

ALERTS

EEOC Issues New Guidance on Caregiver Discrimination and COVID-19

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On March 14, 2022, the U.S. Equal Employment Opportunity Commission (“EEOC”) issued guidance on caregiver discrimination under federal employment discrimination laws with respect to the COVID-19 pandemic. The EEOC also updated its general COVID-19 guidance to include a section on “Caregivers/Family Responsibilities” (collectively, the “Caregiver Guidance”). The Caregiver Guidance describes unlawful discrimination against applicants and employees that can arise based on caregiving responsibilities during the COVID-19 pandemic.

The EEOC noted that the COVID-19 pandemic “significantly impacted employees’ work and personal obligations, creating concurrent, and at times, competing job and caregiving demands.” Millions of Americans with “children, spouses, partners, older relatives, individuals with disabilities,” etc. had to adjust to “vastly changed circumstances.” The EEOC recognized that the “challenge of juggling work and caregiver obligations” remains even as the pandemic continues to evolve.

The Caregiver Guidance makes clear that caregiver status is not a protected class under federal employment discrimination law^[1] and that federal employment discrimination laws do not prohibit employment discrimination based solely on caregiver status. In general, employees do not have a right under federal discrimination laws to reasonable accommodations such as telework or flexible schedules because they are caregivers, nor are employers required to excuse poor performance resulting from employees’ caregiving duties during the COVID-19 pandemic.

Caregiver discrimination violates federal employment discrimination laws when it is based on an applicant's or employee's sex (including pregnancy, sexual orientation or gender identity), race, color, religion, national origin, age (40 or older), disability, or genetic information (such as family medical history). Caregiver discrimination also is unlawful if it is based on an applicant's or employee's association with an individual with a disability or on the race, ethnicity or other protected characteristic of the individual receiving care.

The Caregiver Guidance provides several examples of how unlawful discrimination may arise, noting that such discrimination is often connected to stereotypes about caregiving responsibilities or roles. For instance, an employer may not decline to assign female caregivers certain projects based on the employer's assumptions regarding the female employees' caregiving obligations or refuse to hire pregnant applicants based on assumptions that the applicants should be focused on ensuring safe and healthy pregnancies. It would also be unlawful for an employer to deny men or LGBTQ+ employees leave or permission to work a flexible schedule to care for a family member with COVID-19 or other pandemic-related caregiving duties if the employer grants the same requests when made by similarly situated women. Female employees with school-age children cannot be given more favorable treatment than male employees because of gender-based stereotypes regarding caregiving responsibilities.

Employers are permitted, but not required, to provide accommodations to employees to enable employees to balance work and personal obligations without impairing performance or productivity, such as telework, modified schedules or leave to enable them to care for family members, as long as they are not treating employees differently based on sex, race or other protected characteristics.

Workplace harassment related to employees' COVID-19 pandemic caregiving responsibilities may also be unlawful and can occur both in-person and remotely. For example, comments regarding an employee's choices during the COVID-19 pandemic based on gender stereotypes may constitute sexual harassment. Such conduct becomes unlawful harassment where: 1) enduring the offensive conduct becomes a condition of continued employment or 2) the conduct is severe or pervasive enough to create a work environment that a reasonable person would consider intimidating, hostile or abusive

In response to the Caregiver Guidance, employers should be cognizant of how their actions may be interpreted as caregiver discrimination, and should continue to apply their policies consistently, respond promptly to harassment and discrimination related claims, take appropriate corrective action if harassment or discrimination occurs, and train all employees with managerial responsibilities on their obligations under applicable employment discrimination laws.

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If you have any questions concerning this *Alert*, please contact your attorney at Schulte Roth & Zabel or one of the authors.

[1] Although federal employment discrimination laws do not prohibit discrimination based solely on caregiver status, some state or local laws provide explicit protections for workers with caregiving responsibilities. In New York State, for example, employers cannot discriminate against an employee because they have a child under 18. See N.Y. Human Rights Law § 296.1. New York City law goes further, altogether banning employment discrimination based on an employee's status as a caregiver. See N.Y.C. Admin. Code § 8-101.

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