	Timid, frightened, may be lying, lacks confidence in their viewpoint	Vocal chords not built for booming voice; soft spokenness valued within speaker's culture
Speaks loudly	Insensitive to individuals in the immediate environment, is a bully, a know-it-all	Vocal chords built for booming voice, lacks physical capacity to speak more softly, has hearing problem so compensates by speaking loudly
Over-dressed for occasion	Insecure, unsophisticated	Other available clothing may be too worn or casual; limited capacity to purchase more suitable clothing
Under-dressed for occasion	Poor, unsophisticated, disrespectful	May have been advised to dress in that manner; no other options available

Wears a lot of make-up	Is inviting sexual contact; wants focus to be on appearance	May be showing respect for occasion or venue; may be disguising a disfigurement
Wears short skirts and high heels, shows cleavage	Is inviting sexual contact; wants focus to be on appearance	Feels this mode of dress is attractive and appropriate
Is drunk in a social setting	Fair game sexually; is inviting sexual contact	Is vulnerable, needs support
Interrupts others frequently	Is a bully; is strong, forceful, certain of opinion	Comes from a tradition where interrupting not seen as disrespectful but rather as being fully engaged; hearing may be compromised
Does not interrupt	Is polite, shy, timid, unsure of their position	Comes from a tradition where interrupting considered disrespectful; hearing may be compromised
Slow to offer opinion	Doesn't have one	Needs to think before speaking in order to speak precisely
Unemployed	Lazy, unskilled; a moocher, malingerer	Has health issues; lacks skills relative to available jobs; lacks transportation, proper clothing, child care
Inarticulate	Doesn't have a valid point to make; lacks ability to substantiate their assertions	Comes from a tradition that disfavors discussion of certain topics; is nervous; needs more time to organize thoughts
Stutters	Insecure, unsure of point they're trying to make; requires too much effort to understand	Has a valid point but needs assurance that others are willing to give time for expression of point

E. STRATEGIES FOR MINIMIZING NEGATIVE IMPACT OF IB

- 1) The ABA provides guidance in, "Judges: 6 strategies to combat implicit bias on the bench" published, September 2016 found at <http://www.americanbar.org/publications/youraba/2016/september-2016/strategies-on-implicit-bias-and-de-biasing-for-judges-and-lawyer.html>

"Become aware; take the *Implicit Association Test*. The first step to de-biasing is to identify the stereotypes that affect, often unknowingly, personal perceptions of the character and qualities of different races and ethnic groups. The IAT measures the ease and speed with which test participants can match concepts such as "violent" or "peaceful" with photos of people of different races.

Individuation. This strategy involves gathering very specific information about a person's background, tastes, hobbies and family so that your judgment will consider the particulars of that person, rather than group characteristics.

Stereotype replacement. Modify your own approach and recognize when you are responding to a situation or person in a stereotypical fashion. Consider the reasons and factors leading to this response and actively replace this biased response with an unbiased one.

Counter-stereotypic imaging. After you detect a stereotyped response, think of examples of

famous people that show the stereotype to be inaccurate. Thinking of counter-stereotypic people provides concrete examples that demonstrate the inaccuracy of stereotypes. For example, while watching a movie that portrays black people as unintelligent, you could think of Dr. Martin Luther King Jr., Barack Obama, Condoleezza Rice, Frederick Douglass or your own intelligent black friends or acquaintances.

Perspective-taking. Consider different perspectives and step into the shoes of a stereotyped person. This strategy can be very useful in assessing the emotional damage caused by stereotyping others. Think about how you would feel to have your abilities questioned, or to be viewed as lazy and potentially violent on the basis of your appearance. Perspective-taking can be used either proactively, without any prompting from outside sources, or reactively, after a stereotypic response or portrayal has been detected.

Increasing opportunities for contact. Actively seek out situations where you are likely to have positive interactions with stereotyped groups. This can involve joining particular clubs or participating in events that allow you to meet people who disconfirm stereotypes. In addition to seeking personal contact, you can modify your visual environment by watching movies, TV and news that portray stereotyped groups in non-stereotypical ways.”

2) **Practices that reflect the four principles of Procedural Justice are a good complement to the strategies for minimizing the negative impact of implicit bias:**

Understanding – judges ensure that litigants understand their rights and the procedures involved in the matter before the Court.

Neutrality – judges, court personnel, and legal counsel consistently and transparently effectuate process.

Voice – judges convey to participants that they will have the opportunity to tell their side of the story.

Respect – judges, court personnel, and legal counsel treat all with dignity and respect by observing basic rules of common courtesy. Please, thank you, apology for delay, etc.

The above is a paraphrasing of material contained in a video produced by the Center for Court Innovation found at <https://www.courtinnovation.org/publications/what-procedural-justice>.

KEY CONSIDERATIONS FOR LAW FIRMS IN ADDRESSING HARASSMENT AND DISCRIMINATION CLAIMS

1. Create Effective Policies and Procedures.

Many law firms have nondiscrimination and anti-harassment policies contained in their Employee Handbooks. Sometimes these policies are just distributed to administrative employees and new associates, not partners. Many of these policies are “cookie-cutter” ones that have been copied from on-line templates and are not thoughtfully designed to cover the individual workforces. They may satisfy the minimum standards imposed by law to limit liability, but not be effective in preventing or responding to discrimination and harassment complaints. Effective policies and procedures should be developed and distributed to all employees, including partners. There should be an acknowledgement executed by employees and partners that they have received and read the policies.

