

CLIENT ALERT

August 24, 2007

DECISIONS ON CAREGIVERS TO BE CLOSELY EXAMINED BY EEOC FOR UNLAWFUL STEREOTYPING

The pressures of raising children or caring for elderly parents are an increasing concern of employees and employers. Employees make requests for time off under federal or state Family Medical Leave Act or just based on personal need. Employers then must balance good employee relations and their statutory obligations with the pressures of competition and getting the work done. Now the EEOC has issued guidelines on "caregivers"; employees who care for children, parents, or other family members. The EEOC is not creating a new protected classification under Title VII or the Americans with Disabilities Act (ADA). The agency, however, is going to review decisions to ensure that adverse actions are not taken against caregivers based on unlawful stereotyping.

Title VII prohibits discrimination based on sex. If employment decisions are made, consciously or unconsciously, that treat female caregivers differently from males, there may be liability. Similarly, if any protected group, e.g., race or national origin, is disadvantaged in the way its members are treated because of caregiving, then they too may be protected under Title VII.

Part of the EEOC's review will focus on whether caregiver-employees are being stereotyped. The examination will look to see whether caregivers are losing opportunities for good assignments or promotions because of their caregiver responsibilities or whether they are being given less meaningful assignments due to their family responsibilities. If an assumption is made that those responsibilities will interfere with job demands, without any actual evidence of such problems, then the EEOC will view the caregiver as being victimized due to unlawful sexual stereotyping. For example, an employer, who assumes that because a female employee has a child, she is less reliable compared to her childless male and female counterparts, will be found to have discriminated unlawfully, if the employer denies the female employee a promotion or an assignment that others without caregiving responsibilities are given. Utilizing this stereotype would be disparate treatment of a caregiver based on sex.

Liability can also arise if a female employee participates in a flexible work program and the employer then assumes her participation in that program makes her less dedicated to her work and as a result the employer restricts the caregiver's assignments and opportunities. Similarly, Title VII prohibits employers from stereotyping even if it is for benevolent reasons, such as passing over a woman for a promotion to allow her to spend more time with her children.

Gender stereotypes can also adversely affect male caregivers. Employers cannot, for example, grant a female's request for leave based on caregiving and deny a similar request made by a man. While Title VII permits females to receive additional leave that is related to childbirth or pregnancy, employers should respond to men and women in the same way when they are requesting other forms of leave related to caregiving.

Problems of stereotyping can also arise based on race. Being sure that policies are applied even handedly to all employees reduces the risk of challenges to employment policies.

Caregiving issues can arise in other contexts as well. The ADA protects against discrimination not only of individuals with disabilities, but also against discrimination of persons who are associated with individuals with disabilities. Therefore, an employer will violate the ADA if it treats an employee less favorably than other employees because his/her spouse, child, or parent has a disability. It is one thing for the employee to seek a reduction in responsibilities due to conflicting pressures from home and office, but if the employer makes assumptions about the employee's needs and acts on those assumptions to the detriment of the employee, there is potential for legal problems.

As a result of the EEOC's guidelines, it is important to examine decisions that are being made about persons who have caregiving responsibilities to be sure that they are not being given a diminished role based on assumptions and not based on their performance or specific requests. While there are reasons to be concerned about taking action based on assumptions about the needs of employees, employment decisions based on an actual decline in work performance because of an employee's caregiving responsibilities do not violate Title VII or the ADA.

QUESTIONS OR ASSISTANCE?

If you have any questions about Decisions on Caregivers to be Closely Examined by EEOC for Unlawful Stereotyping, please do not hesitate to contact:

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