

'Lean In' Maternity Advice Could Spawn Litigation

By **Bill Donahue**

Law360, New York (April 22, 2013, 8:35 PM ET) -- No matter how well-intentioned, employment attorneys say that asking female employees whether they're planning on having children — as Facebook honcho Sheryl Sandberg advises in her bestseller "Lean In" — will result in one thing: a lawsuit.

The question comes up in the book when Sandberg gets the sense that a woman is declining a promotion or more responsibility — self-limiting, in the parlance of "Lean In." To make sure she isn't, Sandberg asks: "Are you worried about taking this on because you're considering having a child sometime soon?"

"Sandberg is concerned that women are turning down opportunities out of fear that they won't be able to achieve a work-life balance," Seyfarth Shaw LLP attorney Dawn Solowey said. "By asking about their childbearing plans, she's hoping to take that on directly."

To her credit, Sandberg seems to realize that her approach doesn't exactly mesh with gender discrimination laws, telling readers that just asking the question would "give most employment lawyers a heart attack."

Though perhaps not quite coronary-inducing, Sandberg's question certainly makes labor attorneys squirm.

"This is the right idea with the wrong approach," fellow Seyfarth partner Lynn Kappelman said. "It really opens up the company and yourself to all kinds of liability."

That's because state and federal bias statutes were written to protect women from almost that exact situation. Over the years, far less straightforward questions about pregnancy, let alone a direct inquiry, have been seen as illegal considerations that are unfairly directed only at women.

"Even some of the less direct things that employers have asked women along the same lines in the past — are you prepared to travel, for instance — have been seen as subtle forms of gender discrimination," said Ellen Moran Dwyer, managing partner of Crowell and Moring LLP.

Sandberg is asking the question for nearly the opposite reason: to make sure her employees know they can, in fact, have both a family and a career. But that isn't much of a defense if an employee later claims she was fired or treated unfairly after the boss was asking about maternity plans, Dwyer added.

Linda O. Headley, a labor attorney with Littler Mendelson, echoed that idea, saying the existing case law on discrimination law simply “doesn't encourage the dialogue that Sandberg encourages.”

“When employers ask a question like that, it has been used time and again in pregnancy discrimination cases to serve as an indication of a discriminatory view,” Headley said. “In a perfect world, we could give that advice. [But] clients come to us for advice that's going to keep them out of lawsuits. We can't in good conscience give that advice.”

According to Solowey and Kappelman, the question also invites other, more indirect risks for employers. In answering the question, a woman might disclose other highly personal aspects of her life — sexual orientation, disability, etc. — that could lead to separate discrimination claims. And in the dialogue that follows, an employer might promise levels of flexibility or accommodation that, later on, he or she can't deliver.

“It's so clear why she's saying what she's saying,” said Felice B. Ekelman, an employment partner at Jackson Lewis LLP. “But I would have to consult the client and tell them that it's not the best way to approach it.”

Overwhelmingly, though, the attorneys surveyed said companies could avoid the liability caused by Sandberg's pregnancy question and still achieve much of her goal: a work environment in which women can have both a family and long, successful career.

For one, employers can and should reassure doubtful employees that they'll have the support they need to handle a new, tougher role, just so long as they do it for both men and women and don't dig into gender-specific issues like pregnancy.

“You can say, 'You can handle this job; we can work with you; you can have flexibility if you have other commitments in your life,' without having to mention family, children, spouse or other loaded issues,” Ekelman said.

Companies should also create policies that allow both women and men to feel comfortable enough sharing their concerns that they, rather than the employer, initiate the conversation. For instance, Solowey and Kappelman said employers can make clear “open-door” policies so employees know there's always someone to talk with about problems.

Another route is to establish a kind of ombudsman, an independent department designed to field questions and to advocate for anyone concerned about juggling the competing concerns of home and work. That way, if a manager like Sandberg senses that an employee is spurning advancement, he or she can try to address the issue without prying into information regarding a protected category, according to Headley.

“If you treat it in a different department and it's not in a line of reporting or decision-making for work opportunities, it's going to sanitize and neutralize the negative impact and give the positives that Sandberg is espousing,” Headley said.

Perhaps the most effective tool, though, is to foster a company culture that's generally supportive of working mothers and fathers, so that no potentially valuable employee has to choose between raising kids and rising on the corporate ladder. In other words, trying to allay Sandberg's concerns before they even arise.

That can mean day care, extended leaves of absence, more flexible schedules, telecommuting and other helpful perks, as well as handbooks, notifications and other means of outreach to make sure employees understand what's available to them.

"I believe that when you have policies that make it really clear and transparent ... all of the ways that an employer can accommodate employees who have needs that take them away from the workplace, it's sending a message to your employees that you are committed," Dwyer said.

And according to the attorneys surveyed, that's a better way to send that message than by directly questioning a subordinate about a private issue that's explicitly protected by discrimination laws.

"The idea behind what [Sandberg is] trying to accomplish is right — it's just her method that is fraught with peril," Kappelman said.

--Editing by Elizabeth Bowen and Lindsay Naylor.