Employment Edge 72nd Edition - Proceeding with Care: New EEOC Guidance on Caregiver Discrimination

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Proceeding with Care: New EEOC Guidance on Caregiver Discrimination

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In recent years, there has been a significant increase in the number of "caregiver" discrimination cases. Although no law specifically prohibits discrimination against caregivers, differential treatment of employees with care-giving responsibilities may violate various employment laws, including Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act ("ADA"), the Family and Medical Leave Act ("FMLA"), and the Minnesota Human Rights Act. On May 23, 2007, the EEOC issued an Enforcement Guidance entitled "Unlawful Disparate Treatment of Workers with Caregiving Responsibilities." The Guidance is intended to help employers avoid caregiver discrimination claims and to implement best practices towards employee-caregivers.

Caregiver discrimination, also known as "family responsibilities discrimination," is a term coined for the growing number of suits against employers for discriminating against employees based on assumptions about their family responsibilities. Discrimination arises because the employer's decisions are based not on the individual's actual performance, but rather on stereotypes of how the individual will or should act due to his or her caregiving role. Employers may assume, for example, that new parents will not be as reliable or as committed to their jobs as they were before they had children; or employers may believe that mothers should be at home with their children and may offer them fewer opportunities for advancement. Employee-caregivers are not immune from discipline for poor performance or policy infractions; however, employees with caregiving responsibilities should be subject to the same standards and treated in the same manner as employees without caregiving responsibilities.

DISPARATE TREATMENT OF FEMALE CAREGIVERS

The EEOC Guidance recognizes that discrimination against working mothers is the most common form of caregiver discrimination. Although women now comprise nearly half of the U.S. labor force, they continue to be most families' primary caregivers. Caregiver responsibilities extend not only to children, but also to elderly or disabled parents, spouses, in-laws and grandchildren.

According to the Guidance, prohibited employer action may take the form of different treatment of female and male caregivers, such as denying women with young children an employment opportunity that is available to men with young children. Often-times, such differential treatment will be based on stereotypes, such as overlooking a woman with young children for a promotion based on the assumption that she will not want to work long hours or that she will not be able to travel. Similarly, during the hiring phase, an employer may make gender-based assumptions about an applicant's future caregiving responsibilities, perhaps assuming that females will be less dependable than male employees due to their potential future role as a working mother. Differential treatment based on gender stereotypes is unlawful even if it is well-intentioned. For example, an employer who proactively moves a new mother to a position with fewer responsibilities and with fewer opportunities for advancement in order to give her more time to spend with her new child may violate Title VII if the employee did not request the change. It is also unlawful to treat married mothers differently than single mothers.

DISPARATE TREATMENT OF MALE CAREGIVERS

Caregiver discrimination can affect men as well as women. For example, employers may not deny or discourage the requests of male employees for child care leave, but grant similar requests to female employees. Similarly, an employer cannot deny a male employee accommodations to deal with childcare issues if it would grant such accommodations to a female employee. Workplace harassment of men related to their caregiving responsibilities, such as a supervisor referring to a male employee with childcare responsibilities as "Mr. Mom," may also violate Title VII.

PREGNANCY DISCRIMINATION

The EEOC Guidance counsels employers to not make pregnancy-related inquiries or treat pregnant workers less favorably than other workers whose job performance is restricted due to conditions other than pregnancy. For example, an employer who provides up to eight weeks of paid leave for temporary medical conditions must provide the same eight weeks of paid leave for pregnancy-related medical conditions.

DISCRIMINATION DUE TO RELATIONSHIP WITH A DISABLED INDIVIDUAL

The ADA prohibits discrimination against an employee because of his or her relationship with a disabled individual. An employer's refusal to hire an applicant who is a parent in sole custody of a disabled child, upon the assumption that the applicant's caregiving responsibilities would cause him to arrive late and use frequent leave violates the ADA.

RACIAL AND ETHNIC DIMENSIONS

The EEOC Guidance also explores how employer treatment of caregivers may vary based on the employee's race or ethnicity. An employer who denies flexible compensatory time to an African American woman to care for her children but grants the same privilege to white employees violates Title VII's ban on race discrimination.

RETALIATION

The EEOC Guidance states that employers are prohibited from retaliating against workers for opposing unlawful caregiver discrimination, such as by complaining to their employers about gender stereotyping of working mothers. Employers should take complaints regarding caregiver discrimination seriously and should respond in the same way they would respond to other employee complaints of discriminatory or harassing conduct.

THE BEST PRACTICE IS HELPING EMPLOYEES ACHIEVE A WORK-LIFE BALANCE

The EEOC Guidance notes that not all employment decisions that adversely affect caregivers constitute unlawful discrimination. However, the EEOC strongly encourages employers to adopt best practices to make it easier for all workers, whether male or female, to balance work and personal responsibilities. The Guidance notes that there is substantial evidence that workplace flexibility enhances employee satisfaction and job performance. Employers also benefit from adopting flexible workplace polices by, for example, saving millions of dollars in retention costs.