2. What Good Policies and Procedures Should Include.

Good policies and procedures are important for all firms, large and small. They should be tailored to the individual workforce. The policies and procedures should provide clear standards of conduct that the firm expects and describe (i) the prohibited activities, (ii) the manner in which employees can report discrimination and/or harassment, and (iii) how the firm will respond to those complaints.

- There should be clear a statement that the firm is committed to preventing and will not tolerate discrimination and harassment.
- The policies should delineate all the protected categories that may apply and the types of employment decisions that cannot be based on those protected categories. There should be a separate definition of sexual harassment.
- Actual examples of prohibited conduct should be provided, including examples of posting offensive comments on social networks and/or transmitting them electronically, via emails, texts, tweets, and other social networking services.
- The policies should make clear that the prohibitions apply to firm events, even if the prohibited conduct took place at an off-site location. The policies should also provide that prohibited discrimination and harassment may apply not just to employees of law firms, but third parties as well (e.g., an outside vendors, consultants or clients).

- The policies should advise employees of the repercussions that may result if an employee is found to have violated the standards of conduct. There should be a provision that says prohibited conduct can result in disciplinary action, up to and including termination.
- The policies should describe the firm's complaint procedures, including the identity of the persons to whom complaints are to be made.
- There should be a description of the complaint investigation process, and a statement that confidentiality will be maintained during the course of the investigation to the greatest extent possible.
- The policy should make clear that retaliation against the complainant, any reporter of prohibited conduct, or any witness who may be interviewed during the investigation is prohibited and subject to disciplinary action. Further, the policy should say that acts of retaliatory conduct should be reported immediately and will be promptly investigated and addressed.

3. Firms Need to Respond to Complaints Promptly.

The worst case scenario for an employee who has filed a complaint is that there is significant delay in the firm's response to the claims. To the complainant, this signifies that the employer is not committed to its policies and procedures. In choosing the person(s) to receive complaints, consideration should be given to those individuals who can maintain strict confidentiality and are considered trusted persons to whom employees can confide.

4. Firm Needs to Investigate the Complaint Promptly.

Once the firm has received a complaint, it should be investigated thoroughly and promptly. The extent of the investigation will be driven by the egregiousness of the complaint. The policies should state that the investigation will be conducted by an impartial third party (i.e., a person who is not involved in the alleged acts underlying the complaint or is not a friend of or directly supervises the complainant or the accused employee). Sometimes law firms use their regular counsel to investigate the complaints. It is generally not recommended since the regular outside counsel could become a trial witness and all documents not otherwise protected by attorney-client privilege would be discoverable. For example, notes of the regular outside counsel about their discussions with employees during the investigation could be discoverable if litigation ensues. If outside counsel is retained to investigate the complaint, the counsel should not be a member of the firm that would defend any lawsuit arising from the complaint. If firms have a Human Resources Department, an experienced HR person can be designated to conduct the investigation.

5. Investigative Interviews.

Interviews should be conducted first with the complaining employee and then

with the accused employee. After that, interviews of potential witnesses should occur separately and privately. Questions should be planned ahead of time and the questions should be open-ended. Any physical evidence documenting the allegations (on both sides) should likewise be obtained and reviewed. Ultimately, the investigator must weigh the evidence and conclude whether the firm's policies were violated or misconduct occurred. The standard for workplace investigations is "the preponderance of the evidence." Sometimes the investigator is unable to draw any conclusion on what happened because there is no smoking gun or a witness who can support or defeat the allegations. The investigator will need to document any factual findings in a written document. The investigator's notes and witness statements should be attached to the report.

6. Corrective Action.

If the firm finds merit to the complaint, then the accused employee needs to receive appropriate disciplinary action. The corrective action will vary depending upon the gravity of the prohibited conduct and the harm caused to the complainant. Also, the firm should ensure that all employees found to have discriminated or engaged in harassment against another employee should be disciplined as consistently as possible. For example, if one employee is terminated for certain conduct (e.g., posting racially offensive remarks on his Facebook), another employee found guilty of similar conduct should receive the same discipline, unless there is a compelling reason not to do so.

7. Training.

While policies and procedures are very important, law firms should also conduct periodic training sessions on those policies and procedures. Some firms resist trainings because of costs and/or time. Other firms require employees to annually take online sexual harassment trainings. It is recommended that some in-person, formal training be conducted for the workforce. The training should be directed by a qualified in-house person, consultant or lawyer who knows how to engage employees. All employees, including supervisors and partners, should receive training. Training for supervisors (including partners) should be broader than the training conducted for all other employees. Because the law confers more responsibilities and concomitant liability on supervisors, there needs to be training on what the firm and the law expect of them in their managerial capacities. Training should also include sessions on identifying discrimination and harassment and effectively addressing actual violations.

From an organizational perspective, ignoring or not adequately responding to discrimination and harassment will result in negative consequences for the firm, including decreased employee morale and productivity, increased employee turnover and, ultimately, an adverse impact on the firm's bottom line. Law firms can greatly reduce their risk of liability by following the steps described above. When all employees in the workforce feel respected and valued, then it will reverberate on the legal representation the firms provide to their clients.

