



# Employment Law Note

May 2022

## EEOC Guidance Addresses Discrimination Against Caregivers



By **Shreya Ahluwalia**, [sahluwalia@sbj.law](mailto:sahluwalia@sbj.law)

The U.S. Equal Employment Opportunity Commission (“EEOC”) released new guidance<sup>1</sup> on March 14, 2022, regarding caregiver discrimination during the COVID-19 pandemic.

As more employees are returning to the physical workplace, this guidance has been created to supplement earlier EEOC guidance regarding the treatment of workers with personal caregiving responsibilities. The pandemic has altered workers’ obligations and caregiving demands while also requiring some to navigate new hybrid schedules and even extra shifts. The new guidance seeks to provide clarification on the many ways caregivers may be protected under anti-discrimination laws to help avoid potential claims.

### Summary of New Guidance

This new guidance, like its predecessor, makes clear that although the status of being a caregiver is not a protected class in and of itself, caregivers fall under the larger umbrella of anti-discrimination protections on the basis of other characteristics such as sex, race, color, religion, national origin, age, disability, sexual orientation or genetic information. Caregiver discrimination is also unlawful if it is based on an employee’s association with a disability, race, ethnicity, or other protected characteristic possessed by the person(s) for whom they are providing care. Importantly, the guidance also explicitly addresses discrimination on an intersectional basis where multiple protected characteristics may be targeted (for example, discrimination against a woman of color on the basis of both gender and race).

Notably, caregiver duties do not only extend to spouses and children, but also encompass parents, older family members, or family members with disabilities.

### Best Practices

According to the EEOC, there are various best practices that employers can adopt to reduce the chance of the EEOC

issuing Charges involving violations against caregivers. Please keep in mind, though, that these practices are proactive measures and therefore go above and beyond federal non-discrimination requirements.

Overall, the EEOC’s “best practice guidance”<sup>2</sup> emphasizes the importance of cultivating a work-life balance for employees. It notes that policies that help employees create an appropriate work-life balance can result in a decrease of complaints regarding unlawful discrimination. It points to studies showing that “flexible workplace policies can enhance employee productivity, reduce absenteeism, reduce costs, and appear to positively affect profits.” Flexible workplace policies can also assist employers in increasing employee retention.

Moreover, the guidance provides various specific examples of best practices including:

1. Creating awareness of, and training managers about, the legal obligations that may impact decisions about how workers with caregiving responsibilities are treated.
2. Developing and enforcing a strong EEO policy that addresses the conduct that might constitute unlawful discrimination against caregivers.
3. Ensuring that managers comply with the organization’s work-life policies, especially those in managerial roles that deal with leave approval, schedules, promotions, etc.
4. Responding to complaints of caregiver discrimination effectively through prompt and thorough investigation followed by appropriate corrective action and the addition of preventive measures.
5. Ensuring protection against retaliation and guaranteeing that anti-retaliation measures are enforced.

<sup>1</sup> [https://www.eeoc.gov/laws/guidance/covid-19-pandemic-and-caregiver-discrimination-under-federal-employment?utm\\_content=&utm\\_medium=email&utm\\_name=&utm\\_source=govdelivery&utm\\_term=](https://www.eeoc.gov/laws/guidance/covid-19-pandemic-and-caregiver-discrimination-under-federal-employment?utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term=)

<sup>2</sup> <https://www.eeoc.gov/laws/guidance/employer-best-practices-workers-caregiving-responsibilities>

6. Refraining from asking questions about an applicant's or employee's children, family plans, pregnancy, or other caregiving-related issues.
7. Reviewing employment policies, procedures, and handbooks to ensure that they do not disadvantage workers with caregiving responsibilities.

## What Are Some Examples of Unlawful Discrimination Against Caregivers Based on Sex?

Gender-based stereotypes regarding caregiving roles and responsibilities may lead to unlawful discriminatory acts. For example, if an employer refuses to hire or promote a female on the assumption that she should focus on caring for her children, this would violate the law. Or, if an employer grants female employees leave requests for their pandemic-related caregiving duties, but denies similar requests for male employees, this would be unlawful.

Furthermore, members of the LGBTQ+ community also fall under the umbrella of individuals protected on the basis of sex from discriminatory conduct due to sexual orientation or gender identity. So, employers must treat employees equally regardless of such characteristics. For example, employers cannot require more burdensome procedures for their LGBTQ+ employees to provide proof of marriage or other familial relationships with the person for whom they are completing caregiver duties if there is no similar requirement for other non-LGBTQ+ employees.

## Do I Have to Provide Accommodations for Individuals with Caregiving Duties?

Generally, the answer is no. Employees do not explicitly have a right under federal employment discrimination laws to accommodations such as remote work, flexible schedules, reduced travel, etc., because they are caregivers. However, employees who have caregiving responsibilities may have rights under other laws such as the Family and Medical Leave Act ("FMLA"), or state equivalent, which provide the right to

leave for covered caregiving purposes. And employees who cannot perform their job duties because of pregnancy, childbirth, or related medical conditions have to be treated equally to employees who are unable to perform their job duties for other reasons.

Furthermore, pregnant workers may have rights under Title VII, the Americans with Disabilities Act ("ADA"), or the Rehabilitation Act to accommodations such as modified duties, alternative assignments, and leave. Notably, while pregnancy itself is not considered a disability under the ADA or Rehabilitation Act, some pregnancy-related medical conditions may be considered disabilities that therefore entitle employees to reasonable accommodations.

## What if an Employee's Caregiving Duties Result in Poor Performance?

While employee caregivers do have some protections from discrimination as noted above, employers are not required to excuse poor performance resulting from an employee's caregiving duties. For example, employers can still write up their employees for tardiness even if the employee is late because of their pandemic-related caregiving duties and hold employees to productivity standards despite caregiver-related fatigue.

However, discipline of employees for these shortcomings must still be neutral on the basis of protected characteristics. So, for example, it would still be discriminatory if only Hispanic employees were chastised for missing meetings or arriving late to work due to their pandemic-related caregiver obligations, but similar conduct by employees of other ethnicities was overlooked.

## Final Note

As we all continue to navigate through this pandemic, it is important to keep in mind the various intersectional obligations that may arise in unprecedented ways. For any specific or clarifying questions, please reach out to our office to discuss.

For more information about this month's Employment Law Note  
contact us at 425-454-4233

