



## EEOC Warns Against Caregiver Discrimination

Guidance released by the Equal Employment Opportunity Commission (EEOC) on March 14, 2022, makes clear that the EEOC cares about helping caregivers balance work-life responsibilities by protecting these workers from discrimination under equal employment opportunity (EEO) laws. Although the guidance stems from unique circumstances resulting from the COVID-19 pandemic, such as caring for a child in quarantine, it is intended to preserve work-life balance for caregivers well beyond the pandemic and into whatever “new normal” the pandemic evolves.

See Equal Employment Opportunity Commission, *The COVID-19 Pandemic and Caregiver Discrimination Under Federal Employment Discrimination Laws* (March 14, 2022), <https://www.eeoc.gov/laws/guidance/covid-19-pandemic-and-caregiver-discrimination-under-federal-employment>.

According to the guidance, caregivers — though not a protected class of workers under EEO laws — may bring claims of unlawful discrimination when workplace policies adversely impact them as either job applicants or employees. For example, the guidance suggests that using archaic gender-role stereotypes to make employment decisions is an unlawful form of discrimination based on sex. Caregiver discrimination based on sex may include decisions such as:

- ▶ assuming that a female applicant cannot be hired because she would need to care for her children while they attend school remotely;

- ▶ issuing stricter guidelines or punishments to female employees than their similarly situated male co-workers

when missing deadlines or accumulating absences due to COVID-19-related caregiving responsibilities;

- ▶ assigning only males to projects requiring overtime or travel based on the belief that female workers are not available to work extra hours due to COVID-19-related caregiving duties;

- ▶ exempting female employees but not male employees from return-to-work policies based on the assumption that males are not primary caregivers at home; and

- ▶ granting leave requests to female caregivers caring for family members with COVID-19 but denying equivalent leave requests to male employees.

Caregiver sex discrimination may also include discrimination based on a person’s gender identity or sexual orientation. Requiring that LGBTQI+ employees with caregiver responsibilities provide credentials to be considered for leave or other requests (such as proof of marital status or proof of relation to their child), if these credentials are not required of other employees, constitutes unlawful caregiver sex discrimination. Additionally, denying leave to an employee with a same-sex partner because of his or her sexual orientation or gender identity could also be caregiver sex discrimination.

The guidance further provides that it is unlawful to discriminate against a caregiver responsible for providing care to an individual with a disability, including when the disability is either COVID-19 or long-COVID. Caregivers responsible for an individual with a disability are protected under the Americans with Disabilities Act (ADA). Therefore, the refusal to hire, promote or grant requests for unpaid leave to care for a family member with COVID-19 or long-COVID because that family member has a disability would be unlawful.

Race or national-origin-based caregiver discrimination is also unlawful. This includes employment decisions made based on either the caregiver’s race or national origin or that of the care recipient. Thus, requiring that minorities adhere to different procedures when submitting caregiver-related requests as well as denying caregiver requests be-

cause of the care recipient’s nationality are both forms of unlawful caregiver discrimination.

The guidance also provides that employees 40 years of age and older are protected from caregiver discrimination under the Age Discrimination in Employment Act (ADEA). Adversely impacting older workers by requiring a reduced work schedule when caring for a family member with COVID-19 because of age is an unlawful form of discrimination.

Pregnant workers are also protected as caregivers pursuant to the EEOC’s COVID-19 caregiver guidance. One specific protection for pregnant workers makes it unlawful for employers to require only pregnant employees be vaccinated to help keep them safe. Pregnant employees are provided additional protection, such as rights to accommodations, under Title VII, the ADA and Louisiana’s pregnancy discrimination statute (La. R.S. 23:342).

However, according to the guidance, all other caregivers are generally not afforded reasonable accommodations under federal EEO laws, like telework or flexible schedules, because of their caregiving responsibilities. Nor are employers required to accept poor performance due to caregiving duties. If, however, the employer’s performance policies are not uniformly applied to all workers but are instead used to penalize caregivers performing caregiving responsibilities or if similarly requested accommodations are granted to only non-caregivers, then those policies could result in unlawful discrimination.

Another facet of caregiver discrimination regards harassment and retaliation. Per the EEOC, it is unlawful to foster hostile work environments for those employees serving as caregivers. Examples of harassing behaviors include, but are not limited to, asking intrusive questions, making offensive comments, questioning an employee’s professional dedication and distributing unreasonable work assignments based on caregiving requests. Should an employee report discrimination based on his or her caregiver responsibilities, it would be unlawful to retaliate against

the employee. Not recalling an employee from a pandemic-related furlough, transferring an employee to another location and changing work schedules to make it difficult to tend to caregiver responsibilities because an employee reported discriminatory conduct are all examples of prohibited retaliation.

This EEOC guidance is indicative of increased efforts to provide greater rights and protections to caregivers serving in dual roles as employees, even as more of the workplace experience seems to be returning to pre-COVID-19. From the now expired Families First Coronavirus Response Act, which provided paid sick leave or expanded family and medical leave to caregivers caring for another for COVID-19-related reasons, to the pending Build Back Better Act, which if passed by the Senate would provide four weeks of paid leave to caregivers providing care to family members due to a serious health condition, to this new EEOC COVID-19 caregiver guidance, caregivers are certainly a new focus of employment laws.

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