

Discrimination Against Employees with Caregiving or Family Responsibilities

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It is a reality in today's workplace, especially in light of the recent economic downturn, that both husband and wife often are working full-time jobs (and possibly part-time jobs on top of those) to make ends meet. The increased absence of primary caregivers from the home has put a spotlight on issues that arise in the workplace related to employees' responsibilities as caregivers for their families, and in some cases, for elderly parents or relatives. These issues permeate the workplace, arising in the context of employee recruitment, growth, development and career advancement, and employee requests for time off, flexible schedules and other benefits.

If not handled properly, issues related to the management of caregiving responsibilities can give rise to a number of employee relations and morale issues, as well as costs associated with employee turnover and loss of productivity. In addition to such day-to-day workforce issues, employers must manage a number of legal risks when dealing with issues arising out of employees' caregiver responsibilities. These legal risks can arise under Title VII of the Civil Rights Act of 1964 (Title VII), the Americans with Disabilities Act of 1990 (ADA), the Family and Medical Leave Act of 1993 (FMLA), and a host of other federal, state, and local employment laws. In this regard, the Center for WorkLife Law at the University of California, Hastings College of Law issued a report in December 2009 about a study it conducted in which it found a 400% increase in the number of discrimination cases implicating caregiver responsibilities that were filed between 1996 and 2005 as compared with 1986 and 1995. There is no reason to believe this upward trend will not continue.

Title VII and ADA Implications

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). Likewise, the ADA, and in particular the association provision contained in 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).

In May 2007, the Equal Employment Opportunity Commission issued Enforcement Guidance entitled "Unlawful Disparate Treatment of Workers With Caregiving Responsibilities." The EEOC stated that the purpose of the Enforcement Guidance was "to assist investigators, employees, and employers in assessing whether a particular employment decision affecting a caregiver might unlawfully discriminate on the basis of prohibited characteristics under Title VII of the Civil Rights Act of 1964 or the Americans with Disabilities Act of 1990."

In its Enforcement Guidance, the EEOC did not create a new protected classification for "caregivers" per se. Rather, the Enforcement Guidance makes clear that discrimination against caregivers can constitute discrimination on the basis of a protected classification under Title VII, such as the employee's sex or disability or the disability of a person with whom the employee has a relationship or association. The EEOC describes in the Enforcement Guidance six different categories of adverse treatment of employees with caregiver responsibilities that constitute prohibited conduct under Title VII or the ADA:

- Sex-Based Disparate Treatment of Female Caregivers (e.g., asking female applicants, but not male applicants, about how many children they have or are planning to have);
- Pregnancy Discrimination (e.g., making stereotypical assumptions about the commitment of pregnant

women to succeed at work or their ability to perform certain physical tasks);

- Discrimination Against Male Caregivers (*e.g.*, denying male employees' requests for bonding leave or leave for childcare purposes while granting female employees' requests for the same leave);
- Discrimination Against Women of Color (*e.g.*, discriminating against a Hispanic working mother based on stereotypical notions about working mothers or pregnant workers and hostility toward Hispanics);
- Unlawful Caregiver Stereotyping Under the ADA (*e.g.*, discriminating against a parent of a disabled child based on the parent's need to take leave to care for that child or negative assumptions about that person's commitment to work); and
- Retaliation (*e.g.*, taking adverse employment actions against an employee who has complained about stereotyping of working mothers)

Supplemental EEOC Memorandum

Since issuing the Enforcement Guidance in 2007, the EEOC continues to make discrimination against caregivers one of its priority issues. In May 2009, the EEOC issued a supplemental memorandum, entitled "Employer Best Practices for Workers with Caregiving Responsibilities." In this memorandum, the EEOC provided suggestions to employers of best practices they could adopt that would "reduce the chance of EEO violations against caregivers." The best practices recommendations touched on all aspects of the employment relationship, including general recruitment, hiring, promotion, performance management, flexible work arrangements, overtime, reassignment of job responsibilities, and leaves.

Other Federal, State and Local Laws

In addition to federal law concerns, caregiver or family responsibility issues are also implicated by state and local laws. Currently, three states and the District of Columbia 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.

Protection Under the FMLA

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 (ERISA), it is unlawful for an employer to terminate an employee because the employer believes significant medical conditions of the employee's dependents will drive up health care costs and premiums.

Under the 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 in 2008 to provide for up to 26 weeks of leave to care for an injured U.S. Armed Forces service member. The amendment also added 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, which, 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 than covered by the FMLA.

What Employers Should Do

Because caregiver responsibilities likely affect every workplace, all employers should take proactive steps to ensure compliance with applicable laws and utilization of best practices. Employers should review their personnel policies and handbooks to ensure compliance with all applicable laws implicating caregiver or family responsibilities issues, including non-discrimination and non-harassment policies, time off and leave policies, policies concerning alternative work arrangements (*e.g.*, telecommuting, reduced schedules, job sharing), criteria for transfers, promotions, and job assignments, and benefits. Employers also should train their supervisors and

managers on caregiver or family responsibilities issues, protections and prohibited conduct. This training should cover all aspects of the employment relationship, including hiring, promotion, discipline, scheduling and termination decisions, as well as responding to complaints regarding caregiver discrimination. Employers also should take care to monitor compensation practices and performance evaluation systems to ensure that employees are being paid and evaluated in a non-discriminatory fashion and that there is no disparate impact on protected classifications with respect to compensation due to caregiver responsibilities.

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