



Management Alert: Workplace Strategies

Caregiver and Family Responsibilities: *A Continuing Challenge For Employers*

More employers are struggling with issues related to family and caregiver responsibilities in the workplace, whether in the recruitment of employees, the growth, development and advancement of employees, responding to employees' needs to for time off, or requests for flexibility in scheduling and other benefits. Family and caregiver responsibilities generally arise for employees who have responsibilities for caring for children, elderly parents, and/or disabled children, parents, or other relatives.

In addition to addressing employee relations issues and costs (i.e. turnover costs, loss of productivity) that come with family responsibilities, there are also legal land mines that employers must navigate as family responsibilities can raise issues under Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, the Family and Medical Leave Act, and a whole host of other federal, state, and local employment laws. The Center for WorkLife Law at the University of California, Hastings College of Law issued a report in December 2009 and cited a study that found a 400% increase in the number of family responsibilities discrimination cases being filed between 1996 and 2005, as compared to 1986 and 1995. Thus, this issue is likely to continue to be a source for increased charges and lawsuits.

Family Responsibilities As A Protected Characteristic

Title VII makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to...compensation, terms, conditions, or privileges of employment, because of such individual's...sex..." 42 U.S.C. § 2000e-2(a). The ADA forbids discrimination by "excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association." 42 U.S.C. § 12112(b)(4).

Although family responsibilities is not presently an explicit protected characteristic covered by federal law, in May 2007, the Equal Employment Opportunity Commission issued an Enforcement Guidance titled "*Unlawful Disparate Treatment of Workers With Caregiving Responsibilities*." The EEOC stated that the purpose for the Enforcement Guidance was "to assist investigators, employees, and employers in assessing whether a particular employment decision affecting a caregiver might unlawfully discriminated on the basis of prohibited characteristics under Title VII of the Civil Rights Act of 1964 or the Americans with Disabilities Act of 1990."

Practical Implications

So what does this mean for employers? How would family responsibilities discrimination implicate these two statutes if it is not its own protected characteristic? Consider the following situations and whether they are problematic:

1. Assuming a pregnant woman did not want to travel for client meetings based on her pregnancy?

2. Assigning a woman to a less stressful job because she just had her third child?
3. Denying a woman a promotion to a position that is high impact and stress and requires lots of travel and late hours because there is a concern that she could not handle the rigors of the new position because she has been caring for a sick, disabled parent for the last three years?
4. Granting women more paid leave to care for their children than granted to men after the birth, adoption or placement of child in foster care?
5. Requesting a male employee who has children to work late but not making the same requests of his female co-worker who has children?

The answer to the question as to whether any of the above scenarios are problematic under Title VII, the Pregnancy Discrimination Act, which amended Title VII, or the ADA is a resounding “YES.” The problem with each scenario is they involve sex based treatment, unlawful stereotyping, and/or improper treatment based on association. Specifically, the EEOC’s Enforcement Guidance enumerates six different categories of prohibited conduct that implicate family responsibilities discrimination. They are:

- Sex Based Disparate Treatment (e.g., whether female applicants, but not male applicants, were asked about their caregiving responsibilities);
- Pregnancy Discrimination (e.g., prohibited acts like an employer making assumptions about the commitment of pregnant workers or their ability to perform certain physical tasks);
- Discrimination Against Male Caregivers (e.g., “denied male employees’ requests for leave for childcare purposes even while granting female employees’ requests”);
- Discrimination Against Women of Color (e.g., “a Latina working mother might be subjected to discrimination by her supervisor based on his stereotypical notions about working mothers or pregnant workers, as well as Latinos generally”);
- Unlawful Caregiver Stereotyping Based on the ADA (e.g. hostility toward a parent of a disabled child based on the parent’s need to take leave to care for that child); and
- Harassment and/or Retaliation.

The EEOC continues to make this one of its priority issues. In May, 2009, the EEOC issued a [supplemental memorandum](#) to its 2007 Enforcement Guidance, this time with an emphasis on best practices in the workplace. In this supplemental memorandum entitled “Employer Best Practices for Workers with Caregiving Responsibilities,” the EEOC offered “examples of best practices for employers that go beyond federal non-discrimination requirements and that are designed to remove barriers to equal employment opportunity.” The EEOC focused on all aspects of the employment relationship, including general overall considerations, recruitment, hiring, and promotion, and terms and conditions of employment, including performance management, flexible work arrangements, overtime, reassignment of job responsibilities, and leaves of absence. Accordingly, employers should be looking at these areas as well.

In addition to federal law concerns, family responsibility issues are also implicated by state and local laws. Presently four states have statutes addressing familial responsibilities, either as a protected characteristic (Alaska and the District of Columbia; New Jersey for state employers only) or prohibiting employers from making inquiries related to familial responsibilities (Connecticut). Five more states have pending bills related to family responsibilities discrimination. Additionally, according to the Center for Worklife Law, at least 63 municipalities (cities, counties, etc.) in at least 22 states have laws that specifically create a protected category for familial or parental status or family responsibilities. These statutes vary in their definition of what is protected, who is covered, and what acts are prohibited. Thus, it is critical that employers familiarize themselves with any state or local laws that might provide protections or regulations concerning family responsibilities.

Other Federal, State And Local Laws Implicated

Family responsibilities implicate not only discrimination issues but also other conduct regulated by federal, state, and local laws. For example, under the Employment Retirement Income Security Act, it is unlawful for an employer to terminate an employee because the employer believes the employee's dependent's significant medical conditions will drive up health care costs and premiums.

Under the Family and Medical Leave Act (FMLA), an eligible employee is entitled to job protected leave to care for a parent, child or spouse with a serious health condition. If medically necessary, this leave can be taken on an intermittent or reduced work schedule basis. In addition, the FMLA was amended to 2008 to provide for up to 26 weeks of leave to care for an injured servicemember. The amendment also adds the right to take up to 12 weeks of leave to address work-life issues arising out of the deployment to active duty of a parent, child or spouse. Moreover, various states and municipalities have similar laws to the FMLA, that in some cases provide greater protections and rights, including but not limited to covering more employees and employers, providing longer periods of leave, and providing paid leave and leave for greater reasons/individuals than covered by the FMLA.

Thus, regardless of whether family responsibilities is a protected category for discrimination purposes, employers need to ensure they are complying with all other laws and regulations that touch on family responsibilities in the workplace.

What Employers Should Do

Because family responsibilities are likely already affecting your workplace, we recommend that employers take some proactive steps to ensure compliance with applicable laws and utilization of best practices.

1. Review the demographics of your workforce to assess your organization's vulnerability to these issues based on its workforce demographics, either as a whole, or by location or department.
2. Review your policies to ensure compliance with all applicable laws implicating family responsibilities issues, including non-discrimination and non-harassment policies, time off and leave policies, alternative work arrangements (e.g., telecommuting, reduced schedules, job sharing) criteria for transfers, promotions, and job assignments, and benefits.
3. Train your supervisors and managers on family responsibilities issues, protections and prohibited conduct. Training should cover all aspects of the employment relationship, including hiring, promotion, discipline, scheduling, training, and termination decisions. Remind supervisors and manager to seek out Human Resources when confronted with these issues to determine how best to proceed.

4. Ensure all attendance, performance, or other similar issues that might implicate family responsibilities claims are properly documented to demonstrate the legitimate, non-discriminatory basis for the discipline or employment action.
5. Take claims of family responsibilities discrimination as seriously as other complaints of discrimination or harassment, even if you are in a jurisdiction that does not specifically include this as a protected characteristic, as the organization may still have issues under existing federal, state and local laws protecting gender, race, disability, and other forms of discrimination.

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