By, T rese Connerton, Esquire

TOOLBOX FOR CREATING POSITIVE CULTURE

Symptom:

Employees quit after having children or ill/elderly parents, particularly women.

Evaluate:

What are the firm's policies on leave?
Do you have a disability/paid time off policy?
Does your firm have family medical leave?
Does your firm have flexible work or work from home policies?

Boss move:

Create family friendly leave policies, consider a part time return to work or remote work period, provide the same kind of leave to fathers and mothers and people with family care obligations like elderly parents.
Push for family friendly policies and flextime. It's a win/win.

Bonus:

Your team comes back stronger and has your back because you had theirs.
Your team is more productive as they are better rested and able to focus.
Your employees spend more time working because they are no longer commuting to provide intermittent care.

Symptom:

Employees do not take advantage of existing leave policies.

Evaluate:

Does the firm culture support taking leave?
Are employees negatively affected by taking leave?

Boss move:

Make parental leave mandatory.
Use your family/parental leave, make your dedication to parent-ing known in your firm.
Encourage employees to use leave as necessary.
Prevent the use of leave from adversely impacting an employee's reputation or advancement.
Address concerns about the use of leave, or its impact on the reputation of staff using leave.

Symptom:

Staff gossiping/complaining about another's use of leave.

Evaluate:

Is the use of leave unreasonably impacting other staff?
If so, what options does the firm have to relieve the burden?

Boss Move:

If it does not impact the staff, point out the problem: "Her use of leave

should not affect your workload. Is there something I am missing?"

"We shouldn't deter people from taking family leave. It is a great benefit and shows we appreciate our people."

"We are proud to be able to offer a generous leave policy. It allows us to recruit the best people."

If the leave unreasonably impacts the staff workflow:

Reallocate tasks/distribute work differently.

Help employees prioritize reallocated tasks.

Reassure the staff that their contributions are appreciated.

Consider an act of appreciation like a lunch or token gift.

Symptom:

Staff/attorneys are treated differently after taking leave.

Evaluate:

How are assignments made when people return from leave?

Boss Move:

Engage your employees in regular dialogue about their work loads and goals.

Help your employees grow by offering opportunities to meet their goals.

Distribute the assignments evenly.

Take inventory of whether you are equally building your team.

You don't want one "star" player to be able to take all your best clients with him.

Symptom:

Billable hours dropping off for any reasons.

Evaluate:

Are your billable hour expectations reasonable?

Do they require employees to have no time outside of work?

Are your other employees on the verge of burn out?

Have you noticed other employees having trouble maintaining their hours without staying late/working weekends?

Boss Move:

Inquire and correct it. "I noticed your hours are lagging. What is going on?" Consider disciplinary action or an improvement plan where appropriate.

Offer a temporary reduction in hours.

Offer remote work capability.

When you hear any staff or other attorney diminishing another attorney's work or dedication to the firm, address it: "I cannot discuss another employee's particular situation. We support our staff. In the event an employee's hours becomes a problem, we address performance issues as necessary."

Symptom:

Inside jokes, sexual jokes, 'locker room' humor. These can make employees uncomfortable and create a hostile work environment.

Boss move:

Enforce the rules of professional conduct in your firms, businesses and courtrooms.

"All people are to be treated with respect." "That language is not appropriate"

Do not laugh at the joke or spread it. Correct the individual.

Symptom:

Losing employees that have obligations outside of work like children or elderly parents.

Inflexible hours impacting working parents disproportionately.

Boss move:

Implement flex time for all staff/attorneys. Employees with flextime are more productive.

Focus on output rather than time spent in seat.

Design a policy that allows performers to earn the right to use flex time.

Manage and address abuse of flexibility on an individual basis.

Symptom:

Undermining the authority of someone based on race, gender, age.

Boss move:

Call it out. You will conduct yourself with decorum in my courtroom/boardroom/firm.

Symptom:

Social Events excluding particular groups of people.

Golf outings, dinners, client events where others aren't invited. "Old boys" events.

Boss move:

Excluding women from one on one events because of what "might happen" is not ok, is often illegal and not good for business.

Invite people specifically. "Come to the foundation Golf and Bocci Tournament and play Bocci, or just come for the dinner after."

Offer non-sports or non-drinking events or client meetings,

Invite her to the golf outing, put her in your scramble.

Introduce them to your network.

Make an effort to reach out to associates you seldom work with.

Introduce them to your network.

Symptom:

Sexual Harassment.

Jokes about sex, genitals, sexual relations, body parts, employee's appearance or 'sexuality.'

Unwanted touching, solicitation, requests for dates, favors.

Compliments about a person's body or appearance that makes them uncomfortable.

It still harassment if it is a client doing the harassment.

Everyone:

Don't do it.

Just say no.

When you see it, act.

Speak up or report it.

Boss Move:

This behavior is illegal and must be shut down.

Make sure you have a reporting structure, take complaints seriously, and address the behavior.

Review the section on Key Considerations for Addressing Harassment.

Your rainmaker may bring in business, but he will also turn away people that will not be associated with harassers.

Symptoms:

Salary/promotion disparity.

Men, Caucasian, gender conforming people are promoted at a higher rate than women, people of color, LGBTQ.

