Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities

On May 23, 2007, the Equal Employment Opportunity Commission (“EEOC”) issued an enforcement guidance relating to potential discrimination against employees who are responsible for the care of family members entitled: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities (the “Guidance”). Those with caregiving responsibilities could include virtually any employee who bears responsibility for the care of a child, parent or a disabled relative including mothers, fathers, children (caring for the elderly), grandparents and other relatives.

The Guidance provides that it is “not intended to create a new protected category, but rather to illustrate circumstances in which stereotyping or other forms of disparate treatment may violate” existing anti-discrimination laws such as Title VII of the Civil Rights Act of 1964 and/or the Americans with Disabilities Act (the “ADA”). The Guidance suggests that the status of some workers as “caregivers” often relates closely enough to sex and/or to race to support an employment discrimination claim under applicable statutes if employees suffer adverse employment actions relating to their roles as caregivers. The EEOC’s Guidance contains concrete examples demonstrating how the existing EEO laws apply to employees who attempt to balance work and family responsibilities, several of which are summarized below.

Disparate Treatment of Female Caregivers: Stereotyping and the “Double Bind”

The Guidance instructs EEOC investigators to be sensitive to whether adverse employment actions were taken based on stereotypes about pregnant employees or employees with caregiving responsibilities. Those stereotypes include the presumption that women are more likely to assume childcare responsibilities and that the quality of their work and/or their commitment to work suffers as a result. Accordingly, the Guidance provides that employers are not permitted to base employment decisions on assumptions about pregnancy or caretaking responsibilities, regardless of whether the employer intends the decision to be “benevolent” or otherwise supportive of the employee’s caretaking responsibilities.

For example, a female CPA at an accounting firm told her boss that she had become the guardian of her niece and nephew and that they were coming to live with her, and requested a few days off to help them adjust. The boss expressed concern about the employee’s ability to balance her responsibilities, moved her from her lead position on three of the firm’s biggest accounts, and assigned her to supporting roles handling several smaller accounts, telling her that he did it so she would have more time to spend with her new family. At the end of the year, the employee was denied a pay raise (even though others were given raises) and was told that she needed to be available to work on bigger accounts if she wanted to receive raises. Under the circumstances, the EEOC’s position is that the employer unlawfully discriminated against the employee.
Similarly, the Guidance cautions investigators to be aware of the effects of stereotyping on employers’ assessments of work performance. Specifically, the Guidance suggests that women caregivers find themselves in a “double bind” in the workplace because employers, or those charged with evaluating employee performance, can sometimes allow the presumption that working mothers are “bad mothers” for investing time and resources into their careers and “bad workers” for devoting time and attention to their families to effect their evaluations of the employee’s work performance. Additionally, women of color may be subjected to discrimination on the basis of race relating to their roles as caregivers if white working mothers are treated more favorably by their employer.

For example, an African American employee for the City files an EEOC charge alleging that she was denied the opportunity to use compensatory time because of her race. She asked her supervisor for the opportunity to use compensatory time to occasionally take care of her children when she doesn’t have a sitter. Her supervisor rejected the request and explained that absences must be under the official leave policy. The EEOC’s investigation reveals that City doesn’t have an official policy and several White employees in the same position have been allowed to use compensatory time for childcare purposes and no African Americans have been allowed to do so. Under the circumstances, the EEOC would take the position that the employee was unlawfully denied the opportunity to use compensatory time based on her race.

Overall, the Guidance suggests that employers have an obligation to support their subjective assessments of an employee’s performance with specific objective criteria. The apparent focus in the Guidance on employers’ stereotyping suggests that investigators will be more likely than before to presume that adverse employment actions resulted from unlawful discrimination under circumstances where they are not supported by objective facts.

**Disparate Treatment of Male Caregivers: Denial of Benefits**

The Guidance also observes that stereotypes about women’s roles can often be reinforced by parallel stereotypes about men’s roles. As a result of those stereotypes, men may be denied access to opportunities to obtain benefits, such as leaves of absence and/or flexible schedules, and denial of those benefits may run afool of the anti-discrimination laws. Accordingly, the Guidance cautions employers to distinguish between pregnancy-related leaves of absence and other types of leave and to ensure that pregnancy-related leave is limited to the period when women are incapacitated by pregnancy and childbirth.

