EEOC Issues Enforcement Guidance on Unlawful Disparate Treatment of Workers with Caregiving Responsibilities

On May 23, 2007, the Equal Employment Opportunity Commission (“EEOC”) issued “Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities” (“Enforcement Guidance”). The Enforcement Guidance is not binding legal authority. However, all EEOC offices will adhere to it when investigating and administering discrimination charges, and courts may consider it as persuasive authority when adjudicating discrimination lawsuits. Thus, it is imperative for employers to be aware of situations in which the EEOC will find a violation of Title VII of the Civil Rights Act of 1964 (“Title VII”) or the Americans with Disabilities Act of 1990 (“ADA”) based on employers’ treatment of their caregiving employees.

Neither Title VII nor the ADA prohibits discrimination against caregivers *per se*. Accordingly, the Enforcement Guidance does not (and could not) create a new category of protected employees. However, the Enforcement Guidance states that stereotyping and other disparate treatment of caregivers may violate Title VII’s prohibitions against gender, race or national origin discrimination or the ADA’s prohibition against discrimination based on an employee’s association with an individual with a disability.

Disparate Treatment of Female Caregiver

Because caregiving is not a protected category under Title VII, the Enforcement Guidance states that “it is essential that there be evidence that the adverse action taken against the caregiver was *based on sex*” (emphasis added). For example, a requirement that a female caregiver adhere to an attendance policy that is uniformly applied to both male and female employees does not constitute disparate treatment in violation of Title VII, even though it may be more difficult for the female caregiver to adhere to the policy.

The Enforcement Guidance also provides that “employment decisions that discriminate against workers with caregiving responsibilities are prohibited by Title VII if they are based on sex or another protected characteristic, *regardless of whether the employer discriminates more broadly against all members of the protected class*” (emphasis added). For example, the EEOC states that discrimination against working mothers is prohibited by Title VII even if the
employer does not discriminate against childless women. The EEOC’s unstated assumption is that working fathers are not subjected to similar discrimination. If they are, the discrimination is not based on sex, but on parenthood status, and therefore does not violate Title VII.

The Enforcement Guidance lists the following 10 types of evidence that may be relevant to establish whether a caregiving female employee is subjected to unlawful discrimination:

1) Whether the employer asks female applicants, but not male applicants, whether they are married or have young children, or about their childcare and other caregiving responsibilities;
2) Whether the employer’s decisionmakers or managers make stereotypical or derogatory comments about pregnant employees or about working mothers or other female caregivers;
3) Whether the employer begins subjecting the charging party or other women to less favorable treatment soon after becoming aware that they are pregnant;
4) Whether, despite the absence of a decline in work performance, the employer begins subjecting the charging party or other women to less favorable treatment after they assume caregiving responsibilities;
5) Whether female employees without children or other caregiving responsibilities receive more favorable treatment than female caregivers based on stereotypes of mothers or other female caregivers;
6) Whether the employer steers or assigns women with caregiving responsibilities to less prestigious or lower-paid positions;
7) Whether male employees with caregiving responsibilities received more favorable treatment than female workers;
8) Whether statistical evidence shows disparate treatment against pregnant employees or female caregiving employees;
9) Whether the employer deviates from workplace policy when it takes the challenged employment action; and
10)Whether the employer’s asserted reason for the challenged action is credible.

Gender Role Stereotyping of Working Women
According to the Enforcement Guidance, Title VII prohibits employers from treating female employees less favorably than their male counterparts on the gender-based assumption that female employees will assume caretaking responsibilities or that such responsibilities will interfere with their work performance.

Stereotyping may occur where an employer assumes that a female with children will be unable to devote necessary hours due to caregiving responsibilities, or where an employer believes that women with young children should not work long hours or are less committed to their jobs. Decisions based on speculation, rather than on the specific work-performance of a particular employee, violate Title VII.
Conversely, employment decisions based on actual work performance, rather than assumptions or stereotypes, do not violate Title VII.

The Enforcement Guidance theorizes that an employer’s gender stereotypes of caregivers may broadly affect its perceptions of an employee’s general competence. The Enforcement Guidance advises investigators to be attentive to evidence of the following: (1) changes in an employer’s assessment of an employee’s performance that are not linked to changes in actual performance and that arise after the employee becomes pregnant or assumes caregiving responsibilities; (2) subjective assessments that are not supported by specific objective criteria; and (3) changes in assignments or duties that are not readily explained by nondiscriminatory reasons.