Evaluate:

Are your performance reviews neutral?

Does review criteria include subjective criteria subject to bias?

Are you subconsciously docking point for using leave, flexible hours, or remote work?

Are they disproportionately affecting women/people of color/LGBTQ/people with families?

Do you consider whether a man has a family to support in salary determinations? Such consideration is not appropriate.

Boss Move:

Create neutral evaluations.

Consider the work product and effect rather than time spent in the office.

Promote/hire qualified women and minorities to improve the balance in firm leadership.

Finding Help

PA Human Rights Commission

<https://www.phrc.pa.gov/Resources/Law-and-Legal/Pages/Policies-and-Nondiscrimination-Guidelines.aspx>

EEOC

<https://www.eeoc.gov/employers/smallbusiness/resources.cfm>

ACBA WLD Model Policies and Resources

<http://www.acba.org/resources/resources-for-legal-professionals>

Philadelphia Bar Association Resources

<https://www.philadelphiabar.org/page/ModelPolicies?appNum=1>

ACBA - WLD Workplace Policy Committee

Paid Parental Leave

The WLD promulgates this sample policy as a resource to Allegheny County law firms that may consider adopting a formal policy for paid parental leave.

Notes on Administering a Policy

- Employers have no obligation under federal or state law to provide paid parental leave.
- The sample below includes best practices, should an employer choose to implement a parental leave policy. The sample policy leaves open the amount of time an employer offers – most employers offer between 2 and 4 weeks. Some employers choose to prorate the amount of wage replacement depending on years of service. Optional language for this is suggested below.
- Employers generally offer paid parental leave in one block of time, but give some flexibility about when it can be used. This allows for an employee to stagger leave with his or her co-parent. For example, a male employee might take his paid parental leave after his spouse has concluded leave with her employer. The sample policy leaves room for customization, but most employers allow employees to take the leave within the first year after a child joins the home. Employers should consider whether they will offer this leave to both parents if both are employees. Some employers choose to limit the FMLA leave entitlement for spouses working at the same employer to provide a combined total of 12 workweeks leave during any 12 month period for the birth and care of a newborn child, or for placement of a child with the employee for adoption or foster care. This is valid under federal law, and includes all spouses as defined under the law of the state where the marriage took place, including same-sex couples. However, there is some risk in adopting this policy because it does not apply to non-married partners working for the same employer. This can leave similarly situated employees subject to different treatment and may conflict with state law.
- Law firms should address concerns about billable hour requirements, bonus eligibility and compensation for partners expressly in the policies they publish. Firms covered under the FMLA likely already prorate these expectations when employees are eligible for FMLA leave and that policy will apply when they offer concurrent paid parental leave – but smaller firms will have to add language to the sample policy such as the following: “The firm will prorate the billable hour expectation of any attorney who uses this leave.”
- To avoid litigation risk related to discrimination laws, employers should grant parental leave to parents of both sexes based on their new status as parents. In Pennsylvania, risk of discrimination claims related to parental leave arises from the fact that sex, including pregnancy, is a protected class.¹ Local Governments may also provide protections for marital status, familial status, sexual orientation and gender identity that make it important to offer leave evenhandedly, based on an employee’s status as a parent alone.²

¹ 16 Pa. Code §§ 41.101- 41.104.

² See Pittsburgh Code § 659.01 *et seq.*; Philadelphia Code § 9-1100 *et seq.*; and Allegheny County Ordinance 26-09-OR. {00059205.DOCX}1

- As with some other states, Pennsylvania has a regulation which requires employers that give leave for childrearing or child care to extend such leave to both male and female and adoptive parents equally.³ Additionally, birth fathers and adoptive mothers are similarly situated in that both become parents without physically giving birth. A policy that would provide such similarly situated employees different levels of benefits creates risk of a disparate impact on female employees.
- Foster parents may be covered under the FMLA, but are not covered under state law at this time. This is also true of families created through surrogacy. Firms should consider including placement of an adopted or foster child or child by surrogacy in its paid parental leave policy. Including these families avoids a gap in the policy should the situation arise. However, employers may consider establishing a rule allowing only one parental leave per calendar or rolling-calendar year, which also clarifies the amount of leave available in the case of multiple births/placements.
- Pennsylvania regulations expressly require employers to treat disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth and recovery as temporary disabilities under their disability leave policies.⁴ If an employer has a short-term disability plan, then a female employee who gives birth will take her paid parental leave at the conclusion of her period of disability. For self-funded programs, employers may need to adjust the period of time for which they presume disability after childbirth when adding a paid parental leave policy.
- Parental leave is a broader term than paternity leave, allowing for leave for same-sex couples where neither parent is male. Employers should also consider taking a public stance on their support for the use of parental leave by both male and female employees, as is modeled in the statement of purpose in the sample policy below. Studies show that messages that reinforce a public support for equality and disapproval for bias actually serve to reduce bias – which, in this case, makes it more likely that both male and female employees will feel free to take advantage of a parental leave policy.⁵
- Employers should consider how they will administer this type of leave in the case of stillbirth or late-term miscarriage.
- Employers should consider what class of employees is eligible (full-time, part-time) and whether the employers will exclude temporary employees or whether the employer will phase in benefits by requiring a term of service.
- Employers should consider whether they will allow an employee to use this time before the birth of a child, such as in the case of an employee caring for a spouse/partner on bed rest.

