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Caregiver Discrimination and COVID-19

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Although COVID-19 infection numbers have been declining recently, COVID-19 legal risks are still looming for employers who do not fully understand the potential for liability. On March 14, 2022, the Equal Employment Opportunity Commission (“EEOC”) issued new guidance: [The COVID-19 Pandemic and Caregiver Discrimination Under Federal Employment Discrimination Laws | U.S. Equal Employment Opportunity Commission \(eoc.gov\)](#). While pointing out that there is no specific law that prohibits discrimination against COVID-19 caregivers, the EEOC is quick to note that employees with COVID-19 caregiver responsibilities may be protected from discrimination based upon federal EEO laws such as Title VII, the ADA, the ADEA, and Pregnancy Non-Discrimination Act and may also be covered under the Family and Medical Leave Act. Therefore, it is important for employers to ensure that they are treating employees with COVID-19 caregiver responsibilities in a non-discriminatory manner.

The EEOC reminds employers it is unlawful to make employment decisions based upon gender stereotypes. In the context of COVID-19 caregivers, this could take place in a number of ways. For example, a woman who has children at home attending school remotely due to COVID-19 may not be denied a high-profile project that would require overnight travel and provide increased opportunity for promotion simply because the employer believes she is needed at home. Similarly, a male employee requesting a flexible schedule so that he may care for his child who is home with COVID-19 may not be denied a flexible schedule if similarly situated female employees are allowed flexible schedules.

However, notwithstanding the possibility of illegal discrimination, the EEOC also notes that employees do not have the right to accommodations for COVID-19 caregiving responsibilities, such as telework or flexible schedules, simply because they are caregivers. Rather, COVID-19 caregiving employees in protected classifications must be treated in the same manner as other employees who are temporarily unable to perform their job duties. Additionally, employers do not have to excuse poor performance resulting from an employee’s COVID-19 caregiving responsibilities. An employee working remotely may be held to the same performance standards as those working in the office, even though the reason for the remote work is due to COVID-19 caregiving responsibilities.

Additionally, employers should not be overly paternalistic when assigning work based upon assumptions regarding certain COVID-19 caregivers. For example, assuming a pregnant employee needs to have limited contact with others to avoid the risk of infection could result in illegal discrimination even though that assumption was based upon a genuine employer concern. Employers must consider a request for an accommodation from a pregnant employee, but it is illegal for an employer to impose requirements on the pregnant employee due to assumptions regarding the possible risk of COVID-19.

Employers should remember that it is important to evaluate the legitimate, non-discriminatory business reason for personnel decisions. COVID-19 caregiving responsibilities have impacted millions of employees and could potentially result in legal liability if those caregiving responsibilities become the reason for the adverse employment action. When dealing with COVID-19 caregivers in the workplace, employers should focus on the employee’s job performance, not the employee’s responsibilities at home. Similarly, when an employee with COVID-19 caregiving responsibilities requests workplace accommodations, the request should be treated in the same manner as other workplace accommodation requests. If in doubt, employers should consult with legal counsel to make sure they do not receive a call from the EEOC.

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