

CLIENT ALERT: EEOC Issues New Guidance on Caregiver Discrimination and the COVID-19 Pandemic

On March 14, 2022, the Equal Employment Opportunity Commission (“EEOC”) issued guidance titled “The COVID-19 Pandemic and Caregiver Discrimination Under Federal Employment Discrimination Laws.” This guidance details the EEOC’s position on employers’ responsibilities and obligations toward employees who may be caregivers for children, immunocompromised individuals, the elderly and/or other vulnerable individuals, in light of the drastic effects the COVID-19 pandemic has had on caregivers and their ability to work.

At the outset, the EEOC reiterated its 2007 guidance that discrimination against a person with caregiving responsibilities may be unlawful under federal employment discrimination laws if it is based on a person’s protected characteristic and/or any intersections of such characteristics. Protected characteristics include sex/gender (including pregnancy, sexual orientation, and/or gender identity), race, color, religion, national origin, age (40 or older), disability and genetic information (such as family medical history). Caregiver discrimination can also be present if it is based on an applicant’s or employee’s association with an individual with a disability, within the meaning of the Americans with Disabilities Act (“ADA”), or one of the protected categories listed above.

The EEOC’s new guidance focuses on the disparate impact that female applicants and employees have suffered due to the ongoing COVID-19 pandemic, but notes that male applicants and employees can also be subject to discrimination to the extent they are treated unfairly as compared to female applicants and employees. The EEOC further explains that employers may not punish female employees more harshly for absences or missed deadlines than similarly situated male employees; in that same vein, employers should not deny men leave or permission to work a flexible schedule if such requests would be granted for similarly situated women. The same is true for LGBTQI+ applicants and employees who seek accommodations for caregiving requirements if such requests would be granted for other employees.

The guidance further emphasizes that employers should be careful not to discriminate against employees based on their association with an individual with a disability, including employees with caregiving responsibilities for individuals with disabilities—which can include a diagnosis of “long-COVID.” For example, employers should not refuse to promote an employee who has a child with a mental health disability that worsened during the pandemic due to the employer’s fears that the employee could not keep up with their workload.

The EEOC clarifies, however, that employees are not entitled to accommodations to handle caregiving duties so long as similarly situated employees without similar caregiving duties are being treated the same way. Employers should be especially careful, however, to provide accommodations for employees due to pregnancy, childbirth, or other related medical conditions, and these individuals must be treated similarly to other employees who are temporarily unable to perform job duties. For example, if employees were granted leave and/or other job modifications for severe fatigue, difficulty

breathing and/or headaches due to COVID-19, then the EEOC advises that such accommodations should be provided to pregnant employees as well.

Employers are also not required to excuse poor performance due to caregiving responsibilities, but should be careful to apply its performance policies in a consistent manner to all employees.

The EEOC provides additional examples of how employers might be found to have engaged in unlawful discrimination based on an employee's caregiving responsibilities, including but not limited to:

- Disparaging female employees for focusing on their careers rather than their families during a traumatic event such as a pandemic;
- Accusing female employees, without justification, of being preoccupied with keeping their families safe from COVID-19, distracted from their professional obligations, and insufficiently committed to their jobs;
- Criticizing or ridiculing male employees for seeking to perform, or performing, caregiving duties, such as taking leave to care for a child who is quarantining after potential COVID-19 exposure, or limiting overtime or overnight travel, based on gender stereotypes of men as breadwinners and women as caretakers;
- Asking intrusive questions or making offensive comments about gay or lesbian employees' sexual orientation after they request leave to care for their same-sex spouse, partner, or ex-partner, who has COVID-19 symptoms;
- Insulting Asian employees caring for family members with COVID-19 because COVID-19 was first identified in an Asian country;
- Assigning unreasonable amounts of work or imposing unrealistic deadlines on employees of color because they requested or received leave for pandemic-related caregiving purposes;
- Questioning, without merit, the professional dedication of employees caring for individuals with disabilities who are at higher risk of severe illness from COVID-19, or mocking such employees on that basis for taking pandemic precautionary measures to avoid infection; and/or
- Stating that older employees caring for their grandchildren should be receiving care, not providing it, given the employees' age; or asking whether the recipient of care is "worth the risk," given older individuals' higher risk of severe illness from COVID-19.

Given the widespread effect COVID-19 has had on caregivers and their responsibilities across industries, the EEOC is closely scrutinizing potential discrimination in these circumstances. Employers should continue to keep their policies updated and should carefully consider the needs of their workforce during the next stages of the pandemic. Employers are encouraged to contact their MBJ attorney with any questions about this new guidance and/or any policies that may apply to their workforce.

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