³ 16 Pa. Code § 41.104.

⁴ 16 Pa. Code §§ 41.101, 41.103.

⁵ See A. Grant and S. Sandberg, “When Talking About Bias Backfires,” December 6, 2014:

http://www.nytimes.com/2014/12/07/opinion/sunday/adam-grant-and-sheryl-sandberg-on-discrimination-at-work.html?_r=0.

Sample Policy

Purpose: The firm recognizes that the addition of a child is a significant life event and that both mothers and fathers need time to bond with their new child. Therefore, the firm provides a paid parental leave benefit to legal staff and salaried employees, including lawyers, after a child joins their family by birth, adoption, surrogacy, or through placement of a foster child.

Parental leave under this policy is a paid leave intended to provide parents bonding time with wage replacement after the birth of an employee's child, a child born to a same- or opposite-sex domestic partner or spouse, a child born via surrogacy or a child adopted or fostered by the employee. Employees may take this leave in one block of time within [____ days/weeks/months] after the birth or placement of the child.

Eligibility Requirements

All employees are eligible for [____ days/weeks/months] of paid parental leave. This leave is in addition to any period of paid medical leave under the firm's Short-Term Disability program. [Insert if the employer has more than 50 employees in the location: "This leave runs concurrently with FMLA and/or any relevant state family and medical leave."] After the paid parental leave is exhausted, the employee may charge sick leave and/or vacation leave for additional wage replacement.

The firm will continue to provide health insurance benefits during the paid parental leave under this policy at the same rate as in effect before the leave was taken regardless of length of service [Optional: "provided the employee has at least one full year of service."]

The employee must provide 30 days' notice (or as much notice as practicable if the leave is not foreseeable) to [Human Resources] of the request for leave. Please see [Human Resources] for the proper request forms.

The firm prohibits and will not tolerate discrimination or retaliation against any employee or applicant because of that person's pregnancy or parental leave. Specifically, no one will be denied employment, reemployment, promotion or any other benefit of employment or be subjected to any adverse employment action based on that person's pregnancy or parental leave. In addition, no one will be disciplined, intimidated or otherwise retaliated against because that person exercised rights under this policy or applicable law.

[Optional if there is unpaid, non-FMLA leave: "Employees not eligible for FMLA leave should refer to the Leave of Absence Policy after the period of paid parental leave is completed regarding continuation of insurance coverage for employees on unpaid leave of absence."]

NOTE: This is a sample policy promulgated by the Allegheny County Bar Association for consideration by employers. The legal landscape in this area is evolving. Any employer intending to adopt a policy governing paid parental leave is encouraged to review the policy with their own legal counsel to be sure that it is consistent with the other policies in place and to be sure that the policy complies with all of the laws that are applicable at the time of adoption.

ACBA - WLD Workplace Policy Committee

Paid Parental Leave

The Business Case

Paid parental leave policies have significant business benefits. Such policies can favorably impact the bottom line in the form of:

- Greater employee loyalty and productivity;
- More successful recruitment, with a particular boost for diversity and inclusion efforts;
- Increased employee retention;
- Enhanced client satisfaction, retention and ability to develop business;
- Litigation avoidance.

Employee Loyalty and Productivity

Flexible work arrangements, including parental leave, enhance “productivity by avoiding unscheduled absenteeism and unwanted turnover due to work-life conflicts.”¹ Flexibility is also linked to higher employee engagement, which increases productivity.²

These links have been established in law firms. A report published by the New York City Bar found that strong parental leave policies increased attorney productivity. Specifically, the report stated:

Studies reveal that employees who have utilized strong parental leave policies tend to be more committed to their employer and less likely to pursue other job opportunities. In addition to engendering institutional loyalty, such policies promote increased productivity, employees are more engaged in workplaces that recognize the importance of time for family or other outside activities and are nearly three times as likely to report job satisfaction, which is a factor linked to productivity. Employers contemplating the implementation of a formal parental leave policy should consider such data carefully as it suggests that generous policies may increase profits and improve work product.³

¹ Workplace Flexibility: Ensuring Success for the 21st Century, Corporatevoices.org:
http://www.shrm.org/Advocacy/Issues/WorkplaceFlexibility/Documents/Focus%20Group%20Summary_Financial.pdf.

² *Id.*

³ New York City Bar, “Parental Leave Policies and Practices for Attorneys”, p. 5:
http://www.nycbar.org/pdf/report/Parental_Leave_Report.pdf.

Recruitment

Employers are increasingly recruiting new employees in an environment where workers are more vocal about the desire for work-life balance. And this requirement is not coming from women alone. In a recent article in *The Atlantic*, a former Supreme Court clerk describes his choice to take time off at the end of his clerkship to stay at home with his daughter.⁴ He cites a 2013 Pew study that found that 60% of men describe their child care hours as “very meaningful.” These numbers are very similar to what working mothers reported and are a very real factor when law firms seek top talent.

