

LEGAL UPDATES

PUBLISHED: APRIL 4, 2022

Services

HR Consultation &
Training

Labor & Employment

Professionals

BARBARA A. GRANDJEAN
DENVER:

303.892.4458

BARBARA.GRANDJEAN@
HUSCHBLACKWELL.COM

JULIANNE P. STORY
KANSAS CITY:

816.983.8230

JULIANNE.STORY@
HUSCHBLACKWELL.COM

TRACEY O'BRIEN
ST. LOUIS:

314.480.1562

TRACEY.OBRIEN@
HUSCHBLACKWELL.COM

EEOC Renews Focus on Potential for Caregiver Discrimination

While the term “caregiver” is not identified as a protected class under federal equal employment opportunity (EEO) laws, workplace decisions that adversely impact job applicants and employees who are also caregivers can still lead to claims of discrimination. On March 14, 2022, the Equal Employment Opportunity Commission (EEOC) released new guidance and updated its COVID-19 FAQs reiterating that the pandemic has upended employees’ work-life responsibilities and created challenges for those with caregiving responsibilities like never before. The guidance goes on to warn employers that discrimination against caregivers may be unlawful under federal employment discrimination laws.

How are caregivers protected under anti-discrimination laws?

The new guidance acknowledges that caregiver status is not a protected class but simultaneously announces that employers nonetheless have a responsibility not to discriminate against caregivers under Title VII, the Age Discrimination in Employment Act (ADEA), the Americans with Disabilities Act (ADA) and the Genetic Information Nondiscrimination Act (GINA) based on their sex (including pregnancy, sexual orientation or gender identity), race, color, religion, national origin, age (40 or older), disability or genetic information (such as family medical history). The guidance also explains that caregiver discrimination can arise under the ADA if an employer discriminates against an applicant or employee based on their association with an individual with a disability and for whom they provide care.

The guidance provides some useful examples of potential caregiver discrimination based on sex and pregnancy:

Denying male caregivers leave or a flexible work schedule to care for a family member, if the employer provides these accommodations to similarly situated female employees;

Ridiculing men for performing caregiver duties due to the pandemic;

Refusing to hire a female applicant or refusing to promote a female employee based on assumptions that, because she is female, she would (or should) focus primarily on caring for her young children or for her parents or other adult relatives;

Imposing more burdensome procedures on LGBTQI+ employees who make caregiver-related requests, such as requiring proof of marital or other familial relationship with the individual who needs care; or

Allowing harassment of pregnant employees who telework or maintain physical distancing from colleagues to avoid exposure to COVID-19.

Similarly, the guidance provides examples of caregiver discrimination based on disability or association with an individual with a disability:

Discriminating against a caregiver because of their association with an individual with a disability, including long-haul COVID-19;

Refusing to promote an employee who is a primary caregiver of a mentally disabled child whose disability was adversely affected by the pandemic based on an assumption that the employee would not be committed to their job; or

Refusing to hire an applicant with a family member that has a disability that exposes the family member to a higher risk for COVID-19 because of potential increases in health insurance costs borne by the employer.

The guidance also fleshes out how caregiver discrimination might be based on race or ethnicity:

Denying an employee's request for leave to care for a cousin from another country who was recently diagnosed with COVID-19, because a COVID-19 variant was first identified in the cousin's country of origin; or

Requiring that Black or Asian employees submit requests for leave, flexible schedules or telework in writing and wait several days for a response, while permitting similarly situated employees of other races or national origins to make such requests verbally and receive responses immediately.

What are best practices to avoid caregiver discrimination?

EEO policies and training

Ensure your employee handbook 1) describes the types of prohibited conduct against caregivers based on protected characteristics and stereotypes, 2) prohibits retaliation against those who report discrimination, and 3) identifies managers or other leaders to whom complaints of discrimination can be made.

Define “family” and “caregiver” broadly in EEO policies that go beyond the immediate and traditional family definitions.

Train managers and supervisors on state and federal employment laws and how the protections of those laws may cover caregivers.

Adopt work-life policies supportive of caregivers.

Hiring, recruitment and promotions

Disseminate job openings and promotion opportunities to all individuals regardless of caregiver status or perception of caregiver status.

Focus on applicants’ qualifications and not on their caregiving or family circumstances.

Ensure that employment decisions are based on legitimate, non-discriminatory reasons and not on stereotypes. Document those decisions.

Terms and conditions of employment

Consider providing flexible work arrangement options, if feasible.

Monitor compensation practices and performance appraisals for patterns of potential discrimination against members of a protected class.

Apply personal and sick leave policies consistently.

Do not limit employees' ability to participate in complex or high-profile assignments based on assumptions related to caregiving responsibilities.

For positions with changing work schedules, post schedules early to enable workers to arrange caregiving needs in advance.

What does this mean for employers?

Lawsuits based on caregiver bias are on the rise. As employers continue to grapple with the Great Reshuffle and the Great Resignation, they also need to remain focused on adopting and consistently applying workplace policies and practices that treat employees fairly and without unlawful consideration of their protected statuses and caregiving responsibilities. Doing so not only helps to avoid the risk of discrimination claims but also creates a positive workplace culture resulting in increased employee productivity and less turnover.

Contact us

If you would like assistance developing workplace policies; training management or supervisory personnel; or reviewing recruitment, hiring and retention practices, contact Julianne Story, Barbara Grandjean, Brittany Falkowski, Tracey O'Brien, Sonia Ramirez Anderson or your Husch Blackwell attorney.