

Rocking the Cradle

How to Balance Your Employees' Work/Life Issues and Prevent Caregiver Discrimination Claims

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An increasing number of employees want more from life than just a high-paying, prestigious job. They want, and often need, more flexibility in juggling work and home commitments, yet at the same time they want to feel valued and respected at the workplace. On the other hand, as a manager, you want an employee, male or female, who is 100% committed to the job; an employee who is dependable, responsible, and will bring tasks and projects to completion regardless of the time it takes. Although you value your employees and care about them as individuals, tasks and projects still need to be completed. Your state of mind may be further clouded if, during your career, you made substantial personal sacrifices for your employer, often at the expense of your family. Although not a completely novel issue, this delicate balancing act between employers' and employees' needs and desires and equal employment laws has recently captured the attention of the U.S. Equal Employment Opportunity Commission (EEOC). Specifically, the EEOC has issued new enforcement guidance on unlawful disparate treatment of workers with caregiving responsibilities. Discrimination against caregivers is also known as Family Responsibilities Discrimination or FRD.

What prompted this guidance? For starters, each new generation has its own definition of job commitment and work/life balance, along with different time pressures. Consequently, the EEOC is focusing on the workplace effects that these evolving ideas and challenges have on caregivers today. Moreover, the EEOC believed the guidance was necessary because of the changing workplace demographics, which have created the potential for greater discrimination against working parents and others with caregiving responsibilities. Such changes include, but are not limited to, women's increased participation in the labor force and both male and female



employees' increased working hours. Notably, the EEOC recognized that women continue to be most families' primary caregivers and that mothers who have young children are almost twice as likely to be employed today as were their counterparts 30 years ago. Also, caregiving responsibilities are not limited to childcare. Many individuals are caregivers of the elderly, a situation that will only increase as the baby boomer population ages. Some employees are also part of the so-called "sandwich generation" in which they are dealing with issues related to caring for both their children and their parents while needing to stay employed.

The EEOC guidance is intended to assist employers and the EEOC staff in determining whether discrimination against persons with caregiving responsibilities violates equal employment law. You may be asking, when did caregivers become a protected group under the federal EEO statutes? Most managers know that race, sex, gender, disability and religion, to name a few, are protected groups. No, there has not been a change in the federal statutes. Caregivers have not been specifically added to the federal EEO statutes and accordingly are still not directly covered under the EEO statutes prohibiting discrimination based on their parental or caregiver status. However, caregivers have been and continue to be covered indirectly, although in the past this may have not been clear to employers and employees. The EEOC guidance helps clear any confusion by highlighting the ways a caregiver can be a target of illegal discrimination based upon his or her membership in another protected class.

Specifically, the EEOC guidance explains that under federal law, an FRD claim or unlawful disparate treatment can occur when an employer subjects a worker with caregiving responsibilities to discrimination based on a protected class, such as sex, race or disability. Many of the sex claims are not based simply on sex, but rather based upon the expected sex role of the employee; in other words, based on the stereotypes of a woman's and a man's role at home and at work. Ironically, the EEOC explains that some claims are based upon seemingly benevolent incidences when the employer acts in what it believes to be the employee's best interest, such as moving the employee to a less demanding project or schedule, or reducing his or her job responsibilities, absent any request for a modification or job change from the employee.

Also, keep in mind that state law may be more expansive than federal law and protect caregivers more directly. There are a few states that presently protect, and a few others that have

pending legislation to protect, employees from discrimination based upon parental status, familial status or caregiver status. Although Delaware does protect individuals based on marital status, presently Delaware does not have any specific caregiver protection.

Claims may be based, for example, on failure to hire, failure to promote, denial of benefits, hostile work environment or retaliation. The federal statutory bases for these claims are commonly Title VII of the Civil Rights Act of 1964 and the Pregnancy Discrimination Act, but FRD claims can also arise under the Family and Medical Leave Act, the Americans With Disabilities Act, the Equal Pay Act and the Employee Retirement Income Security Act. Interestingly, many employees pursuing FRD claims have more direct evidence of discrimination than in typical race or gender cases because managers may be more vocal about their opinions on the topic. For instance, the "smoking gun" can be the manager's comments that working mothers cannot be both good mothers and good workers, that a woman's place is in the home caring for her children, or that men are not suited for taking care of children. Often comments such as these can be considered direct evidence of discriminatory intent.



