

Back-To-School 2022: 3 Considerations For Employers

By **Amanda Ottaway**

Law360 (August 25, 2022, 9:23 PM EDT) -- As kids in the U.S. load up their backpacks for the third straight pandemic school year, employers should brush up on lessons about legal issues that may affect their workforce, experts say.

The loosening of virus-related policies by both local governments and schools may provide some relief for families but could also drive an increase in cases that leads to workplace issues involving time off. Additionally, some experts have pointed to a possible rise in caregiver discrimination issues, and state laws directing the treatment of LGBTQ youth could lead parents in those states to require additional support from their employers.



Among other things to keep in mind as school resumes, employers should make sure they're aware of any requirements to provide family leave if an employee's child falls ill, experts said. (AP Photo/Brittany Newman)

"There are so many things that are just coming down the pipeline that employers have not dealt with before. And it's really changing day to day," said Katie Collins, an employer-side associate at Weintraub Tobin.

Here are three things for employers to keep in mind as children reenter the classroom.

Changes to COVID-19 Guidance

Earlier this month, the U.S. Centers for Disease Control and Prevention issued updated COVID-19

guidance for schools. Among other changes, it lifted the recommendation to quarantine after exposure.

While the eased guidelines may provide some relief for families, they could also lead to higher transmission of the virus, lawyers noted. And if infection rates tick upward, so will the need for employees to take various forms of leave.

"It's just not the case yet that we're out of the woods," said Polsinelli PC principal Lindsay Ryan, who represents employers and added that she has school-aged children herself. "So long as we have quarantine and isolation recommendations in effect from the CDC" — such as the minimum of five days people still must isolate after testing positive — "employers are going to need those protections when it hits their home."

Marjorie Mesidor, a partner at Phillips & Associates who represents employees, said the fact that guidelines like social distancing and mask requirements have been lifted in many schools could put parents of children with underlying conditions in an especially tricky spot.

"They may need to let their employers know that, 'Hey, my kid has asthma, my kid is obese, my kid has a heart condition ... So if there's a COVID breakout in the school or my kid gets sick, I just want to put you on notice,'" she said. She suggested those parents apply preemptively for intermittent leave under the Family and Medical Leave Act in case they need it later.

Employers should also make sure they're aware of any requirements to provide family leave, either paid or unpaid, if an employee's child falls ill, experts said, noting those rules vary by location.

In June, the CDC recommended that children under age 5 get vaccinated for COVID-19, which it said expanded eligibility to 20 million more people. That means more parents may need time to take their child to get the shot or care for them during any side effects, experts noted.

"But also, hopefully, that will help mitigate the impact that exposure and infection of kids has on the actual caregivers," Ryan pointed out.

Heightened Awareness of Caregiver Bias

While caregiver discrimination is not unique to the pandemic, the health crisis highlighted the problem, Ryan said. She noted that while federal anti-bias law doesn't bar employment discrimination based on someone's status as a caregiver, other bias laws such as those prohibiting discrimination on the basis of sex or disability might come into play.

Cynthia Calvert, a lawyer, consultant and expert in what she calls family responsibilities discrimination, said that when she thinks about back-to-school time, child care comes to mind first: both the need for parents to take time off work if their kid is sick, and the need for workers to still have child care in place even if they're working from home.

"Employers have the right to set the rules about how work gets done, when it gets done, where it gets done," she said.

But Calvert added that she still sees issues of discrimination. For example, an employer might reasonably say employees should make sure there's no background noise when they're on work calls, but then enforce that rule specifically against parents rather than employees who might have a barking dog, a television playing or a partner talking in the background, she said.

"A lot of employers do not write their policies broadly enough to apply to all employees," she explained.

Polsinelli's Ryan said that while she hasn't seen those kinds of policies, she knows companies are concerned about walking the line between caregiver discrimination and making clear that employees shouldn't be using work hours for child care duties.

"If you are given the flexibility to work remotely, your caregiving obligations cannot get in the way of that work that you're being paid to perform," she said.

Workers May Need Help to Support LGBTQ Youth

The **ongoing legal battles** over LGBTQ rights, including those of LGBTQ children, will also affect families

as kids head back to school, experts said.

Numerous states over the past year have enacted anti-LGBTQ directives related to education. For example, Florida's so-called "Don't Say Gay" law went into effect over the summer, forbidding public school teachers from talking about sexual orientation or gender identity in the classroom.

Other states have banned transgender girls from participating in school sports.

All of this is likely to exacerbate mental health struggles, like depression and anxiety, for LGBTQ youth, and their parents may need flexible schedules to help them cope, experts said.

Parents "are the ones that are dealing with the kids who don't want to go to school, or who are staying home because they are being bullied," Collins said.

Several federal anti-bias laws could come into play as parents navigate how best to support their LGBTQ children, experts said.

Depression and anxiety are covered disabilities under the Americans with Disabilities Act. Though the ADA doesn't require accommodation if an employee's child has a disability, it does protect the worker from discrimination for their association with a disabled child.

The federal FMLA provides up to 12 weeks of job-protected but unpaid leave and can be used to care for a child with a disability, according to the U.S. Department of Labor.

Ryan also drew a connection to the U.S. Equal Employment Opportunity Commission's **March guidance about caregivers**, part of which focused specifically on protections for LGBTQ caregivers. For example, the EEOC explicitly stated that bias against LGBTQ caregivers is illegal. It said an LGBTQ employee requesting time off to care for their spouse shouldn't have to show proof that they're married if heterosexual co-workers aren't required to.

Ryan said she could imagine a similar situation here, such as if an employee asks for leave related to the care of an LGBTQ child and the employer goes too far in inquiring about why they need the leave, that's "certainly an area where I could see it being ripe for problems."

--Additional reporting by Jack Karp. Editing by Haylee Pearl.

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