

Management Alert

EEOC Issues Guidance on Caregiving Responsibility Discrimination

On May 23, 2007, the Equal Employment Opportunity Commission (EEOC) issued an Enforcement Guidance regarding discrimination against workers with caregiving responsibilities. Although the EEOC acknowledged that “caregivers” are not a protected class under the federal discrimination laws, the Guidance identifies circumstances in which it believes that stereotyping or other forms of disparate treatment would violate Title VII of the Civil Rights Act or the Americans with Disabilities Act (ADA). The Guidance, which does not have the force and effect of law, but will be used by EEOC investigators as they handle charges, signals a broadening of the Commission’s interpretation of Title VII by considering fact patterns that were not previously viewed as being covered by the discrimination laws. It also signals an increased focus on the ADA “association provision,” which includes protection for qualified individuals because of the known disability of an individual with whom the qualified individual has a relationship or association. The Guidance does not address the Family and Medical Leave Act (FMLA), which already provides eligible employees with job-protected leave to address certain caregiver issues.

What is Caregiving Responsibility Discrimination?

According to the EEOC, caregiving responsibility discrimination (CRD) occurs when an employer’s decision affecting a caregiver unlawfully discriminates on the basis of a protected characteristic under Title VII or the ADA. Although the Guidance is careful to state that this discrimination must also be because of an employee’s federally protected class, such as race or sex, in practice, the Guidance may be used to establish “caregiving responsibilities” as a proxy for statutorily created protected classes.

Which Employees are Covered by CRD?

The Guidance focuses heavily on pregnant women and mothers; however, it stresses that all types of employees can be subject to CRD, including unmarried women, fathers, and grandparents or other family members who may have caregiving responsibilities. One theme of the new Guidance and of the hearings leading to its issuance is that while CRD affects all levels of the workforce, lower wage earners and part-time employees are particularly affected.

What Constitutes “Caregiving Responsibilities”?

The Guidance speaks of “caregiving responsibilities of workers,” which include employees’ responsibilities to care for their children, elderly or disabled family members, and the ongoing “work-family conflicts” that often arise as a result of these responsibilities.

Circumstances Under Which CRD Might Arise

The Guidance identifies six circumstances where discrimination against an employee with caregiving responsibilities would be unlawful under Title VII (which includes the Pregnancy Discrimination Act) or the ADA. These include:

- Sex-based disparate treatment of female caregivers
- Pregnancy discrimination
- Discrimination against male caregivers
- Discrimination against women of color
- Unlawful caregiver stereotyping under the ADA (Note that under current law, an employer is not required to provide accommodation in this situation.)
- Hostile work environment

Under the Guidance, How Will the EEOC Determine if an Employer has Discriminated on the Basis of Caregiving Responsibility?

Although the Guidance indicates that CRD can be proven using any of the types of evidence used in other discrimination cases, and that investigators should look at the totality of the circumstances, it also instructs investigators to consider several pieces of evidence that may be of concern to employers:

- Most significantly, the Guidance provides that comparative evidence is not necessary to establish CRD. This means a claimant may succeed on a CRD claim even where he or she cannot point to a similarly situated comparative outside of his or her class who was treated more favorably. For example, comments by managers evidencing bias against a caregiver may support an inference of discrimination even absent comparative evidence.
- The Guidance cautions investigators to recognize sex stereotyping, noting that it “may be more difficult to recognize . . . when it affects an employer’s evaluation of a worker’s general competence . . . Such stereotyping can be based on unconscious bias, particularly where officials engage in subjective decisionmaking.”

Because of the many nuances of CRD, and because CRD is not itself a protected class, it may be difficult for investigators and employers alike to assess where actionable discrimination has occurred.

Recommended Employer Action Steps

As stated previously, the Guidance does not have the force and effect of law. However, the EEOC will begin to implement the Guidance and scrutinize an employer’s actions in this area. As a result, we recommend that employers take the following proactive steps:

- Review existing policies and procedures that may implicate CRD issues, including alternative or flexible work schedule policies, sick and leave policies, and “compensatory time” policies, to ensure that the policies and their administration are nondiscriminatory. While the Guidance does not suggest that employers have any obligation to accommodate employees’

caregiving responsibilities, it does provide that the employer policies and practices must be implemented without regard to protected class.

- Conduct management training on CRD, particularly for those in a position to make hiring, firing, promotion, and scheduling decisions, so that managers can learn to identify CRD issues, involve human resources as appropriate, and avoid workplace comments that could suggest CRD.
- Document performance issues and ensure human resources oversight of employment decisions that could trigger CRD claims.
- Handle EEOC charges that may implicate CRD with care, recognizing that this is a priority for the Commission.

The Guidance is available at <http://www.eeoc.gov/policy/docs/caregiving.html> and http://www.eeoc.gov/policy/docs/qanda_caregiving.html. The Guidance includes factual scenarios illustrating what may constitute CRD.

If you have any questions concerning this Management Alert, please contact the Seyfarth Shaw LLP attorney with whom you work or any labor and employment attorney on our website www.seyfarth.com.

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