TIPS ON AVOIDING CAREGIVER DISCRIMINATION CLAIMS

Employers can take several steps to help reduce the risk of a caregiver discrimination claim.

- Consider adopting policies that help facilitate work-life balance for employees and train supervisors on these policies.

- Train supervisors not to make assumptions based on an employee's or applicant's perceived caregiving responsibilities. Employment actions should be based on legitimate business needs and actual employee performance or applicant potential, not stereotypes and biases.

- Train supervisors regarding caregiver discrimination and the law. Many supervisors don't realize that comments such as "I don't see how you can be a good worker and a good mother" or "you should not have a baby if you want to get ahead here" can be illegal.

- Train supervisors that men and women have the same leave rights under the FMLA and the Minnesota Parenting Leave Act. They should not deny family leave to men or discourage men from taking such leave by questioning their commitment to work or warning them that taking leave may interfere with their advancement at the company.

- Train supervisors to assess job performance based on objective factors, when possible. For subjective assessments, train supervisors to limit their focus to pure job performance and not to speculate about what other life factors might be affecting an employee's performance.

- Take steps to prevent harassment directed at caregivers in the workplace. Train supervisors to avoid stereotypical or derogatory comments about pregnant employees or male or female caregivers, and to immediately correct such conduct by others.

- Train supervisors and employees that caregiver discrimination is prohibited by the employer's anti-discrimination policy. Encourage employees to notify appropriate individuals of harassment or other discriminatory conduct.

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UNITED STATES SUPREME COURT CLARIFIES THE STATUTE OF LIMITATIONS FOR PAY DISCRIMINATION CLAIMS UNDER TITLE VII IN LEDBETTER V. GOODYEAR TIRE & RUBBER CO.

In a big win for employers last week, the U.S. Supreme Court issued a decision sharply curtailing an employee's ability to sue his or her employer for pay discrimination under Title VII of the Civil Rights Act of 1964. In Ledbetter v. Goodyear Tire & Rubber Co., the Supreme Court held that, with limited exceptions, workers generally lose their right to sue for pay discrimination under Title VII unless they file a charge of discrimination within 180 days of the original discriminatory pay decision (or 300 days in Minnesota, Wisconsin and other states with their own employment discrimination laws).

Lilly Ledbetter worked for Goodyear Tire & Rubber Co. for 19 years, from 1979 until her retirement in November of 1998, in a position predominantly held by men. Although her initial salary was in line with the salaries of men performing similar work, her pay slipped over time. By the end of her employment, Ledbetter was paid substantially less than men performing comparable work. In March of 1998, Ledbetter filed a gender discrimination charge with the EEOC. Ledbetter admitted that Goodyear did not act with discriminatory intent in its most recent pay decisions, but claimed that Goodyear's earlier discriminatory pay decisions continued to affect her current pay, making each new paycheck a violation of Title VII.

Ledbetter's claim of pay discrimination in violation of Title VII was tried to a jury, which found that it was "more likely than not that Goodyear paid Ledbetter an unequal salary because of her sex," and awarded her damages. Goodyear appealed, claiming that, because the discriminatory pay decisions all occurred well before Ledbetter filed her EEOC charge, her pay discrimination claim was untimely under the 180-day (or 300-day) filing period under Title VII.

The Supreme Court agreed with Goodyear, finding that the EEOC charging period was triggered when the discriminatory pay decision was made. The fact that each new paycheck carried forward the effect of the earlier discriminatory pay decisions did not make each new paycheck a new and separate violation of Title VII. Rejecting Ledbetter's claim, the Supreme Court stated, "[c]urrent effects alone cannot breathe life into prior, uncharged discrimination." Because Ledbetter could not show an actual discriminatory pay decision occurring within 180 days of the filing of her charge, her Title VII claim was barred by the statute of limitations.

The Ledbetter decision should provide employers with protection from Title VII lawsuits alleging pay discrimination based on individual, discriminatory pay decisions occurring a long time ago, but which may still be manifested in an employee's current pay. Consequently, so long as an employer is currently treating its employees fairly and in a non-discriminatory manner with respect to pay decisions, an employer should not be liable under Title VII for past discriminatory pay decisions.

Ledbetter will not, however, protect employers who adopted and continue to implement discriminatory pay structures. Employers should continue to be proactive to assess their overall pay systems to determine whether employees in protected categories could claim that the pay system is discriminatory.

At this time, it is unclear whether the court's analysis will be applied by Minnesota courts in employee claims of pay discrimination under the Minnesota Human Rights Act. In addition, employers should be aware that Ledbetter does not affect pay discrimination claims under the Equal Pay Act, which has a two- or three-year statute of limitations. Therefore, the Ledbetter decision will not protect employers from all claims of pay discrimination that are more than 180 or 300 days old.

The Ledbetter decision was a 5-4 decision, with a strong dissent by Justice Ginsberg in which she called for Congress to step in and correct the majority's ruling. In response, a number of senators have already publicly stated their intention to introduce legislation overruling the Ledbetter decision. Ledbetter may not be the last word.

Please contact Catie Bitzan should you have questions regarding this information.

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