

## **New Eeoc Guidance Regarding Unlawful Discrimination Against Employees With Caregiving Responsibilities**

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On May 23, 2007, the EEOC published its "Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities" along with "Questions and Answers" about the Guidance. The Guidance specifically supersedes the previous (1990) EEOC Policy Guidance on Parental Leave. While not formally a "regulation" (to which courts generally give great deference), this policy statement gives insight to the EEOC's investigation and enforcement posture and is a document courts may give some weight in evaluating a claim of discrimination.

The Guidance opens with a general discussion of the increasing role of caregivers, particularly in the "sandwich generation" (age 30-60), who find themselves caring for children and parents. Not surprisingly, there is ample statistical evidence that these duties have fallen disproportionately on females. There is also significant discussion of the disproportionate role women of color play as caregivers in our society.

The Guidance does not create a new protected class (caregivers) or prohibited basis of discrimination, although it should be remembered that such specific protection *is* available under some state's laws (not including North Carolina). Rather, the Guidance is limited to discussions of **disparate treatment**—the theory of discrimination which prohibits treating individuals differently because of their protected status under existing statutes (race, gender, etc.). With that in mind, the majority of the Guidance is not surprising: numerous examples of bias or stereotyping are included, none of which should surprise an experienced human resource professional or attorney—for example, it is illegal to reject women with small children from an executive training program while admitting men with small children, based on assumptions about childcare responsibilities. The Guidance highlights the danger of stereotypes—for example, assuming women with children will not be willing to work overtime—and the dangers of "benevolent" stereotypes—such as, not considering a female with small children for a promotion that would require relocation on the assumption that she would not want to disrupt her childcare arrangements.

The Guidance does not separately address the issues of the Family Medical Leave Act ("FMLA"), which are obviously implicated in many caregiving issues, such as parental leave for care of a newborn or family medical leave for care of a seriously ill family member. This omission is probably due to the fact that the enforcement agency for the FMLA is the US Department of Labor, not the EEOC.

The Guidance reminds employers about the provisions of the Pregnancy Discrimination Act. See the EEOC's Guidelines on Discrimination Because of Sex, Employment Policies Relating to Pregnancy and Childbirth, 29 CFR sec. 1604.10. It also reminds employers of the prohibition under the Americans with Disabilities Act ("ADA") of discriminating against any individual who has a relationship with a person with a disability. Thus, discriminating against an employee because of caregiving responsibilities for a disabled family member would implicate issues under the ADA.

Finally, the Guidance also reminds employers that workplace harassment based on protected characteristics (race, gender, etc.) is equally applicable when members of a protected class who happen to be caregivers are being singled out for harassment whereas caregivers not in that protected class are not.

Interestingly, and without explanation, this Guidance specifically does not address the much thornier issue of application of the **disparate impact** theory of discrimination to this subject. The disparate impact theory, in general, states that a facially neutral rule which has a disparate impact on a protected group must be justified by the employer under a much stricter test (business necessity), regardless of whether the employer intends to discriminate. Given the statistics cited in the Guidance, it seems highly likely that any facially neutral workplace rule based on caregiver status is likely to have a disparate impact against females, and possibly against minority females in particular. We are not aware of any employers using caregiver-based employment rules and would caution any employer considering such a rule to carefully consider the evidentiary burdens of the business necessity doctrine and the provisions of the EEOC's Uniform Guidelines on Employee Selection Procedures, 29 CFR § 1607.

In sum, the Guidance serves to highlight a long-standing problem in the workplace—the competing strains of work and family. The short lesson is: don't rely on assumptions or stereotypes in dealing with employees who are struggling with these issues.