

## Handle employee with caregiving responsibilities with care

By Dan Eaton

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Throughout the pandemic, employers have dealt with employees with disclosed or assumed caregiving responsibilities at home. The U.S. Equal Employment Opportunity Commission (EEOC) recently issued guidance on how to address these sensitive issues without violating federal employment discrimination laws.

### Don't make decisions based on gender or other stereotypes

The EEOC warns employers not to make hiring, promotion, or project assignment decisions based on the persistent stereotype that women are the primary household caregivers. "For example," says the agency, "it would violate the law if an employer refused to hire a female applicant or refused to promote a female employee based on assumptions that, because she was female, she would (or should) focus primarily on caring for her young children while they attend school remotely, or on caring for her parents or other adult relatives."

Similarly, an employer may not deny leave or flexible work scheduling to men for COVID-19-related home care, because men are the presumed household breadwinner, where such options are routinely granted to female employees.

Neutral, consistently applied policies will avoid more than gender stereotypes. An employer violates the Americans with Disabilities Act if it discriminates against an applicant or employee because of the individual's association with a disabled individual. It would be unlawful, then, "for an employer to refuse to promote an employee who is the primary caregiver of a child with a mental health disability that worsened during the pandemic, based on the employer's assumption that the employee would not be fully available to colleagues and clients, or committed to the job, because of the employee's caregiving obligations for a child with a disability."

An employer may violate the federal Age Discrimination in Employment Act by assuming older workers with caregiving responsibilities need special treatment. If an older worker is caring for a grandchild while the child's parent recovers from COVID-19, an employer may not unilaterally cut the employee's hours based on an age-based assumption that the worker lacks the stamina to perform full-time job duties effectively while caring for a young child.

### The road to litigation is paved with good intentions

The EEOC underscores that an employer may not make discriminatory decisions out of a benevolent concern for the employee. "For example, employers may not decline to assign female caregivers demanding or high-profile projects that increase employees' advancement potential but require overtime or travel, or reassign such projects from female caregivers, based on employers' assumptions that such actions will make it easier for female employees to juggle work and personal obligations, or based on the belief that female caregivers cannot or would prefer not to work extra hours or be away from their families if a family member is infected with or exposed to COVID-19."



The Law at Work (San Diego Union-Tribune)

The same is true of requiring pregnant employees to telework to limit their contact with others thereby keeping them and their unborn children safe.

Employers may nonetheless grant exceptions to generally applicable policies, preferably at the employees' request. "[I]f employees with caregiving responsibilities request work assignments that have a predictable schedule or that do not require extra hours or travel, employers may grant such requests at their discretion, as long as they do so in a nondiscriminatory manner."

### **Employees with caregiving responsibilities may be held accountable for poor performance**

According to the EEOC, federal law does not require employers to excuse poor performance that arises from pandemic-related caregiving responsibilities. An employer may discipline an employee who is repeatedly late because of pandemic-related caregiving responsibilities the same way it disciplines other employees who are repeatedly late.

The EEOC cautions employers, however, not to apply performance standards differently from those with caregiving responsibilities. Employers "may not penalize female employees more harshly than similarly situated male employees for absences or missed deadlines due to pandemic-related caregiving duties."

### **Punish and deter harassment based on pandemic-related caregiving responsibilities**

The EEOC gives several examples of unlawful pandemic-related harassment:

- Criticizing women for being insufficiently committed to their careers because of their focus on keeping their families safe;
- Ridiculing male employees who seek leave to care for a child quarantining after potential COVID-19 exposure;
- Insulting Asian employees caring for family members with COVID-19 because the disease was first identified in an Asian country;
- Unjustifiably "questioning 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."

The EEOC's timely guidance reminds employers to be at least as vigilant about keeping their workplaces free from pandemic-related discrimination and harassment as they have been about keeping their workplaces free from COVID-19 itself.

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