

# Client Alert

A report  
for clients  
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## EEOC Issues Enforcement Guidance on Discrimination Against Caregivers

### Executive Summary

New EEOC Enforcement Guidance addresses various circumstances under which disparate treatment of an employee who is responsible for caregiving to children, parents, or disabled family members might violate Title VII, the Americans with Disabilities Act, and/or other federal equal employment statutes or labor standards. Examples highlighted by EEOC include:

#### Sex-based stereotyping of working women:

- Reassigning a woman to less desirable projects based on the assumption that, as a new mother, she will be less committed to her job.
- Reducing a female employee's workload or responsibilities after she assumes full-time care of her niece and nephew based on the assumption that, as a female caregiver, she will not want to work excess hours.

#### Assumptions about pregnant workers:

- Limiting a pregnant worker's job duties based on pregnancy-related stereotypes.

#### Discrimination against working fathers:

- Denying a male caregiver leave or a flex-schedule to care for an infant under circumstances where such leave would be granted to a female caregiver.

#### Stereotyping based on association with an individual with a disability:

- Refusing to hire a worker, who is a single parent of a child with a disability, based on the assumption that caregiving responsibilities will make the worker unreliable.

#### Hostile work environment affecting caregivers:

- Subjecting a female worker to severe or pervasive harassment because she is pregnant, a mother with young children, or has taken maternity leave; likewise, harassing a male worker because he requires a flex-schedule or refuses to work excess hours in the office on given days of the week.
- Subjecting a worker to severe or pervasive harassment because his or her spouse has a disability.

Last week, the Equal Employment Opportunity Commission ("EEOC") announced new Enforcement Guidance regarding the potential for unlawful disparate treatment of employees with caregiving responsibilities ("Caregiver Guidance"). This new Guidance does not create a new protected category for employees who care for children, parents or family members with disabilities. Rather, it is intended to serve as a reminder to employers that caregiver stereotyping or other forms of disparate treatment may violate Title VII's prohibitions on discrimination on the basis of race, color, sex, national origin and religion and/or the Americans with Disabilities Act's prohibition on discrimination based on an employee's association with an individual with a disability. While the U.S. Supreme Court has held that the deference given to such Guidance will vary based on how persuasive the EEOC's arguments are, employers would be well-advised to keep this Caregiver Guidance in mind, as the EEOC (and plaintiffs' attorneys) will likely be paying closer attention to adverse employment decisions impacting employees with caregiving responsibilities.

In recent years, there has been a dramatic rise in the number of employees faced with the responsibilities of caring for their children and parents, often simultaneously. As the “baby boomer” population ages, the number of employees with eldercare responsibilities is growing. In light of these changing demographics, and the EEOC’s interest in the subject, it is important for employers to be aware that employment decisions made with regard to employees whom they know to be caregivers may implicate anti-discrimination laws, giving rise to inadvertent and unintended liability.

As the EEOC’s Guidance highlights five key categories, we summarize key points below:

### **Sex-based Disparate Treatment of Female Caregivers**

While disparate treatment of caregivers is not in and of itself a violation of federal law, when that treatment affects *only* female employees, Title VII’s prohibition on discrimination *because of sex* comes into play. There are numerous circumstances in which disparate treatment of a female caregiver might be used as evidence of sex discrimination, and employers are well-advised to scrutinize adverse employment decisions affecting female caregivers on a case-by-case basis. Among the issues the EEOC has indicated it will be looking at when such adverse employment decisions affect female caregivers:

- Whether an employer asks female applicants, but not male applicants, if they are married or have young children, or about their caregiving responsibilities;
- Whether decision-makers or other officials have made derogatory comments about pregnant workers, working mothers or other female caregivers;
- Whether the employer subjected an employee to less favorable treatment soon after becoming aware that she was pregnant or had caregiving responsibilities; and
- Whether statistical evidence shows disparate treatment in terms and conditions of employment with respect to pregnant women or female caregivers.

