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Labor & Employment Alert

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EEOC signals interest in combating caregiver discrimination

By Stephanie M. Caffera, Conor T. Tallet, and Jeniffer Taylor

New EEOC guidance advises employers that discriminating against applicants or employees with caregiving responsibilities may be unlawful under federal employment discrimination laws.



What's the Impact?

- / Employers must take care not to treat workers with caregiving responsibilities differently from other similarly situated workers
- / The EEOC expects employers to prevent harassment associated with caregiving responsibilities
- / Employers generally are not required to provide accommodations such as telework, flexible schedules, or reduced travel or overtime to workers with caregiving responsibilities

The COVID-19 pandemic has significantly disrupted employees' work and personal obligations. School and childcare closures, as well as quarantine requirements, have resulted in competing work and caregiving demands on workers. Large numbers of women, in particular, have left the workforce due to caregiving responsibilities. Recognizing this strain on caregivers, the EEOC has

issued [new guidance](#) outlining when employment decisions involving workers with caregiving responsibilities may be unlawful.

Caregiver status is not a protected status

Caregiver status alone is not a protected status under federal employment discrimination laws. The EEOC guidance reminds employers, however, that caregiver discrimination may be unlawful if it is based on the applicant's or employee's protected characteristics (such as sex or gender identity, pregnancy, race/color, or national origin), an employer's assumptions about such characteristics, or the caregiver's association with an individual with any of these protected characteristics. These legal protections apply to workers caring for children, spouses, partners, relatives, individuals with disabilities, or others.

For example, although a female employee generally could not claim discrimination on the basis of having general caregiving responsibilities for her children, the EEOC guidance reminds employers that the employee may claim discrimination on the basis that the employer declined to assign her to a project based on the employer's assumption that she would prefer not to work extra hours or be away from her family if her children were infected with COVID-19. The guidance also makes clear that employment decisions based on assumptions about the identity of the caregiver can result in unlawful discrimination. It is unlawful, for example, for employers to discriminate against male and LGBTQI+ applicants and employees with caregiving responsibilities based on their gender, sex stereotypes, sexual orientation, and/or gender identity.

Employees with caregiving responsibilities must be treated the same as similarly situated employees

Employers must treat employees with caregiving responsibilities the same as other similarly situated employees. For example, it would be unlawful for an employer to deny a male employee permission to work a flexible schedule to care for a family member with COVID-19 if the employer would grant the same request to a female employee. The guidance also states that it would be unlawful for an employer to refuse an employee's request for unpaid leave to care for a parent with long COVID (a "disability" under the Americans with Disabilities Act) while approving other employees' requests for unpaid leave to manage other personal responsibilities.

Employers should help prevent harassment related to employees' caregiving responsibilities

Harassment related to a worker's caregiving responsibilities also may be unlawful. The guidance notes that this harassment may arise in a variety of ways, including insulting employees of a certain ethnicity for caring for family members with COVID-19 or assigning unreasonable amounts of work to employees of color because they request leave for pandemic-related caregiving purposes.¹ Employers can and should help to prevent this harassment by maintaining

¹ For specific examples, see "[The COVID-19 Pandemic and Caregiver Discrimination Under Federal Employment Discrimination Laws.](#)"

anti-harassment policies and complaint procedures, periodically training employees on such policies and procedures, and educating managers and supervisors specifically about caregiver discrimination and harassment to ensure they apply such policies and procedures in a non-discriminatory fashion.

Accommodations for caregivers

Under federal employment discrimination laws, workers generally do not have a right to reasonable accommodations such as telework, flexible schedules, or reduced travel or overtime based on their caregiver status. However, caregivers may have rights under the Family and Medical Leave Act or other similar state or local laws.

Employers are free to provide such accommodations, but the EEOC emphasizes that employers must do so in a non-discriminatory manner. Notably, the guidance cautions that even employment decisions made for purportedly benevolent reasons may be unlawful. For example, despite an employer's desire to keep pregnant employees safe, the guidance states that an employer may violate the law by unilaterally requiring pregnant employees to telework to limit their exposure to COVID-19.

Notably, employers do not have to excuse poor performance resulting from an employee's caregiving responsibilities. However, employers must apply performance standards consistently to all employees. For instance, the guidance states that employers may not penalize employees of one specific ethnicity for taking relatives to medical appointments while overlooking the same conduct by employees of other ethnicities.

Looking ahead

The EEOC guidance provides helpful instruction and examples as to how employers should make various employment decisions involving workers with caregiving responsibilities. As the pandemic continues to evolve and affect caregiving workers, employers should be prepared to consult with counsel to ensure that they maintain and apply policies in a manner consistent with this new guidance to avoid claims of unlawful discrimination.

For more information on the content of this alert, please contact your Nixon Peabody attorney or:

[Stephanie M. Caffera](#)

585.263.1066

scaffera@nixonpeabody.com

[Conor T. Tallet](#)

585.263.1378

ctallet@nixonpeabody.com

[Jeniffer Taylor](#)

585.263.1434

jtaylor@nixonpeabody.com
