

EEOC Issues Best Practices Guidance For Employers

Employees today are often beset with multiple caregiving responsibilities for children and aging parents. In recognition of the challenges faced by the so-called sandwich generation, the U.S. Equal Employment Opportunity Commission (EEOC) recently issued a new guidance for employers detailing best practices to prevent illegal discrimination against these employees.

Dubbed "Employer Best Practices for Workers with Caregiving Responsibilities," the guidance supplements the EEOC's 2007 guidance on this topic and provides suggestions for employers who wish to avoid incurring discrimination claims by employees who act as caregivers for a spouse, child, parent, older family member, injured service member or for a relative with a disability.

The EEOC's goal in issuing the guidance is to educate employers about ways to eliminate barriers to equal employment opportunity faced by caregivers and avoid running afoul of the job bias statutes. The guidance is published on the EEOC's website at <http://www.eeoc.gov/policy/docs/caregiver-best-practices.html>.

Technically, caregivers are not a recognized so-called protected class under federal or California law. Therefore, employers are under no legal compulsion to adhere to these suggestions. However, caregivers often are subjected to behavior which does run afoul of existing laws barring discrimination, harassment, or retaliation on the basis of gender, race, disability, or other protected bases. Therefore, even though there is no specific claim of caregiver discrimination, these other laws do allow employees to file suit. Therefore, employers should heed EEOC's directions.

The EEOC's best practices are divided into three categories: General; Recruitment, Hiring and Promotion; and Terms, Conditions and Privileges of Employment. Each is discussed below.

General Practices

The EEOC recommends training all people managers about the company's legal obligations toward caregivers under federal job bias laws such as Title VII, the Americans with Disabilities Act, and the Family and Medical Leave Act. If an existing EEO policy does not already address caregiver discrimination, EEOC suggests that you update the policy. Among the things to cover:

- Describe the common stereotypes or biases about caregivers that could lead to discriminatory employment decisions. These include such topics as assuming that female employees who work part-time are less committed to their jobs than males or assuming male employees should not undertake significant caregiving obligations;
- Give examples of prohibited conduct regard-



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ing caregiving responsibilities, such as failing to hire or promote an employee based on the individual's caregiver responsibilities or eliminating an employee's significant work responsibilities because of perceived conflicts between work and the employee's family responsibilities;

- Prohibit retaliation for reporting discrimination or harassment based on caregiving responsibilities; and

- Identify an individual in the company to contact in the event an employee believes he or she may have suffered caregiver discrimination.

As with other instances of alleged illegal discrimination and harassment, employers should promptly and effectively respond to complaints of caregiver discrimination and document all steps taken to deal with the matter.

Recruitment, Hiring, and Promotion Best Practices

In the area of recruitment and hiring, EEOC suggests that employers focus on an applicant's qualifications for a job and not on the individual's family or other caregiving-related matters. Interviewers and hiring executives should avoid any questions about caregiving responsibilities since the information is not relevant to most jobs. Where a strong connection can be made (e.g., jobs that require late hours, irregular hours and/or frequent travel), the interviewer must allow the applicant to explain how he or she plans to deal with such contingencies and take the applicant at his or her word if the applicant pledges that such responsibilities will not interfere with obligations at work. According to EEOC, to do otherwise would open up the employer to a claim for alleged gender stereotyping, for example.

EEOC also suggests that businesses develop specific, job-related qualifications that reflect the duties and functions of the position. This will help ensure that employment decisions are based on an applicant's qualifications. It will also minimize the potential for gender stereotyping and other unlawful discrimination against caregivers.

The EEOC also suggests specifically targeting individuals with caregiving responsibilities as part of the Company's recruitment efforts by, for example, advertising positions in parenting magazines and other publications directed to caregivers.

Another strategy would be to identify and remove any barriers to re-entry into the workplace for those individuals who have taken time off for caregiving responsibilities. Toward this end, EEOC cautions that instead of focusing on the periods of absence, employers should focus on the person's work experience and accomplishments and attribute the same importance to cumulative relevant experience as would be given to employees with uninterrupted service.

In the area of promotions, EEOC suggests that employers make certain that all job openings and promotions are communicated to all eligible employees, regardless of caregiving responsibilities. Promotions and other employment decisions should also be well documented.

Terms, Conditions, and Privileges of Employment Best Practices

The guidance contains a long list of practices an employer may implement to help avoid caregiver discrimination claims. For example, employers can monitor compensation practices and performance appraisal systems for patterns of potential discrimination against employees with caregiving responsibilities.

EEOC also recommends reviewing workplace policies such as fixed work hours or mandatory overtime that limit employee flexibility. The objective of this review is to confirm that the policies are absolutely necessary to business operations.

Along these lines, EEOC goes so far as to encourage employees to request flexible work arrangements that allow them to balance work and family responsibilities and to ensure that managers do not discourage employees from seeking them or penalize those employees who do.

Although employers are not required to implement these best practices, EEOC's renewed attention to the issue of caregiver discrimination shows that the commission views this as a significant growing legal concern. Prudent employers will take steps now to make sure that policies and procedures adequately protect the rights of caregivers and that supervisors and managers are well trained to recognize potential legal issues when talking with employees about such matters and making employment decisions that may adversely impact caregivers.

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