Employers can also run afoul of sex discrimination laws if they treat female employees less favorably based on the *assumption* that they will assume caregiving responsibilities in the future. As the EEOC indicated, Title VII may be violated where employment decisions are based on sex-based stereotypes such as female caregivers will not be committed to their jobs. Similarly, denying a promotion to a female employee within months of her returning from a pregnancy leave because of subjective assumptions that she will not have the time to devote to new and higher level job responsibilities is the kind of fact circumstance that the EEOC will be scrutinizing.

It is important to bear in mind that employment decisions that differentially treat employees with caregiving responsibilities are prohibited by Title VII if they are based on a protected characteristic (*e.g.*, sex, race, disability) regardless of whether the employer discriminated more broadly against all members of the protected class. For example, discrimination against mothers with caregiving responsibilities is prohibited even if the employer does not discriminate against all women. If an employer treats female caregivers differently than male caregivers, the employer may be liable under Title VII, even though it does not discriminate against women in general.

### **Pregnancy Discrimination**

Title VII’s prohibition against sex discrimination prohibits discrimination because of pregnancy, even where an employer does not discriminate against women generally. Thus, as with other sex-based stereotypes, employment decisions based on assumptions about the effect of pregnancy (*i.e.*, “future caregiver” status) on an employee’s future willingness or ability to perform her job, will violate Title VII. The EEOC will generally regard any pregnancy-related inquiry by an employer as evidence of pregnancy discrimination where the employer subsequently makes an adverse employment decision negatively affecting the pregnant employee’s conditions of employment.

### **Discrimination Against Male Caregivers**

Male caregivers can be the victims of sex discrimination too. Assumptions about working fathers and other male caregivers sometimes lead employers to deny male employees opportunities provided to working women. For example, employers frequently deny male employees’ requests for childcare leave while granting such requests to female employees. While employers may designate leave provided to women for the period they are incapacitated because of pregnancy, childbirth, and related medical conditions protected as disability leave, employers may not treat male and female employees differently with respect to other types of leave, such as leave for childcare purposes. To avoid running afoul of Title VII, employers should carefully distinguish between disability leave that is pregnancy related and other forms of leave, ensuring that any leave provided to women is made available to male co-workers by providing male employees equal terms and conditions for caregiving leave and reduced hours arrangements.

### **Unlawful Caregiver Stereotyping Under Americans with Disabilities Act**

Among other things, the ADA prohibits discrimination because of the disability of an individual with whom the employee has a relationship or association, such as a child, spouse, or parent. As such, an employer may not treat an employee less favorably based on assumptions about his/her willingness or ability to perform a job satisfactorily while also providing care to a relative with a disability. For example, an employer who refuses to hire a job applicant who has a disabled child or other relative on the

assumption that the applicant will frequently be tardy and require excessive leave time to care for the child violates the ADA, despite the fact that the applicant is not disabled.

## Retaliation

Employers may not retaliate against employees who complain that caregivers have received disparate treatment because of a protected characteristic, or for participating in the EEOC charge process, such as by filing a charge or testifying on behalf of someone who has filed a charge. For example, a change in an employee's work schedule may make little difference to most workers, but may matter enormously to a mother with school age children. If that mother had complained about discrimination or participated in the EEOC charge process, the EEOC may view such a schedule change as evidence of retaliation, as the employer's conduct might reasonably deter a caregiver from engaging in protected activity.

## Conclusion

While the EEOC's Caregiver Guidance may, at first, appear to add a new burden on employers, this Guidance does not actually add any new obligations. Laws prohibiting employers from making employment decisions based on stereotypes that implicate protected characteristics have been in place for years. Title VII does not prohibit discrimination based solely on caregiving status any more than it ever did. As before, caregivers are not a protected class under Title VII. Because caregiver issues are now among the EEOC's priorities, employers must be vigilant to ensure that employment decisions affecting caregivers are based on legitimate factors, not as proxies for unlawful discrimination.

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