Additionally, the next generation of lawyers has been far more vocal than any group before about how they value workplace benefits that make room for greater balance. The Bentley University Center for Women & Business surveyed 1,000 college-educated men and women born after 1980 and found that 57% of respondents stated that being a good parent was among the most important things in their lives and 62% defined good parenting as spending as much time with their children as possible.⁵ The survey authors make a specific recommendation that millennial employees value parental leave. Law firm leadership may need to reevaluate the best incentive packages to offer this generation of lawyers and take note that work-life policies such as paid parental leave may soon be a necessary part of a competitive compensation package.⁶

Employee Retention

Several states have served as laboratories to test how paid parental leave affects employee retention. Research on California’s Paid Family Leave Insurance program demonstrates that over 95% of workers who took paid family leave in California returned to work – and over 80% returned to the same employer.⁷ In the legal context, the New York City Bar also found a connection between parental leave policies and retention. It stated:

Legal employers devote significant resources to recruiting recent law school graduates and lateral hires, training these attorneys, and developing their expertise, but attorneys sometimes leave before a significant return on that investment can be realized (albeit for a variety of reasons). According to a 2005 NALP study, 77% of women associates had left their firms within five years (55 months). Every one of these lawyers represents a lost investment in recruitment and training, the cost of which can amount to 150% of an attorney’s annual compensations. Retention is especially critical when an individual attorney’s level of skill and experience cannot readily be replaced, or when disproportionate rates of attrition impact firm culture. Although the 2005 NALP study looked at the issue in the law firm context, the conclusions the study reached apply with

⁴ R. Park, “What Ruth Bader Ginsburg Taught Me About Being a Stay-at-Home Dad.” January 8, 2015: <http://www.theatlantic.com/features/archive/2015/01/what-ruth-bader-ginsburg-taught-me-about-being-a-stay-at-home-dad/384289/>.

⁵ CWB Millennial Report, August 5, 2013: http://www.scribd.com/doc/158258672/CWB-Millennial-Report?secret_password=2191s8a7d6j7shshcctt&_ga=1.161270649.550500981.1421781987.

⁶ For additional commentary, see also, D. Parnell, “The Millennial Lawyer and BigLaw Hunger Games,” October 13, 2013: <http://www.forbes.com/sites/davidparnell/2013/10/30/the-millennial-lawyer-and-biglaw-hunger-games/>.

⁷ E. Appelbaum and R. Milkman, “Leaves That Pay: Employer and Worker Experiences with Paid Family Leave in California,” January, 2011: <http://www.cepr.net/publications/reports/leaves-that-pay>.

equal force to other legal employers. To increase retention rates, legal employers need to respond to the increasing demand for work/life balance. Many attorneys increasingly cite work/life balance as one of the factors affecting their decision to leave a firm. Strong parental leave policies reflect an employer's view of the importance of family and a concern with work/life balance and thus are a critical component of attorney retention. In addition, strong parental leave policies allow those new parents that want more time to be with their child to have such time and thereby may avoid those parents leaving the workforce.⁸

Parental leave policies also have important social benefits including, for example, fostering parent-child bonding and promoting equality in the workplace. These social benefits have a business value, because they can create goodwill and increase engagement, by both employees and the community, and aid employee retention.⁹

Client Satisfaction, Retention and Business Development

Law firms can leverage successful attorney recruitment and retention into business development efforts. The Association of Corporate Counsel's 2012 report on GC Value Insights compiles trends about client expectations by interviewing the legal leaders of Fortune 50-ranked companies. When asked what General Counsel value most in the firms they choose to work with, these GCs prioritized a law firm's ability to partner with them – and take the long view.¹⁰ They also value firms that understand their business and their goals and demonstrate an investment in the company's needs.

True partnerships with clients require staffing matters with familiar faces. Clients are increasingly formalizing this demand for consistent staffing – with 63% of in-house counsel respondents in a 2010 survey requiring client consent for changes in attorney staffing.¹¹ Although parental leave represents a short-term disruption to attorney matters, the only way firms can take the long view is by retaining the attorneys with the institutional knowledge of the client and the relationship.

On top of this, clients have taken a stand on diversity and inclusion. The Chief Legal Officers of almost 500 major corporations have committed themselves to a diversity Call to Action, beginning in 1999 and reaffirmed in 2004. The signatories promised the following:

We pledge to make decisions regarding which law firms represent our companies based in significant part on the diversity performance of the firms. We intend to look for

⁸ New York City Bar, "Parental Leave Policies and Practices for Attorneys", p. 7:
http://www.nycbar.org/pdf/report/Parental_Leave_Report.pdf.

⁹ H. Boushey and S.J. Glynn, "There Are Significant Business Costs to Replacing Employees," November 2012:
<http://cdn.americanprogress.org/wp-content/uploads/2012/11/CostofTurnover.pdf>. This article examines 30 case studies in 11 research papers published between 1992 and 2007 and concludes that employee retention leads to significant cost savings for employers.

¹⁰ The Association of Corporate Counsel, "GC Value Insights" 2012:
<http://www.acc.com/advocacy/valuechallenge/toolkit/loader.cfm?csModule=security/getfile&pageid=1316714&page=/valuechallenge/resources/index.cfm&qstring=&title=GC%20Value%20Insights>.

