

EMPLOYER ALERT: EEOC Issues Guidance on Caregiver Discrimination

The Equal Employment Opportunity Commission (EEOC) recently issued guidance concerning caregiver discrimination titled, "The Covid-19 Pandemic and Caregiver Discrimination Under Federal Employment Discrimination Laws" (the "Guidance"). The Guidance is intended to provide employers with best practices to address the challenges employees may have with balancing work and caregiving obligations that may have intensified as a result of the COVID-19 Pandemic, and the onslaught of requests for flexible work arrangements faced by many employers.

At the outset, the EEOC's Guidance expressly acknowledged that federal employment discrimination laws do not specifically prohibit discrimination that is based solely on caregiver status. Indeed, the EEOC affirmed in the Guidance that employees generally do not have an express right under federal employment discrimination laws to reasonable accommodations, such as working remotely, flexible schedules, or reduced travel or overtime, just because they are caregivers.

However, the Guidance then clarified that employees with caregiving responsibilities may have rights under other laws due to their membership in another protected class, including employees' sex (including pregnancy, sexual orientation, or gender identity), race, color, religion, national origin, age, disability, or genetic information. The EEOC also stressed in the Guidance that caregivers may have rights and protections under various federal laws, including the Family and Medical Leave Act (FMLA), Title VII of the Civil Rights Act of 1964 (Title VII), the Americans with Disabilities Act of 1990 (ADA), the Rehabilitation Act of 1973 (Rehabilitation Act), the Pregnancy Discrimination Act (PDA), or the Age Discrimination in Employment Act (ADEA). To demonstrate these points, the EEOC provided several examples of prohibited conduct in the Guidance, including the following:

- Refusal to hire a female applicant or refusal to promote a female applicant based on the assumption that, because she was female, she would focus primarily on caring for young children, parents, or other adult relatives, rather than a focus on work.
- Refusal to assign female employees with caregiving responsibilities demanding or high-profile projects that increase employees' advancement potential but require significant overtime or travel.
- Reassignment of projects to other employees based on assumptions that female caregivers cannot, should not, or would not want to work extra hours or be away from their families if a family member is infected with or exposed to COVID-19.
- Refusal to permit male employees to telework or to adjust their schedules to enable them to perform pandemic-related caregiving obligations, such as caring for young children or parents, while granting such requests when made by similarly situated female employees.
- Refusal of requests for exceptions from return-to-work policies or attendance policies made by male employees with caregiving responsibilities, based on their gender, but providing them to female employees.
- Imposition of more burdensome procedures on LGBTQI+ employees who make caregiver-related requests, such as requiring proof of a marital or other family relationship with the individual needing care, if such requirements are not imposed on other employees who make such requests.
- Refusal to promote an employee who is the primary caregiver of a child with a mental health disability that worsened during the pandemic, based on the employer's assumption that the employee would not be fully available to colleagues and clients, or committed to the job, because of the employee's caregiving obligations for a child with a disability.
- Refusal of an employee's request for unpaid leave to care for a parent with long COVID, while approving other employees' requests for unpaid leave to handle other personal responsibilities may be a violation of the ADA or the Rehabilitation Act. Depending on the circumstances, this may also violate the FMLA.
- Requiring an employee who is caring for a grandchild while the child's parent recovers from COVID-19 to accept a reduced schedule out of concern that, because of the employee's age, the employee lacks the stamina to perform full-time job duties effectively while also caring for a young child, may be a violation of the ADEA.

Main Takeaways from the Guidance:

1. Although caregiver is not a protected class under federal law, treating caregivers differently than other employees may violate existing federal employment discrimination prevention laws if an employer bases workplace flexibility decisions on a caregiver's protected characteristics, including sex, disability, age, or race.
2. Several state and local laws *do* recognize caregivers as a protected class and provide broad protections for employees with caregiving responsibilities. For example, because caregivers are a recognized protected class under the New York City Human Rights Law, employers cannot deny benefits to employees with caregiving responsibilities if they provide the same benefits to other employees. However, even under the broad NYC Human Rights Law, employers do not have to offer accommodations to employees solely because of their caregiving responsibilities. Additional information about the protections afforded to caregivers under the NYC Human Rights Law can be found in the NYC Commission's recently published Fact Sheet, title "Protections for Workers with Caregiving Responsibilities." Employers should therefore consider whether an employee's request for flexible work arrangements implicates any specific federal, state, or local laws before granting or denying the request.
3. Employers are generally not required to excuse poor performance caused by an employee's caregiving responsibilities, and we recommend that employers continue to track and document all employees' performance.
4. The EEOC's Guidance is not the same as passing new law. However, the Guidance does provide insight into what the EEOC views as a rising trend and the types of claims that may be given enforcement priority.

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