For example, a male elementary school teacher, requests unpaid leave for the upcoming school year for the purpose of caring for his newborn son. The school’s collective bargaining agreement allows for up to one year of unpaid leave for personal reasons, including the care of a newborn; however, the Personnel Director denies the request. When the male teacher points out that women have been granted childcare leave, the Director says, “That’s different. We have to give childcare leave to women” and suggests that the male employee take 90 days emergency unpaid leave. This is a violation of Title VII because the employer is denying male employees a type of leave, unrelated to pregnancy, that it is granting to female employees.

**Americans with Disabilities Act, Hostile Work Environment and Retaliation**

The Guidance observes that under the ADA, employees may not be treated less favorably based on stereotypical assumptions about the employee’s ability to perform job duties satisfactorily while also caring for someone with a disability.

As is the case under traditional anti-discrimination rules, employers may be liable if workers with caregiving responsibilities are subjected to offensive comments or other “hostile work environment” harassment on the basis of race, sex or other protected characteristic if the harassment is sufficiently severe or pervasive to create a hostile work environment.
For example, after a female supervisor at a construction site returned to work from maternity leave, she asked her supervisor for permission to use her lunch break to breastfeed her child at the child’s day care center. The supervisor agreed, but added, “Now that you’re a mother, you won’t have the same dedication to the job. That’s why I never had any kids! Maybe you should rethink being a supervisor.” She also began monitoring the employee’s time, and admonishing her if she was late, even if only a few minutes. Other employees who left the site during lunch were not similarly monitored. The supervisor warned the employee that if she had another child, she could “kiss her career goodbye,” and stated that it was impossible for any woman to be a good mother and a good supervisor at the same time. Despite a complaint to management, the employer refused to do anything in response. After the conduct continued for several more months, the employee files an EEOC charge alleging that she was subjected to sex-based harassment. Under the circumstances, the investigator would determine that the employee was subjected to a hostile work environment based on sex and that the employer should be liable.

Finally, employers are prohibited from retaliating against employees for opposing unlawful discrimination, including discrimination involving caregiving issues.

Commitment to Employer “Best Practices” For Workers With Caregiving Responsibilities

Although the Guidance confirms that caregivers are not protected from discrimination solely on the basis of their family responsibilities, it reflects a commitment by the EEOC to closely scrutinize claims of discrimination filed under the current equal employment opportunity or EEO laws, on the basis of family or caregiving responsibility.

In particular, the Guidance highlights the changing composition of the workforce today and identifies work/life balance as an issue of increasing importance regardless of gender, age, race, socio-economic and industry factors.

An EEOC Guidance is not considered legally binding; however, it does illuminate the issue as an area of interest to the EEOC where there is likely to be increased litigation. Because this is an issue that touches workers in all segments of the workforce, we suggest that employers should be particularly cognizant of the types of claims exemplified in the Guidance.

Employers also should consider their own policies and practices to avoid facing family responsibility or caregiving discrimination lawsuits. In particular, employers should be prepared to take proactive steps to avoid increased risk of litigation by working parents and others with caregiving responsibilities and to establish internal “best practices” regarding work/family balance issues. Some areas that K&L Gates would advise employers to consider include:

- **Training:** Employers should consider training all employees, including supervisors and managers, to prevent discrimination against employees on the basis of all legally protected categories. Anti-discrimination and sensitivity training also should include examples concerning discrimination on the basis of caregiving responsibilities, similar to those provided in the EEOC Guidance.

- **Hiring and Firing:** Employers should consider their policies and practices concerning an employee or applicant’s suitability for a particular job or assignment and assess whether their criteria and decisions might unlawfully discriminate on the basis of stereotyping or some other disparate treatment under Title VII or the ADA.

- **Leave Policies:** Employers should review their leave policies to ensure that they are both facially neutral and applied in a non-discriminatory fashion, including toward employees who have made their caregiving responsibilities known to their employers.

- **Requests for Accommodation:** Employers should carefully consider each employee’s request for an accommodation based either on his or her own disability or the disabilities of family members.

- **Performance Evaluations / Adverse Employment Decisions:** Employers should consider whether the reason asserted for a negative review or an adverse decision is credible and supportable. Employers should ensure that where supervisors and managers are making subjective assessments of caregivers they are supported by specific, objective criteria.
• Flexible Work Arrangements: Employers should consider whether flexible arrangements, such as reduced hour schedules, job-sharing and/or telecommuting opportunities are available to employees who request them in order to balance family caregiving responsibilities.

The EEOC designed the Guidance as a tool to assist employers, employees and EEOC staff investigators in determining whether discrimination against those with caregiving responsibilities constitutes unlawful discrimination. It may, however, also serve as a useful reminder to employers to carefully consider creating policies and procedures designed to attract and retain the growing pool of talented employees who balance work and family responsibilities.