¹¹ 10th Annual ACC/Serengeti Managing Outside Counsel Survey, October 23, 2010:
http://www.serengetilaw.com/news_events/Pages/lawfirmsspending.aspx.

opportunities for firms we regularly use which positively distinguish themselves in this area. We further intend to end or limit our relationships with firms whose performance consistently evidences a lack of meaningful interest in being diverse.¹²

The Call to Action has additionally spurred a group of law firm managing partners and general counsel to form the Leadership Council on Legal Diversity. The Leadership Council has made a point to broaden the concept of diversity and inclusion initiatives to consider strategies applicable to all associates – but continues to focus on the importance of career development and attorney retention as an important means of both building a better profession and improving the bottom line for law firms.¹³ The Council has expressly recognized the importance of policies that address work/life balance conflicts as a significant part of the retention puzzle.¹⁴ Law firms can use work/life initiatives like paid parental leave policies to actively demonstrate to their clients that they stand with them on these issues.

Litigation Avoidance

Neither federal nor Pennsylvania state law creates a right for paid parental leave. However, there are several related laws.

Federal law governs pregnancy and parental leave under:

- Family and Medical Leave Act of 1993 (FMLA), 29 U.S.C. §§ 2601-2654, which requires employers to provide up to 12 workweeks of unpaid leave to eligible employees in a 12-month period for the birth and care of an employee's newborn child or placement of an employee's adopted or foster child with the employee.¹⁵ Generally, employees working at a location that does not have 50 or more employees within 75 miles are not eligible for FMLA leave, and an employee must also have worked for the employer for at least 12 months and for at least 1,250 hours in the 12-month period preceding the first day of leave in order to be eligible for FMLA leave.¹⁶
- Title VII of the Civil Rights Act of 1964 (Title VII), as amended by the Pregnancy Discrimination Act (Title II), 42 U.S.C. § 2000e(k), which protects employees from discrimination due to pregnancy or pregnancy-related medical conditions.¹⁷ Under the Pregnancy Discrimination Act, women affected by pregnancy or related conditions must be treated in the same manner as other applicants or employees who are similar in their ability or inability to work.
- The Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12101-12117. Although a normal pregnancy is not a disability under the ADA, certain pregnancy related impairments may

¹² “A Call to Action – Diversity in the Legal Profession,” October, 2004. pp. 6-8:

<http://www.acc.com/vl/public/Article/loader.cfm?csModule=security/getfile&pageid=16074>.

¹³ ABA Litigation Section Corporate Counsel, “The Diversity Dilemma: Another Victim of the Bad Economy?” February 11-14, 2010: <https://apps.americanbar.org/litigation/committees/corporate/docs/2010-cle-materials/11-diversity-dilemma-another-victim-bad-economy/11a-diversity-dilemma.pdf>.

¹⁴ “A Call to Action – Diversity in the Legal Profession,” October, 2004. pp. 7-8. *See also* New York City Bar, “Parental Leave Policies and Practices for Attorneys”, p. 8.

¹⁵ 29 U.S.C. § 2612(a).

¹⁶ 29 U.S.C. § 2611(4)(A)(i); 29 C.F.R. § 825.104.

¹⁷ Note that the EEOC published new enforcement guidelines on July 14, 2014: http://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm.

qualify as disabilities, which entitle the employee to reasonable accommodations, absent undue hardship to the employer.

These laws create risk that employers must navigate, not just to avoid legal liability, but also to avoid the appearance of unfairness that can often lead to costly litigation. A well-administered paid parental leave policy can reduce the risk of litigation because it:

- Recognizes and eases a point of stress. New parents almost always have conflicts between their work responsibilities and their duties as parents. A paid parental leave policy recognizes this proactively, reducing the likelihood of unplanned interruptions;
- Builds in a plan that may often solve the employers' need to accommodate an employee who has become disabled due to a pregnancy-related medical condition; and
- Reduces the risk that an employer places an undue burden on employees with caregiving responsibilities, which may violate Title VII.

Legal Requirements and Notes on Administering a Policy

- Employers have no obligation under federal or state law to provide paid parental leave. Therefore, the sample below includes best practices, but no language is legally required. The sample policy leaves open the amount of time an employer offers – most employers offer between 2 and 4 weeks. Some employers choose to prorate the amount of wage replacement depending on years of service. Optional language for this is suggested below.
- Employers generally offer paid parental leave in one block of time, but give some flexibility about when it can be used. This allows for an employee to stagger leave with his or her co-parent. For example, a male employee might take his paid parental leave after his spouse has concluded leave with her employer. The sample policy leaves room for customization, but most employers allow employees to take the leave within the first year after a child joins the home. Employers should consider whether they will offer this leave to both parents if both are employees. Some employers choose to limit the FMLA leave entitlement for spouses working at the same employer to provide a combined total of 12 workweeks leave during any 12 month period for the birth and care of a newborn child, or for placement of a child with the employee for adoption or foster care. This is valid under federal law, and includes all spouses as defined under the law of the state where the marriage took place, including same-sex couples. However, there is some risk in adopting this policy because it does not apply to non-married partners working for the same employer. This can leave similarly situated employees subject to different treatment and may conflict with state law.
- Law firms should address concerns about billable hour requirements, bonus eligibility and compensation for partners expressly in the policies they publish. Firms covered under the FMLA likely already prorate these expectations when employees are eligible for FMLA leave and that policy will apply when they offer concurrent paid parental leave – but smaller firms will have to add language to the sample policy such as the following: “The firm will prorate the billable hour expectation of any attorney who uses this leave.”
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claims related to parental leave arises from the fact that sex, including pregnancy, is a protected class.¹⁸ Local Governments may also provide protections for marital status, familial status, sexual orientation and gender identity that make it important to offer leave evenhandedly, based on an employee's status as a parent alone.¹⁹

