

New EEOC “Caregiver Discrimination” Guidance

Late this past Spring, the Equal Employment Opportunity Commission (EEOC) issued guidance to address what it termed “an emerging discrimination issue.” The “discrimination” relates to how employers may be disadvantaging workers who have the responsibility to care for children or other family members.

The guidance states that these “caregiver workers” do not constitute a separate category of employees protected under federal civil rights laws. However, since the burden of caregiving responsibilities (particularly though not exclusively with respect to children) falls primarily on females, policies or practices that deal with caregiving employees in a stereotypical way may amount to illegal disparate treatment based on sex under Title VII of the Civil Rights Act of 1964. In addition, where the family member requiring care is disabled, the worker may have a claim under the “association” provision of the Americans with Disabilities Act, which makes unlawful any discrimination based on a worker’s association or relationship with a disabled person.

The Guidance provides examples of how an employer, without intending to discriminate, may nevertheless be guilty of violating these laws:

[E]mployers may make the stereotypical assumptions that women with young children will (or should) not work long hours and that new mothers are less committed to their jobs than they were before they had children. Relying on such stereotypes, some employers may deny female caregivers opportunities based on how they might balance work and family responsibilities.

The Guidance then concludes this example by stating that when an employer relies on this kind of “sex-based assumptions or speculation” in making decisions, rather than on the work performance of a particular employee, it has violated Title VII. Even a “benevolent” or “well intentioned” assumption, such as believing that a mother with young children would not be interested in a promotion requiring some travel, may be discriminatory. A male caregiver may also be victimized by these kinds of gender-based assumptions. For example, a new father’s request for unpaid leave to care for his infant son may be denied, though such leave is routinely granted for new mothers, on the theory that “men don’t really need such leave.”

The issuance of this Guidance likely signals a greater emphasis by the EEOC on “family responsibility” claims and has prompted some commentators to identify this as a mushrooming area for employment litigation. The key to avoiding claims is simply for supervisors, in hiring, promoting, etc., actions, to focus on the actual record or performance of the individual involved and avoid basing decisions on suppositions as to how female or male workers would “typically” act or react.