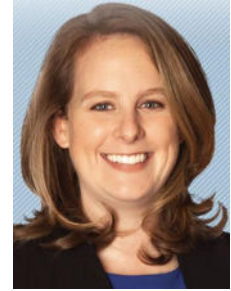


Employer Tips Following EEOC Caregiver Bias Updates

By **Catherine Scott** (March 29, 2022)

On March 14, the U.S. Equal Employment Opportunity Commission issued guidance titled "The COVID-19 Pandemic and Caregiver Discrimination Under Federal Employment Discrimination Laws." [1]

This guidance details and reiterates the EEOC's position, initially set forth in 2007 guidance, on employers' responsibilities and obligations toward employees who may be caregivers for children, immunocompromised individuals, the elderly and/or other vulnerable individuals, in light of the drastic effects the COVID-19 pandemic has had on caregivers and their ability to work.



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Such guidance highlights an area of law that employers should expect to continue to develop in light of the changing workforce expectations now associated with the COVID-19 pandemic.

Claims of caregiver discrimination have long been on the rise in the U.S., but the law involving allegations of caregiver discrimination is still developing.

What is clear is that claims of being a caregiver alone are insufficient to state a claim for discrimination or retaliation in employment.

As the EEOC has recognized in its own guidance, "the federal EEO laws do not prohibit discrimination against caregivers per se," and, in particular, "Title VII does not prohibit discrimination based solely on parental or other caregiver status." [2]

What the EEOC and courts now appear to be focused on, however, are the instances in which a claim of caregiver discrimination accompanies a claim based on a protected characteristic, such as:

- Sex and gender, including pregnancy, sexual orientation and gender identity;
- Race;
- Color;
- Religion;
- National origin;
- Age, meaning 40 and older;
- Disability;
- Genetic information, such as family medical history;
- Association with an individual with a disability or protected characteristic; or
- The intersection of any of the protected characteristics listed above.

"Gender Plus" or "Sex Plus" Caregiver Discrimination

The EEOC's new guidance seems to be driven primarily by reports that the COVID-19 pandemic has had a disparate impact on women, especially those who have needed to step back from or drop out of the workplace in order to care for their children.

The EEOC notes, however, that male employees can be similarly subject to caregiver discrimination to the extent they are treated unfairly as compared to female employees.

For example, employers may not punish female employees more harshly for absences or missed deadlines than similarly situated male employees; in that same vein, employers should not deny men leave or permission to work a flexible schedule if such requests would be granted for similarly situated women.

The same is true for LGBTQ applicants and employees who seek accommodations for caregiving requirements if such requests would be granted for other employees.

These types of sex-plus claims, though difficult to prove,[3] have faced some traction in the courts in recent years.

Several federal circuits, including the U.S. Courts of Appeals for the First, Second and Seventh Circuits, have recognized that employees can state a sex-plus claim — meaning a claim, as the First Circuit described in its 2009 Chadwick v. Wellpoint Inc. ruling, in which "not all members of a disfavored class are discriminated against ... but rather treats differently a subclass of men or women." [4]

Even the U.S. Supreme Court has taken judicial notice of the fact that there is a sex-based stereotype that women, not men, are responsible for raising children and family, explaining in 2003 in Nevada Department of Human Resources v. Hibbs that the Family and Medical Leave Act was created gender-neutral in order to

[attack] the formerly state-sanctioned stereotype that only women are responsible for family caregiving, thereby reducing employers' incentives to engage in discrimination by basing hiring and promotion decisions on stereotypes.[5]

The latest EEOC guidance seems to anticipate further claims brought in this vein by men, women and nonbinary individuals as a result of the COVID-19 pandemic, and the extreme burden placed on individuals in terms of caregiving responsibilities.

Associational Discrimination

The EEOC further emphasizes in its guidance that employers should be careful not to discriminate against employees based on their association with an individual with a disability, including employees with caregiving responsibilities for individuals with disabilities — which the EEOC has so far opined can include a diagnosis of long COVID-19.

For example, an employer should not refuse to promote an employee whose child has a mental health disability that worsened during the pandemic, solely due to its fears that the employee could not keep up with his or her workload.[6]

The EEOC clarifies, however, that employees are not entitled to accommodations solely to handle caregiving duties so long as similarly situated employees without similar caregiving duties are being treated the same way.[7]

Employers should be especially careful, though, to provide accommodations for employees due to pregnancy, childbirth or other related medical conditions, and these individuals must be treated similarly to other employees who are temporarily unable to perform job duties.

For example, if employees were granted leave and/or other job modifications for severe

fatigue, difficulty breathing or headaches due to COVID-19, then the EEOC advises that such accommodations should be provided to pregnant employees as well.

Tips for Employers

Though caregiving discrimination claims have been on the rise for quite a while, they have long been considered a niche area of employment law, arising only in limited circumstances.

Given the EEOC's recent focus on the issue, however, this may not be the case for long.

