

# EEOC SAYS DISCRIMINATION AGAINST CAREGIVERS CAN VIOLATE EMPLOYMENT DISCRIMINATION LAWS: FIVE TAKEAWAYS FOR EMPLOYERS

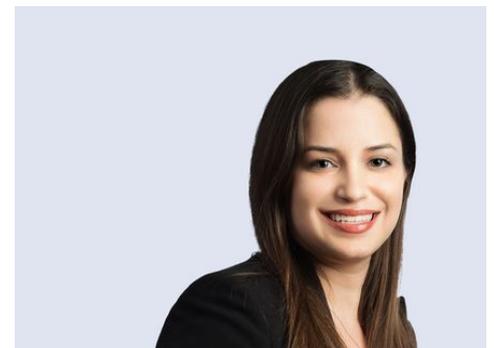
Insights  
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Although COVID-19 cases have been steadily decreasing recently, human resources personnel, corporate in-house counsel, and front-line managers continue to grapple with issues surrounding employees' caregiving obligations in the wake of the pandemic. These obligations may include caring for a child whose school or daycare facility unexpectedly closed down due to an outbreak, caring for a family member who has contracted COVID-19 or whose mental health disability has worsened during the pandemic, or having to quarantine unexpectedly due to exposure to someone infected with COVID-19. In light of these increased caregiving responsibilities, many employers have been asked to provide more flexibility in the form of modified work schedules, telework (in many cases on a permanent basis), extended periods of leave, and modified job duties.

The Equal Employment Opportunity Commission just [released guidance](#) to clarify circumstances under which discrimination against a person with caregiver responsibilities in the age of COVID may be unlawful under federal employment discrimination laws. Importantly, the federal EEO statutes do not prohibit discrimination based solely on caregiver status. Instead, the Commission explains in its guidance that "caregiver discrimination" violates federal law only if it is based on:

- An applicant's or employee's sex (including pregnancy, sexual orientation, or gender identity), race, color, religion, national origin, age (40 or older), disability, or genetic information (such as family medical history); or

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- An applicant's or employee's association with an individual with a disability, within the meaning of the ADA, or on the race, ethnicity, or other protected characteristic of the individual for whom care is provided.

While there is nothing particularly surprising in this guidance, it signals an increased focus by the EEOC on caretaker-related claims.

## What Does This Mean for Employers? Five Biggest Takeaways

1. ***Avoid Making Decisions Based on Assumptions or Stereotypes.*** For example, gender-based stereotypes that women are caregivers and thus less committed to their jobs and less dependable are improper. Similarly, denying men leave or permission to work remotely to care for a family member with COVID-19 would be unlawful if the same requests are granted for similarly situated female employees.

Even well-intentioned decisions can run afoul of the law. For example, if an older worker is caring for a grandchild while the child's parents recover from COVID-19, employers should not require the worker to work fewer hours due to concerns that the worker lacks stamina to work full-time while caring for a child. Additionally, employers should not decline to assign female caregivers projects that require overnight travel or late nights to make it easier for the employee to juggle work and family obligations.

The key to avoiding claims is to apply your policies consistently to similarly situated employees.

2. ***LGBTQI+ Employees and Applicants are Protected Against Caregiver Discrimination.*** Two years ago, the U.S. Supreme Court ruled in *Bostock v. Clayton County* that discrimination because of a person's sexual orientation or gender identity violates Title VII of the Civil Right Act. Therefore, in thinking of caregiver issues, employers should consider whether a policy or practice violates federal law. For example, employers should not impose more burdensome procedures on LGBTQI+ employees who make caregiver-related requests, such as requiring proof of a marital or other family relationship with the individual needing care, if such requirements are

not imposed on other employees who make such requests.

**3. *Employees are Not Entitled to Reasonable Accommodations Based on Their Status as a Caregiver.***

Employers do not need to provide accommodations such as remote work, flexible schedules, or reduced travel simply because an employee is a caregiver. Of course, if you plan on denying such a request, you should consider whether another federal, state or local law provides such a right. For example, the Family Medical Leave Act provides for 12-weeks of job protected leave to eligible employees who are needed to care for covered family members with serious health conditions. Further, even if you are not legally required to provide a flexible arrangement, employers may choose to do so as long as the policy and/or practice is applied consistently to similarly situated employees.

**4. *Pregnancy Discrimination Related to the Pandemic May Arise in a Variety of Ways.*** For example, the EEOC asserts that it would be unlawful for an employer to allow employees to harass a pregnant co-worker for maintaining a physical distance from colleagues, changing their schedules, teleworking, or taking other actions to avoid being exposed to or infected with COVID-19.

Again, even well-intentioned decisions can lead to legal exposure. For example, employers should not unilaterally require pregnant employees to work remotely or adjust their schedules to limit contact with others to help keep pregnant employees safe.

Finally, while pregnancy is not a disability under the law, some pregnancy-related medical conditions such as severe fatigue due to a COVID-19 may be disabilities under the law. If a pregnant employee makes a request for an accommodation, you should engage in the interactive process as you would with any other employee.

**5. *Employers are Not Required to Excuse Poor Performance Caused by Caregiving Responsibilities.***

The key is to ensure that performance standards are applied consistently. For example, if an employer provides written warnings to a Hispanic employee who repeatedly arrives late to work because of pandemic-related caregiving obligations, it should not overlook such

conduct by similarly situated employees of other ethnicities.

## **Conclusion**

Employers should carefully consider the many circumstances under which so-called caregiver discrimination claims may arise, particularly given that the EEOC has signaled with its guidance that such claims will be an enforcement priority. To reduce the risk of claims, we recommend that you review and update your EEO policies and complaint procedures, post the policies in accessible areas on-site and online, conduct periodic training, investigate and address complaints, and apply your policies consistently.

We will continue to monitor developments related to COVID-19, including any additional guidance from the EEOC. Make sure you are subscribed to [Fisher Phillips' Insight system](#) to get the most up-to-date information. If you have questions please reach out to one of the authors, or any Fisher Phillips attorney.