

The Four-Day Work Week: Legal Considerations



By Margaret M. DiBianca, Esq.

Serious consideration should be given to the possible legal implications before formulating or implementing any substantial change in the workplace. Alternative work schedule policies are no exception. Employers considering alternative schedules have quite a bit of information to process. Such policies potentially invoke several employment laws that may impact the decision-making process.

The Americans With Disabilities Act



The Americans With Disabilities Act (“ADA”), prohibits workplace discrimination against qualified individuals with a disability. Employers have an obligation to make reasonable accommodations to the known physical or mental limitations of an individual, unless the employer can show that the accommodation imposes an undue hardship or the person poses a significant risk of substantial harm to himself or others.

There is some risk that a compressed work week may have negative consequences for employees protected by the ADA.

For example, employees who have a disability that causes fatigue or weakness may require shorter work days and longer work weeks as a reasonable accommodation. In a workplace where *all* employees are converted to a compressed work week, the ADA would not require the employer to make an accommodation for the individual. In that case, though, the employee who is unable to work an extended shift could find himself unemployed.

Of course, you may decide to offer the employee the opportunity to convert to a part-time schedule, thereby enabling him to continue on the reduced-hour shift. But if this alternative would cause the employee to lose his or her health-care coverage, it may not be seen as an alternative at all.

Where only some of the workforce is converted to the reduced-day schedule, the employer should make every reasonable effort to preserve the employee’s accommodation by ensuring that he is not required to convert to the compressed work week.

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Another scenario with the potential for negative consequences is in the case of an employee who takes time off for the treatment of a long-term or chronic condition. For example, an employee may be given off every Thursday afternoon so that he can receive kidney dialysis. This type of accommodation may have a more serious impact on the productivity of the workplace in a four-day week. If he had previously been permitted to leave on Thursdays at 3 pm instead of 5 pm, the company could be said to have lost 2 hours of work product during that time. Yet, in the compressed work week, the employee, who was too fatigued to return to work following his dialysis treatment, would now be out from 3 pm to 7 pm—doubling the lost time to 4 hours.

Although the employee may be able to push back the time for his weekly appointment to 5 pm, or even reschedule them for Friday afternoons instead, it is also possible that he may not be able to make the change for any number of reasons. It is safe to presume that he needed the appointment on Thursday originally for a reason, thereby necessitating the accommodation in the first place. In this case, the employer would have to find a way to work around the four hours of lost productivity. It would likely violate the ADA to revoke the employee's accommodation.

The Family and Medical Leave Act



The Family and Medical Leave Act (“FMLA”), provides up to 12 work weeks of unpaid, job-protected leave in a twelve-month period for one of four qualifying reasons: (1) the birth of a child and the first year care of the newborn; (2) the placement of a child through adoption or foster care and the first year care of the child; (3) the need to care for a parent, spouse or child with a serious health condition; and (4) the serious health condition of the eligible employee.

The FMLA provides for intermittent leave, which is taken in separate blocks of time due to a single qualifying reason. The same concerns identified in the ADA scenario, above, are also present in the context of FMLA intermittent leave. Because the 4/10 schedule puts a heavy emphasis on increased productivity via a shortened work week, absenteeism would have a greater impact.

But productivity is not the only concern. The more stress put on an organization as a result of an employee taking protected leave, the more likely

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it is that the employee will be subject to unlawful retaliation. Supervisors who are unfamiliar with the anti-retaliation provisions of the FMLA may be more likely to terminate, or take other adverse action against an employee who is on protected leave.

The National Labor Relations Act



The National Labor Relations Act (“NLRB”), is the statute that governs union activity. As the NLRB has been interpreted, a change in work schedules is a mandatory subject of bargaining. In other words, employers in the unionized workplace may not unilaterally institute a four-day work week policy. Instead, the union would have to consent to such a change. This, of course, could trigger negotiations on other, unrelated issues.

The Fair Labor Standards Act



The Fair Labor Standards Act (“FLSA”), controls the way in which regular wages are determined. The FLSA mandates the minimum wage, for example. It also provides the standards for what constitutes overtime hours and how overtime rates are calculated. It regulates what pay records employers must maintain and for how long. Finally, the FLSA is the law that governs child labor.

The FLSA imposes limits on the hours that a minor under 16 can work. Parallel state laws often impose stricter limits—regulating which hours, the total number of hours, and the maximum number of consecutive hours that a minor may be permitted to work. The U.S. Department of Labor provides a link to each state’s child-labor laws. Be sure to check every state in which you may employ children under 18 so that you are in compliance with those state’s laws, as well as the FLSA. (<http://www.youthrules.dol.gov/states.htm>)

Some of the most misunderstood provisions of the FLSA are the overtime regulations. According to federal law, employers must pay non-exempt employees at one and one-half times the regular rate of pay whenever the employee works any hours in excess of 40 during the work week. Federal overtime law does not require premium pay for time worked in excess of 8 hours per day.

It is common practice in many industries, though, to pay overtime (or even double time) to employees who work a shift longer than the standard 8 hours.

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How these industries would handle a compressed work week is unclear. It seems highly unlikely that those employers will continue to pay a premium rate for what would be standard time. As a result, employees who have come to rely on the extra income may resist making the change. Would the drop in pay drive the employees to look for work with another organization?

In a few states, including Alaska, California, Colorado, and Nevada, employers are required to pay an overtime rate based on the number of hours worked per day, as opposed to per week. So, in Alaska, employers who implement a compressed work week will be required to pay employees two hours per day, or eight hours per work week at time and one-half of their normal hourly rate. Calculated over the period of a year, this means that employers would be paying for approximately 400 hours *per employee* for time that was not actually worked.

Special Considerations in California



California employers face additional obstacles. In accordance with the California Labor Code, employees who work 10 hours or more per day in a 40-hour work week must be compensated at their overtime rate. To implement an alternative work schedule, employers must comply with some onerous requirements.

The plan must be described in a written notice that must be provided to the affected work unit. A meeting must be held where the employees are given the opportunity to discuss the proposal. Then, a secret-ballot election is held no fewer than 14 days after the meeting. More than two-thirds of the work unit must vote to approve the schedule.

The employer has 30 days to report the results to the state Division of Labor Standards Enforcement. In addition, workers cannot be required to work the new schedule for another 30 days. During these forty-four (or more) days, there can be work stoppages and other disruptions to the workplace as the focus turns to the proposed change in schedules.

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