Employers can take certain steps to ensure they are ahead of the curve in terms of defending against these types of claims, including but not limited to:

- Drafting, editing and reviewing leave of absence, paid time off, vacation and sick time policies to ensure they are gender-neutral;
- Training managers and supervisors on ongoing and new policies related to leaves of absence, paid time off, vacation and sick time, equal employment opportunity, and reasonable accommodations to ensure they are being applied neutrally across all protected characteristics;
- Reviewing performance policies with all employees, and ensuring proper and timely documentation of performance issues across all categories of employees;
- Researching and implementing caregiving-friendly policies, including generous leave of absence, paid time off, vacation and sick time, flex time, and work-from-home policies; employee assistance and in-house stress reduction programs; support groups for caregivers; and subsidized day care and home care programs for employees; and
- Conducting employee surveys requesting input into caregiver needs and morale in the workplace;

Employers should be clear about their policies with managers and supervisors and be vigilant for circumstances in which caregiving discrimination might be alleged.

The EEOC provided an extensive, though not exhaustive, list in its new guidance of circumstances in which caregiving discrimination might occur.[8]

Given the widespread effect COVID-19 has had across industries on caregivers and their responsibilities, the EEOC is closely scrutinizing potential discrimination in these circumstances.

Employers should continue to keep their policies updated and should carefully consider the needs of their workforce during the next stages of the pandemic.

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[1] U.S. Equal Employment Opportunity Commission, Enforcement Guidance: The Covid-19 Pandemic and Caregiver Discrimination Under Federal Employment Discrimination Laws, EEOC-NVTA-2022-1 (March 14, 2022), available at <https://www.eeoc.gov/laws/guidance/covid-19-pandemic-and-caregiver-discrimination-under-federal-employment>.

[2] U.S. Equal Employment Opportunity Commission, Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities, EEOC-CVG-2007 (May 23, 2007), available at <https://www.eeoc.gov/laws/guidance/enforcement-guidance-unlawful-disparate-treatment-workers-caregiving-responsibilities>.

[3] There is some disagreement as to whether an employee asserting a "sex-plus" claim of discrimination must establish a "comparator," i.e., an individual of the opposite sex-plus characteristic who was treated more favorably, in order to establish a prima facie case of sex-plus discrimination. See *Nathan v. Takeda Pharmaceuticals, Inc.*, 890 F. Supp. 2d 629, 640-641 (E.D. Va. 2012) (collecting cases and holding sex-plus discrimination matter requires showing of a comparator as part of prima facie case).

[4] *Chadwick v. Wellpoint, Inc.*, 561 F.3d 38, 43 (1st Cir. 2009) (citations and quotations omitted) (reversing summary judgment for employer where employee could establish supervisor may have denied employee promotion on the basis of her learning of her child care responsibilities). See also *Back v. Hastings on Hudson Union Free School Dist.*, 365 F.3d 107, 118 (2d Cir. 2004) (sex stereotyping in employment where women were believed to be less committed to work because of their child care responsibilities); *Lust v. Sealy, Inc.*, 383 F.3d 580, 583 (7th Cir. 2004) (sex stereotyping found under Title VII where supervisor admitted he did not promote female employee because she would not want to relocate her family).

[5] *Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 737 (2003).

[6] Much like in the "sex-plus" context, an associational discrimination claim based on disability involves fears of an employee being unable to keep up at or properly dedicate themselves to their employment, but can also involve fears of significant expense in terms of health insurance and/or a fear that others at work will contract said disability (possibly applicable in the context of COVID-19). See *Williams v. Union Underwear Co.*, 614 F. App'x 249, 254 (6th Cir. 2015).

[7] See *Den Hartog v. Wasatch Academy*, 129 F.3d 1076, 1084 (10th Cir. 1997) (ADA does not require employers to provide accommodations to individuals who are associated with a relative with a disability).

[8] "Examples of harassing conduct related to employees' pandemic-related caregiving responsibilities that may contribute to an unlawful hostile work environment include:

- Disparaging female employees for focusing on their careers rather than their families during a traumatic event such as a pandemic;
- Accusing female employees, without justification, of being preoccupied with keeping their families safe from COVID-19, distracted from their professional obligations, and insufficiently committed to their jobs;
- Criticizing or ridiculing male employees for seeking to perform, or performing, caregiving duties, such as taking leave to care for a child who is quarantining after potential COVID-19 exposure, or limiting overtime or overnight travel, based on gender stereotypes of men as breadwinners and women as caretakers;
- Asking intrusive questions or making offensive comments about gay or lesbian employees' sexual orientation after they request leave to care for their same-sex spouse, partner, or ex-partner, who has COVID-19 symptoms;
- Insulting Asian employees caring for family members with COVID-19 because COVID-19 was first identified in an Asian country;
- Assigning unreasonable amounts of work or imposing unrealistic deadlines on employees of color because they requested or received leave for pandemic-related caregiving purposes;
- Questioning, without merit, the professional dedication of employees caring for individuals with disabilities who are at higher risk of severe illness from COVID-19, or mocking such employees on that basis for taking pandemic precautionary measures to avoid infection;
- Stating that older employees caring for their grandchildren should be receiving care, not providing it, given the employees' age; or asking whether the recipient of care is "worth the risk," given older individuals' higher risk of severe illness from COVID-19."