

EEOC Issues New Enforcement Guidance on "Family Responsibilities Discrimination" and Holds Public Meeting on Employer Best Practices For Work/Family Balance

Breaking Developments In Labor and Employment Law 05/31/07

On May 23, 2007, the United States Equal Employment Opportunity Commission ("EEOC") issued a new Enforcement Guidance on "Unlawful Disparate Treatment of Workers With Caregiving Responsibilities." This type of unlawful treatment, also referred to as "Family Responsibilities Discrimination" or "FRD," has become fertile ground for lawsuits against employers, with FRD claims increasing 400 percent in the last decade. The Enforcement Guidance offers insight into the EEOC's view of how agency-enforced laws apply to workers with caregiving responsibilities.

In a Questions and Answers document, issued at the same time as the Enforcement Guidance, the EEOC said the Enforcement Guidance was a proactive measure intended to address emerging discrimination issues in the 21st century workplace, observing: "Changing workplace demographics, including women's increased participation in the labor force, have created the potential for greater discrimination against working parents and others with caregiving responsibilities."

At the same time it announced the issuance of its new Enforcement Guidance, the EEOC also held a public meeting focusing on employer best practices to achieve work/family balance. At the public meeting, the Commission heard prepared presentations from a wide range of expert panelists who discussed best practices by employers to balance family-friendly workplaces with legitimate business needs. According to one speaker, the benefits to employers include boosting productivity, reducing staff turnover, increasing employee commitment to the organization, and reducing absenteeism due to child care and other issues.

The EEOC states that the Enforcement Guidance is not intended to create a new protected category. Indeed, no federal statute exists that prohibits discrimination based solely on parental or other caregiver status. Instead, the Enforcement Guidance explores claims brought under Title VII of the Civil Rights Act of 1964 ("Title VII") and the Americans With Disabilities Act ("ADA"), and contemplates that claims may also arise under certain other federal laws, such as the Family and Medical Leave Act ("FMLA").

The Enforcement Guidance notes that caregiving responsibilities fall primarily on women's

shoulders. It states further that FRD also appears to have a significant impact on women of color, particularly African-American women, who have a long history of working outside the home. As more mothers have entered the workforce, families have increasingly faced conflicts between work and family responsibilities, sometimes resulting in a "maternal wall" that limits the employment opportunities of women with caregiving responsibilities.

But FRD does not just affect women. According to the Enforcement Guidance, the time men spent on child care nearly tripled between 1965 and 2003. Male caregivers may face a mirror image stereotype that men are poorly suited caregivers. Accordingly, men may be denied parental leave or other benefits routinely afforded their female counterparts. In the Enforcement Guidance, the EEOC has highlighted the following areas where employers need to be vigilant to avoid discriminating against employees based on their caregiving responsibilities:

Sex-based Disparate Treatment of Female Caregivers.

This would include asking female, but not male, applicants whether they are married, have children or intend to have children. This also includes making stereotypical or derogatory comments about pregnant women or working mothers. A significant red flag for the EEOC is whether the employer subjects caregiving employees to disciplinary action or less favorable treatment, even where the employee's performance is not actually affected by his or her caregiving responsibilities.

This type of discrimination necessarily includes treating women with caregiving responsibilities differently from males with caregiving responsibilities. However, it also includes treating women with caregiving responsibilities less favorably than women without such responsibilities.

Claims of disparate treatment may also arise based on an employer's "benevolent" stereotyping. This is where employment decisions are well intentioned and perceived by the employer as being in the employee's best interest. An example of this would be excluding a mother with school-age children from consideration for a promotion that includes a transfer, assuming that the female employee would not want to uproot her children.

Pregnancy Discrimination.

Employers may also violate Title VII by making assumptions about pregnancy, such as the employee's commitment or ability to work. Consequently, employers should not make pregnancy-related inquiries. The EEOC states in the Enforcement Guidance that it will generally consider pregnancy-related inquiries as evidence of pregnancy discrimination where the employer subsequently makes an unfavorable job decision affecting a pregnant employee or job applicant. The EEOC also cautions that an employer should not treat a pregnant employee who is temporarily unable to perform some of her job duties because of pregnancy less favorably than workers whose performance is similarly restricted because of temporary conditions other than pregnancy.