- As with some other states, Pennsylvania has a regulation which requires employers that give leave for childrearing or child care to extend such leave to both male and female and adoptive parents equally.²⁰ Additionally, birth fathers and adoptive mothers are similarly situated in that both become parents without physically giving birth. A policy that would provide such similarly situated employees different levels of benefits creates risk of a disparate impact on female employees.
- Foster parents may be covered under the FMLA, but are not covered under state law at this time. This is also true of families created through surrogacy. Firms should consider including placement of an adopted or foster child or child by surrogacy in its paid parental leave policy. Including these families avoids a gap in the policy should the situation arise. However, employers may consider establishing a rule allowing only one parental leave per calendar or rolling-calendar year, which also clarifies the amount of leave available in the case of multiple births/placements.
- Pennsylvania regulations expressly require employers to treat disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth and recovery as temporary disabilities under their disability leave policies.²¹ If an employer has a short-term disability plan, then a female employee who gives birth will take her paid parental leave at the conclusion of her period of disability. For self-funded programs, employers may need to adjust the period of time for which they presume disability after childbirth when adding a paid parental leave policy.
- Parental leave is a broader term than paternity leave, allowing for leave for same-sex couples where neither parent is male. Employers should also consider taking a public stance on their support for the use of parental leave by both male and female employees, as is modeled in the statement of purpose in the sample policy below. Studies show that messages that reinforce a public support for equality and disapproval for bias actually serve to reduce bias – which, in this case, makes it more likely that both male and female employees will feel free to take advantage of a parental leave policy.²²
- Employers should consider how they will administer this type of leave in the case of stillbirth or late-term miscarriage.
- Employers should consider what class of employees is eligible (full-time, part-time) and whether the employers will exclude temporary employees or **whether the employer will phase in benefits by requiring a term of service.**
- Employers should consider whether they will allow an employee to use this time before the birth of a child, such as in the case of an employee caring for a spouse/partner on bed rest.

¹⁸ 16 Pa. Code §§ 41.101- 41.104.

¹⁹ See Pittsburgh Code § 659.01 *et seq.*; Philadelphia Code § 9-1100 *et seq.*; and Allegheny County Ordinance 26-09-OR.

²⁰ 16 Pa. Code § 41.104.

²¹ 16 Pa. Code §§ 41.101, 41.103.

²² See A. Grant and S. Sandberg, “When Talking About Bias Backfires,” December 6, 2014:

http://www.nytimes.com/2014/12/07/opinion/sunday/adam-grant-and-sheryl-sandberg-on-discrimination-at-work.html?_r=0.

Sample Policy

Purpose: The firm recognizes that the addition of a child is a significant life event and that both mothers and fathers need time to bond with their new child. Therefore, the firm provides a paid parental leave benefit to legal staff and salaried employees, including lawyers, after a child joins their family by birth, adoption, surrogacy, or through placement of a foster child.

Parental leave under this policy is a paid leave intended to provide parents bonding time with wage replacement after the birth of an employee's child, a child born to a same- or opposite-sex domestic partner or spouse, a child born via surrogacy or a child adopted or fostered by the employee. Employees may take this leave in one block of time within [] days/weeks/months after the birth or placement of the child.

Eligibility Requirements

All employees are eligible for [] days/weeks/months of paid parental leave. This leave is in addition to any period of paid medical leave under the firm's Short-Term Disability program. [Insert if the employer has more than 50 employees in the location: "This leave runs concurrently with FMLA and/or any relevant state family and medical leave."] After the paid parental leave is exhausted, the employee may charge sick leave and/or vacation leave for additional wage replacement.

The firm will continue to provide health insurance benefits during the paid parental leave under this policy at the same rate as in effect before the leave was taken regardless of length of service [Optional: "provided the employee has at least one full year of service."]

The employee must provide 30 days' notice (or as much notice as practicable if the leave is not foreseeable) to [Human Resources] of the request for leave. Please see [Human Resources] for the proper request forms.

The firm prohibits and will not tolerate discrimination or retaliation against any employee or applicant because of that person's pregnancy or parental leave. Specifically, no one will be denied employment, reemployment, promotion or any other benefit of employment or be subjected to any adverse employment action based on that person's pregnancy or parental leave. In addition, no one will be disciplined, intimidated or otherwise retaliated against because that person exercised rights under this policy or applicable law.

[Optional if there is unpaid, non-FMLA leave: "Employees not eligible for FMLA leave should refer to the Leave of Absence Policy after the period of paid parental leave is completed regarding continuation of insurance coverage for employees on unpaid leave of absence."]

NOTE: This is a sample policy promulgated by the Allegheny County Bar Association for consideration by employers. The legal landscape in this area is evolving. Any employer intending to adopt a policy governing paid parental leave is encouraged to review the policy with their own legal counsel to be

sure that it is consistent with the other policies in place and to be sure that the policy complies with all of the laws that are applicable at the time of adoption.