Client Alert: EEOC Issues Guidance Regarding COVID-19 Caregiver Discrimination

BY TRACY THOMAS BOLAND • MARCH 24, 2022

The EEOC recently issued guidance regarding COVID-19 caregiver discrimination. This guidance reiterates previously-issued guidance (Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities, Questions and Answers about EEOC's Enforcement Guidance on Unlawful Disparate Treatment of Workers with Caregiving Responsibilities and Employer Best Practices for Workers with Caregiving Responsibilities) regarding circumstances under which discrimination against employees with caregiving responsibilities may be unlawful under Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, and other EEOC-enforced laws. In addition to the guidance, the EEOC has also recently released a video explaining caregiver discrimination.

CAREGIVER DISCRIMINATION VIOLATES FEDERAL LAW WHEN BASED ON MEMBERSHIP IN A PROTECTED CLASS

As noted in the guidance, discrimination against caregivers violates federal law when based on the individual's sex (including pregnancy, pregnancy-related conditions, sexual orientation, or gender identity), race, color, religion, national origin, age (40 years old or older), disability, or genetic information. Additionally, discrimination based on a caregiver's association with someone who is a member of a protected class is also unlawful. Finally, caregiver discrimination is unlawful where such discrimination is based on the intersections among these characteristics.

EXAMPLES OF UNLAWFUL DISCRIMINATION AGAINST, AND HARASSMENT OF, CAREGIVERS

The EEOC's guidance provides helpful examples of unlawful discrimination, including:

- Refusing to hire or promote a female employee on the assumption that, because the employee is a woman, she would need to care for children attending remote schooling.
- Declining to assign high-profile projects or work-related travel to a female employee on the assumption that she needs to juggle work and family obligations.
- Refusing a male employee's request for a flexible work schedule to care for a family member with COVID-19.
- Requiring an LGBTQI+ employee to provide additional proof or documentation of family relationship to care for a family member with COVID-19 if non-LGBTQI+ employees are not required to provide such documentation.
- Allowing employees to harass pregnant co-workers for maintaining physical distancing or taking other actions to avoid contracting COVID-19.

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EMPLOYEES ARE NOT ENTITLED TO REASONABLE ACCOMMODATIONS MERELY BASED ON CAREGIVER STATUS

The guidance states that employers are not required to provide reasonable accommodations to employees based merely on their status as a caregiver. That being said, the EEOC notes that caregivers may have rights under the FMLA or other state or local laws for accommodations such as telework, flexible schedules, reduced travel or overtime.

ACCOMMODATIONS FOR PREGNANT WORKERS

The EEOC notes that pregnant employees who are unable to perform their job duties due to pregnancy, childbirth, or pregnancy-related conditions may be entitled to reasonable accommodations under the ADA or the Rehabilitation Act. Such accommodations include modified duties, leave, or alternative assignments.

DISABILITY DISCRIMINATION AND CAREGIVER RESPONSIBILITIES

As noted in the guidance, it is unlawful for employers to discriminate against employees or applicants based on their association with a person with a disability, including caregiving responsibilities for persons with COVID-19 or COVID-19 symptoms. Employers may not, for example, refuse an employee's request for unpaid leave to care for a parent with long COVID, while approving other employees' requests for unpaid leave to attend to other personal responsibilities. The EEOC notes that such discrimination, which is unlawful under the ADA, may also violate the FMLA or similar state leave laws.

RACE AND NATIONAL ORIGIN DISCRIMINATION; CITIZENSHIP AND IMMIGRATION STATUS

Employers may not discriminate against employees based on race or ethnicity-based stereotypes related to the COVID-19 pandemic. By way of example, employers may not require Asian employees to provide additional proof of vaccination status or apply different standards in assessing caregiving requests made by Black employees. Additionally, the EEOC notes that discrimination based on citizenship or immigration status may be unlawful under laws enforced by the Department of Justice.

INTERSECTIONAL DISCRIMINATION IMPERMISSIBLE

The EEOC cautions that discrimination based on two or more protected characteristics is impermissible; this includes, for example, refusing to grant COVID-19 leave requests made by male, Native American employees, while granting such requests made by female, Native American employees.

OLDER EMPLOYEES NOT ENTITLED TO REASONABLE ACCOMMODATIONS MERELY BECAUSE OF AGE; AGE BASED DISCRIMINATION UNLAWFUL

The guidance notes that under the Age Discrimination in Employment Act (ADEA), employees are not entitled to reasonable accommodations for caregiving or any other purpose. The EEOC notes that employers may not discriminate against older caregivers based solely on age and on age-based assumptions that older workers with caregiving responsibilities need special treatment.

CAREGIVER STATUS DOES NOT INSULATE EMPLOYEES FROM PERFORMANCE MANAGEMENT

The EEOC makes it clear that employers are not required to excuse an employee's poor performance related to their caregiving duties. By way of example, employers may issue written warnings to employees who are consistently late due to COVID-19 caregiving duties, so long as such written warnings are consistently applied to all employees.

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EMPLOYERS SHOULD RECOGNIZE AND RESPOND TO HARASSING CONDUCT BASED ON COVID-19 CAREGIVING RESPONSIBILITIES

As set forth in the guidance, employers are cautioned to be mindful of harassment related to their employees' caregiving responsibilities, which may violate federal law. Such behavior includes employees criticizing female employees of being preoccupied with keeping their families safe from COVID-19, ridiculing male employees for performing COVID-19 caregiver duties, making offensive comments about LGBTQI+ employees' sexual orientation after they have requested leave to care for their same-sex spouse with COVID-19, insulting Asian employees because COVID-19 was first identified in an Asian country, or asking older employees whether it's "worth the risk" to care for their grandchildren with COVID-19, given older individuals' increased risk of severe illness due to COVID-19. The guidance reminds employers to maintain and update harassment policies, train employees on such policies, apply harassment policies in a consistent manner, and promptly investigate and address allegations of harassment.

RETALIATION AGAINST CAREGIVERS IS UNLAWFUL

The EEOC notes that employees may not be retaliated against on the basis of reporting or reasonably opposing suspected discrimination. Examples of unlawful retaliation involving caregivers includes changing the work schedule of an employee with young children to conflict with school drop-off and pick-up times because the employee participated in a discrimination investigation, transferring a manager who is the primary caregiver of an older relative in a local care facility to a distant office for refusing to obey a discriminatory order (such as refusing to fire an employee because of their race). Additional EEOC guidance regarding retaliation can be found on the EEOC website.

STATE AND LOCAL LAW CONSIDERATIONS

The EEOC's guidance only addresses caregiver discrimination issues under federal law. Employers also need to be mindful of their obligations under relevant state or local law.

Bowditch will closely monitor any developments on this issue and update you promptly. Employers with questions should consult with their Bowditch Employment & Labor attorneys.

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