**Pregnancy Discrimination**
Title VII’s prohibition against sex discrimination extends to employment decisions based on pregnancy, even where an employer does not discriminate against women generally. Title VII also prohibits an employer from basing an adverse employment decision on stereotypical assumptions about the effect of pregnancy on a female employee’s job performance, regardless of whether the employer is acting out of hostility or misguided magnanimity.

**Discrimination Against Male Caregivers**
The Enforcement Guidance observes that “while employers are permitted by Title VII to provide women with leave specifically for the period that they are incapacitated because of pregnancy, childbirth, and related medical conditions, employers may not treat either sex more favorably with respect to other kinds of leave, such as leave for childcare purposes.”

Thus, the Enforcement Guidance states that employers must “distinguish between pregnancy-related leave and other forms of leave to ensure that any leave only provided to women is limited to the period that women are incapacitated by pregnancy and childbirth.”

Employers also should be mindful that male employees can state a discrimination claim under Title VII if they are treated adversely on the basis of being the spouse of a pregnant employee.

**Unlawful Caregiver Stereotyping Under the ADA**
The ADA prohibits, among other things, discrimination because of the disability of an individual with whom the employee has a relationship or association, such as a child, spouse or parent. Thus, an employer may not treat an employee less favorably based on stereotypical assumptions about the employee’s ability to perform job duties satisfactorily while also providing care to a relative or other individual with a disability.
Hostile Work Environment
The same standards that govern other forms of harassment apply to harassment directed at caregiving or pregnant employees because of race, sex, association with an individual with a disability or other protected category.

Significance of the Enforcement Guidance and Compliance Tips
The Enforcement Guidance signals the EEOC’s intent to look very critically at allegations of caregiver discrimination under Title VII and the ADA. Employers are therefore well-advised to take this opportunity to review their policies and procedures to ensure compliance with all statutory and regulatory requirements.

Employers may generally comply with the Enforcement Guidance by: (1) providing equal treatment and application of policies and benefits to both genders in similar circumstances; and (2) basing employment decisions on individual performance, not on stereotypes or assumptions. The following are some specific compliance tips for employers to consider:

- Make sure that female caregiving employees are treated equally as compared to male employees in similar circumstances. Any policy, selection guidance, discipline, etc., must be applied uniformly to both female and male caregivers.

- Interview questions should focus on the qualifications of the candidate for the position and the candidate’s ability to perform job requirements. While it is acceptable to question the candidate’s ability to devote necessary hours, a decision may not be based on a stereotypical assumption that a working mother or wife will not be able to meet those requirements.

- Employers should base hiring and promotion decisions on the applicant’s qualifications for the job and ability to perform the essential functions of the position. While it is unlawful to refuse to hire or promote an individual based solely on assumptions and stereotypes regarding an association with an individual with a disability, it is not unlawful to inquire as to the applicant’s ability to meet job requirements.

- An employer may consider an employee’s absence from work as a factor in hiring and promotion decisions, even if the absence is for the purpose of childcare and raising a family. Other employment decisions must be based on legitimate criteria and demonstrated performance by the particular employee. An employer may discriminate between, on the one hand, those employees who actually take off long periods of time to raise children and, on the other, those who either do not have children or who are able to raise them without an appreciable career interruption. However, an employer may not take into
account incorrect assumptions and stereotypes concerning the impact of caregiving responsibilities on females' job performance and commitment.

- Decisions as to female caregiving employees should be based on neutral, objective assessments of work performance and other specific, objective criteria. Any changes in terms, conditions or privileges of employment or other employment decisions must be capable of explanation through legitimate, nondiscriminatory reasons.

- Employers should not make pregnancy-related inquiries or conduct pregnancy tests. Employers should provide similar accommodations and benefits for pregnancy as for other temporary medical conditions. In addition, employers should base decisions regarding pregnant employees on individual circumstances and not on an assumption about or stereotype of pregnant employees. Finally, employers may apply uniform policies to pregnant employees.

- Employers should extend the same childcare leave to males that is provided to females. Employers should not subject male employees to adverse action because of a stereotype or assumption about their responsibilities toward their pregnant spouse.

- Employers should disseminate and publish an anti-harassment policy that prohibits all forms of harassment—including harassment concerning pregnancy and caregiving—and provides multiple avenues of reporting the prohibited conduct. In addition, upon learning of harassing conduct, employers should take prompt, remedial action to stop the harassment, correct its effects and ensure that it does not recur. Finally, managers and non-managers alike should be trained that comments and conduct concerning pregnancy or caregiving responsibilities may constitute unlawful harassment.

1The EEOC’s Enforcement Guidance is available at http://www.eeoc.gov/policy/docs/caregiving.html.
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