"Leaning In" . . . But Not to a Lawsuit

By Lynn Kappelman and Dawn Solowey

In Sheryl Sandberg's bestseller *Lean In*, she explains that when she discusses with a female subordinate the prospect that she take on a position with more responsibility, Sandberg asks an unorthodox question: "Are you worried about taking this on because you're considering having a child sometime soon?" Sandberg explains that she always gives an employee the option not to answer. She also makes clear that she is only asking "for one reason: to make sure they aren't limiting their options unnecessarily."

As Sandberg acknowledges, "Raising this topic in the workplace would give most employment lawyers a heart attack." And with good reason. The reality is that asking women (and only women) Sandberg's question, however well-intentioned, is an invitation to a lawsuit alleging discrimination.

This article explains the risks of Sandberg's suggested approach, and how managers and human resources professionals can achieve much the same result with fewer legal risks.

THE RISKS

First, the very fact of the supervisor having asked the question invites legal risk, whether or not the employee chooses to answer it. The employee can point to the question itself as evidence of a bias against women or gender stereotyping. That is, the employee can argue that the question itself reveals that the supervisor has in mind, while considering the employee's job prospects, that the employee may later have a child and that having the child may

impact her job performance. The employee may attribute any subsequent adverse action that she suffers, or any preferential treatment of male colleagues, to the supervisor's alleged bias, even long after the conversation.

Second, the intrusive nature of the question invites deeply personal answers. For example, the question may invite the employee to disclose information about marital status or sexual orientation. Or the question may prompt the employee to divulge information about sensitive information such as a current pregnancy, a miscarriage or terminated pregnancy, or health problems impacting fertility. In turn, the employee may attribute any later adverse action, even if it is totally unrelated, to having disclosed that personal information to the supervisor. As a result, the employee may bring a claim for discrimination based on, for example, gender, marital status, pregnancy, religion, sexual orientation or disability.

Third, in the discussion prompted by the question, the supervisor may find herself making promises she cannot realistically keep. For example, in an attempt to be reassuring, the supervisor may tell the employee that she will not lose out on coveted assignments because of having kids. But this may not be a promise that can be honored, because it depends on so many variables, such as what specific work schedule the employee seeks after having children and what the relevant work demands are at that time. For example, what if the employee cannot travel because of childcare demands, and the coveted assignment requires non-negotiable travel? What if the employee insists on leaving the office at 5 p.m. to pick up at day care, but the coveted assignment requires evening work? The employee may later claim, even long after the discussion and when work circumstances have changed entirely, that the well-meaning assurances were an enforceable promise by the employer.

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THE BETTER WAY

There are better ways to make clear to women employees that they need not choose between having children and enjoying a satisfying and productive career with their employer.

1. Have an Open Door Policy. Establish an open door policy that invites *all* employees to raise concerns or ask questions of any superior. With an effective open door policy, a female employee who wishes to have the sort of frank discussion that Sandberg recommends can readily access a superior with whom she feels comfortable and discuss any issues, questions or concerns about work-life balance or other topics. Human resources professionals can also be an important sounding board available to any employee who wishes to discuss how to balance work and parenting and may not feel fully comfortable raising issues directly with a superior. Human resources can also serve as a liaison between the employee and a supervisor to discuss such issues, when appropriate.

   The key difference between Sandberg's suggested direct question about child-bearing, and a conversation that arises via the open door policy, is that the employee initiates the discussion voluntarily, on her own terms, and her own schedule. Further, the open door policy applies equally to any employee of either gender. Even when the employee initiates the conversation, the supervisor or human resources professional still needs to be careful not to make assumptions based on gender, and not to pry into intrusive personal details about child-bearing or other sensitive personal matters.
2. Adopt and Promote Family-Friendly Policies. Offer workplace policies that invite talented employees, male and female, to return to work after having children. For example, the company might offer parental leave, flex-time or job-sharing, alternative work arrangements or a day care facility or emergency back-up day care. In her book, Sandberg suggests special parking places, close to the work entrance, for pregnant employees. Wellness and fitness programs can be part of an overall program that inspires healthy living and lower stress. Employee assistance programs may offer guidance for new parents, help in finding high-quality child care, or advice on specific topics, such as caring for a child with autism or other special needs.

   Once policies are in place, tout those policies to every employee, at the time of hire and in annual or periodic refreshers. Make the policies easily accessible to employees in a handbook or intranet. Send all employees regular reminders about family-friendly policies, and how to access those policies for further detail. Invite employees to ask any questions they might have about how the policies work in practice, and let them know exactly who they can ask and how. Consider having a system whereby employees can confidentially suggest policy changes or additions.
3. Facilitate Mentorships. Set up opportunities for mentors to provide guidance for employees as they advance in the organization. Consider matching new employees with a professional mentor. Let the employee choose a mentor from a list of volunteers who are willing to share their time and advice. Mentoring programs are effective because an employee who has a trust relationship with a mentor may well feel more comfortable broaching issues of work-life balance, or other concerns, with that mentor in an open dialogue. Such conversations arise naturally and voluntarily, as the employee wishes, rather than being directed by a supervisor. Further, mentoring may provide women the opportunity to see, up close, how women more senior in the organization balance work and family. That insight, in turn, may help the mentees see a successful path forward for themselves as they seek to strike that same balance.
4. Establish a Women's Affinity Group at Work. Consider establishing a women's network in the office that female employees are welcome (but not obligated) to join. Such a group can provide a useful forum for topics of interest to women in the workplace, and an opportunity for women to share experiences within an informal network of peers. Often, conversations

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within these groups range from purely professional and career-based topics to nuts-and-bolts discussions of how individuals manage workplace advancement with child care, home and school obligations. Such a group need not be limited by gender either; some companies offer a "working parents'" affinity group for any employee seeking to balance work and home lives.

Similarly, leadership development programs can be a great way to invite promising up-and-coming female employees expressly to prepare for a greater role in the business. Such a program can encourage women to see themselves in leadership roles in the future and to build the necessary skills to get there.

5. **Develop an Inclusive Work Culture.** Ideally, a workplace culture will offer flexibility, and be inclusive of employees who are also parents. Such a culture will communicate to all employees, regardless of gender, that employees who have children can succeed in the workplace. Consider offering a discreet, private and appealing location for new mothers to pump and store breast milk. To the extent possible given work demands, allow employees of either gender to work from home when a child is sick. Even a simple gesture such as inviting employees' significant others and children to certain social events, or to trick-or-treat in the office on Halloween, can make a big difference in making employees feel that they need not choose between career success and family life.

To be sure, Sandberg's goals are laudable, in that she seeks to promote an inclusive work culture in which women compete on an even playing field. At first glance, readers of *Lean In* may even find her advice to ask explicitly about childbearing plans to be appealing in its candor. But in reality, asking such intrusive questions directly can make an employee deeply uncomfortable and make her feel boxed in to sharing personal information that she would prefer *not* to share. Such questions may cause the employee to think that she is being evaluated on different terms, or being viewed through a different lens, than her male counterparts. The methods described above offer an alternative approach that minimizes the legal risk, while arriving at the same end: a workplace in which women can and do advance to leadership roles. ■

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