Discrimination Against Women of Color.

The EEOC Enforcement Guidance points out that, in addition to sex discrimination, race or national origin discrimination may be a further employment barrier faced by women of color who are caregivers. This may include discrimination specifically directed toward women of a particular race or ethnicity, rather than toward all women, resulting, for example, in less favorable treatment of an African-American woman compared to her white counterpart.

Discrimination Against Male Caregivers.

This may include stereotyping men as "bread winners," meaning that fathers belong in the workplace earning money, not staying at home to tend to the family. Employers are prohibited from denying male employees the same family or "bonding" leave opportunities afforded to female employees (although, of course, leaves for disabilities related to pregnancy or childbirth are unique to women). The EEOC cautions that employers should be careful to not treat men and women differently when applying leave policies.

Unlawful Caregiver Stereotypes Under the Americans With Disabilities Act.

The ADA prohibits discrimination because of the disability of an individual with whom the employee has a relationship or association, such as a child, spouse or parent. Employers are prohibited from treating employees less favorably based on stereotypical assumptions about the employee's ability to perform job duties satisfactorily while also providing care to a relative or other individual with a disability.

The Enforcement Guidance also reminds employers that they may be subject to hostile work environment claims if they make offensive comments or otherwise harass employees based on these protected characteristics. Employers should take steps to prevent harassment directed at pregnant employees and caregivers of either sex. Finally, employers must not retaliate against employees who make FRD claims, under Title VII, the ADA or any other applicable law, such as the FMLA.

What This Means for Employers

The EEOC has made clear its significant efforts to identify and eradicate "Family Responsibilities Discrimination" claims in the workplace. The new Enforcement Guidance gives 20 examples of scenarios that may give rise to FRD claims. This list of scenarios is not exhaustive, and employers must be careful to comply with their obligations under Title VII, the ADA, the FMLA and other applicable federal statutes. FRD claims are not limited to these statutes, and now that the EEOC has highlighted FRD as an unlawful practice under existing fair employment statutes, employers may also be subject to investigation by state enforcement agencies such as the Washington Human Rights Commission or the Oregon Bureau of Labor and Industries, as well as city and county agencies. Last, but certainly not least, regardless of agency

involvement, employers must be aware of their exposure to liability in civil lawsuits.

On July 19, 2007, in Seattle and on July 31, 2007, in Portland, Lane Powell will host an Employer Adviser Breakfast Seminar that further explores the ever expanding scope of Family Responsibilities Discrimination claims, as well as recently passed state laws affecting employers in Washington and Oregon. Please contact **Katie Hays** at 206.223.5496 or haysk@lanepowell.com, for more information about the Seattle Breakfast Seminar and **Meghan Healy** at 503.778.2043 or healym@lanepowell.com, for more information about the Portland Breakfast Seminar.

If you have any questions or concerns regarding whether specific hiring or employment policies or situations may be considered discriminatory against employees with caregiving responsibilities, you should contact counsel for analysis. Please contact the Labor and Employment Law Practice Group at Lane Powell with any other questions:

For more information, please contact the Labor and Employment Law Practice Group at Lane Powell:

206.223.7000 Seattle
503.778.2100 Portland
employlaw@lanepowell.com
www.lanepowell.com

We provide *Employer Adviser* as a service to our clients, colleagues and friends. It is intended to be a source of general information, not an opinion or legal advice on any specific situation, and does not create an attorney-client relationship with our readers. If you would like more information regarding whether we may assist you in any particular matter, please contact one of our lawyers, using care not to provide us any confidential information until we have notified you in writing that there are no conflicts of interest and that we have agreed to represent you on the specific matter that is the subject of your inquiry.

Copyright © 2007 [Lane Powell PC](http://www.lanepowell.com)
Seattle - Portland - Anchorage - Olympia - Tacoma - London