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Even before the EEOC issued its recent guidance, the EEOC and the Center for Worklife Law found that FRD claims have risen substantially throughout the country

in the last decade. Interestingly, not all claims are brought by women; a growing percentage have been brought by men with caregiving responsibilities. Counsel for employees have in the past tried various avenues to obtain relief for caregivers at the federal and state level, some more successful than others. Initiating FRD claims will most likely be easier as a result of the new EEOC guidance because the EEOC investigator will be better trained to spot the potential discrimination in connection with another protected class.

Accordingly, employers and managers should review their behavior and assumptions regarding those employees with caregiving responsibilities. The EEOC guidelines provide many examples of ways a supervisor could violate the federal EEO and/or leave statutes. The following provides some ways management could discriminate against women caregivers:

- treating male caregivers more favorably than female caregivers, such as denying a promotion to a woman with young children that is available to men with young children;

- reassigning a working new mother to a less desirable role based on the assumption that as a new mother she will be less committed to her job;
- lowering subjective evaluations of a female employee's work performance after she becomes a primary caregiver, despite the absence of an actual decline in work performance;
- asking female applicants, but not male applicants, whether they are married or have young children or intend to have children or about their childcare and other caregiving responsibilities;
- rewarding female workers without children or other caregiving responsibilities with better projects or otherwise treating them more favorably than female caregivers, despite similar performance;
- terminating a new mother based on the belief that she should be at home caring for her baby;
- setting glass ceilings for mothers by furthering a culture where females are pigeonholed into less prestigious or lower paying positions based on the assumption that they do not want to or cannot work overtime, travel or move ahead in the company because of their caregiving responsibilities;
- refusing a pregnant woman's request for a temporary job modification, such as limiting heavy lifting, after previously granting the same request for a man or a non-pregnant woman with a back injury; and,
- limiting a pregnant worker's job duties not because of a request for an accommodation from the employee, but rather based on pregnancy-related stereotypes.

Additionally, the EEOC makes clear that male caregivers can also be the subject of illegal discrimination. Today, male parents want or need to be involved in raising their children more than in past generations. Denying a male caregiver leave to care for his child, spouse or parent or other related benefits under circumstances in which you would have granted the same leave or benefits to a female caregiver is a violation of the law based on sex discrimination. Similarly, it is problematic to make derogatory comments to a male caregiver who asks for leave to care for his children based on the stereotype that a man's job is to provide for his family and not change diapers.

The EEOC guidance further explains that caregiving discrimination can also occur in connection with race or disability. For instance, it is illegal discrimination if you reassign a Latino worker to a lower paying position after she becomes pregnant, but in the past had not done the same to Caucasian pregnant women. Also, it is discriminatory if you refuse to hire a male or female worker because of a spouse's disability based on the assumption that his or her caregiving responsibilities will make the person an unreliable employee.

Moreover, employers and managers need to be aware of FRD issues that arise in regards to requests for modifications to work schedules. Flexible work arrangements can be beneficial for employees and employers. Fewer jobs require strict compliance with a nine to five schedule. Technology has undoubtedly helped

employers find workable solutions for granting flexible work arrangements. However, once an employer goes down this path, it must do so on a consistent and uniform basis. Granting flex-time to a male employee to recover from a softball injury, but denying a similar request from a pregnant female with medical complications who is in a similar job category can trigger a discrimination claim. Reviewing and updating job descriptions annually is key to deciding exactly what job functions are essential. This allows you to promptly and accurately respond to requests for work modifications such as part-time, flex-time or working from home.

Another prevention tip is to review your anti-harassment policy and related training to ensure that both the policy and training address caregiver discrimination. Most importantly, if you receive a complaint or even suspect an FRD issue, your organization should investigate promptly, as you should for any other discrimination or harassment claim.

Overall, the best advice is to examine and eliminate your own stereotypes and work to dismantle the stereotypes of others in your organization that employees with caregiving responsibilities are less desirable employees, are less committed to their jobs, or do not desire to rise to more challenging positions. Caregivers should not be forced to choose between having a child or caring for an elderly parent and having a job. Generally, if you treat an employee who is dealing with caregiving issues fairly and with respect, you will gain a committed and loyal employee who brings projects and tasks to completion in a timely manner. Not only is this good for morale, hiring and retention, but it is also good for the bottom line. In the end, both employers and employees can be happy. Thus, in light of the EEOC guidance, existing law and the benefits that go hand-in-hand with compliance, employers and managers need to be aware of, and adapt to, these changing times and emerging work issues.



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