

# First Wednesday

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## Best Practices for Preventing Inadvertent Discrimination Against Employees with Caregiving Responsibilities

Many employers, large and small, are reducing their workforces or altering their employees' salaries and work schedules. These changes raise a variety of complex employment law issues which the savvy employer knows requires the help of legal counsel. This April, the U.S. Equal Employment Opportunity Commission ("EEOC") issued a supplement to its 2007 guidance on discrimination directed at employees with caregiving responsibilities. The 2009 supplement is a pro-active measure meant to provide suggested best practices for employers struggling with hard choices in a tough economy. By following the best practices, employers can avoid inadvertently violating federal and state laws that prohibit discrimination.

The EEOC's caregiver supplement and original guidelines help employers identify and eliminate unlawful discrimination when the employer must implement workforce changes, or, if the employer is fortunate enough to be doing well in this economy, when making decisions about hiring and promotions. The 2007 guidelines define the discrimination and give specific examples of how an employer's decision based on an incorrect assumption or stereotype made can run afoul of the law. The 2009 supplement sets forth best practices in general, as well as specifically in recruitment, hiring, promotion, and in the terms, conditions, and privileges of employment.

This type of discrimination is unique because it is sometimes referred to as a type of "nice" or benign form of discrimination, and it can occur when the employer has good intentions. Most employees have caregiving responsibilities. They include employees who belong to the "Sandwich Generation" – people who care for their aging parents and their minor children at the same time - and any employee who cares for a parent, child, disabled person, or any other family member or loved one with special needs. The EEOC guidelines also address inappropriate attitudes directed towards pregnant employees.

Caregiver discrimination can occur when an employer assumes that:

- A female employee would rather be at home with her family than spend more time at work;
- A male employee doesn't — or shouldn't — have caregiving responsibilities;
- A female employee's caretaking responsibilities will interfere with her ability to succeed in a fast-paced work environment;
- Female employees with part-time or flexible schedules are less committed to their jobs than full-time employees; or
- A pregnant employee or an employee with caregiving responsibilities is less reliable than other employees.

The EEOC's 2009 supplement points out that when employers make these kinds of assumptions and deny employees the same benefits other employees receive, unlawful discrimination has occurred. For example, if an employer decides not to hire one applicant based on a mistaken perception that the applicant won't be as dedicated to the job because they have children, or because they asked if it was possible to have a flexible schedule, and the employer decides to hire a similarly qualified applicant instead, the employer has discriminated against the caregiving applicant.

The 2009 supplement provides several examples of conduct that is prohibited:

- Asking female, but not male, job applicants about their caregiving responsibilities;
- Making stereotypical comments about pregnant employees or female caregivers;
- Treating female employees without caregiving responsibilities better than female employees that have caregiving responsibilities;
- Steering women who have to care for loved ones or family members toward job positions that are less prestigious or lower-paid;
- Treating women of color with caregiving responsibilities differently than other employees with caregiving responsibilities;<sup>1</sup>

- Treating male employees with caregiving responsibilities better or worse than female employees with the same responsibilities;
- Denying male employees requests for leave to provide caregiving; or
- Providing disability accommodations for employees but not pregnant employees.

Employers that promise equal employment opportunities and want to enact and follow procedures designed to eliminate the unlawful effect of misguided assumptions should review the EEOC guidelines and 2009 supplement. The employer's first step is to develop and circulate the company's equal opportunity policies. Employers can then train their managers on the company's policies and compliance with them, to properly respond to complaints, and to not retaliate against any employee who raises a question or complains about being treated differently.

In the hiring and promotion process, the employer should focus on the job applicant's qualifications, develop specific job-related qualification standards, and ensure that employment decisions are well-documented and transparent. Additional preventative measures include: communicating information about job openings and promotions to all eligible employees and potential hires who may have caregiving responsibilities, and proactively working to ensure that employees who have taken an extended leave from employment in order to care for a loved one or family member aren't unnecessarily barred from re-entering the workforce.

The supplement sets forth numerous suggestions for best practices governing the terms, conditions, and privileges of employment. They include monitoring employee compensation, encouraging the use of flex-time, asking for volunteers to take overtime hours and posting overtime requirements as early as possible so employees have time to arrange for caregiving coverage while they are at work, and promoting an inclusive workplace culture. Some suggestions are particularly important and describe conduct employers should already be aware of, such as accommodating pregnant employees and providing personal or sick leave so employees can care for loved ones. The 2009 supplement also encourages

<sup>1</sup> The EEOC supplement makes note of the fact that women, especially women of color, are disproportionately likely to have primary caregiving responsibilities, while it is also true that men have increasingly assumed caregiving duties for children, parents, and disabled relatives.

employers to develop the full potential of its employees, supervisors and executives without consideration of the caregiving responsibilities of the individual employee. This includes having equal opportunity to work on complex or high-profile assignments, equal access to workplace networks of people and information, and providing referrals for resource or support organizations, if possible. The EEOC guidelines and 2009 supplement are posted in full on the EEOC's website at: <http://www.eeoc.gov/policy/docs/caregiving.html> and <http://www.eeoc.gov/policy/docs/caregiver-best-practices.html>.

Employers who want to ensure equal opportunity for their employees and avoid inadvertently discriminating against employees who have — or who the employer thinks may have — caregiving responsibilities should review their equal opportunity policies and practices. When making hiring, firing, and benefits decisions, employers should not consider an employee's personal obligations or make decisions based on its assumptions about those obligations. If the employer does base employment decisions on such assumptions, it risks violating the laws that prohibit discrimination, and triggering an EEOC investigation or lawsuit to remedy the discriminatory practice.

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