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Two weeks ago, the Equal Employment Opportunity Commission (EEOC) issued a written enforcement guidance regarding "family responsibility discrimination" (FRD). (For more on the types of claims comprising FRD, see C. Leh, *Family Responsibility Discrimination*, *The Voice* 6:16, at 1 (Apr. 25, 2007). Observing that, "the federal EEO laws do not prohibit discrimination against caregivers *per se*," the EEOC explained that, "there are circumstances in which discrimination against caregivers might constitute unlawful disparate treatment under Title VII of the Civil Rights Act of 1964 [Title VII] or the Americans with Disabilities Act of 1990 [ADA]."

Since 1992, the EEOC has issued 19 written guidances to assist its investigators and provide information to employees and employers about a specific group of potentially discriminatory practices in the workplace. On April 17, 2007, it held its first-ever hearings concerning FRD. Weeks later, on May 23, the EEOC issued the *Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities* (the May 23 Guidance), and an accompanying fact sheet with questions and answers. On the same day, the EEOC convened a public meeting of experts to discuss the subject.

A. Background

The May 23 Guidance begins with a discussion of current research concerning the caregiving responsibilities of workers. The EEOC notes, for example, that the proportion of women working outside the home was 59% in 2005, up from 43% in 1970. With respect to mothers of children under three years of age, 59% were still in the workforce, up from only 34% in 1975. Based on information from the Bureau of Labor Statistics, women continue to be most families' primary caregivers, although men are devoting more time to caregiving responsibilities than they have in the past. The EEOC cited research indicating that the burdens of caring for extended family members may be even more pronounced among working women of color than their white counterparts.

The nature of caregiving responsibilities is changing also, according to the EEOC. For example, an increasing proportion of caregiving is received by the elderly, a trend that is likely to continue as the Baby Boomers age. Also, one in ten families with children under 18 includes a child with a disability. One in three families has at least one adult child, spouse, parent or other family member with a disability. Nearly all of those who provide

care to those disabled individuals are employed.

After examining trends concerning which workers tend to perform caregiving functions, and the likelihood that those responsibilities will continue, the May 23 Guidance discusses current work and family conflicts. It includes difficulties the working poor may have in fulfilling their job and caregiving responsibilities, and the unlawful assumptions and stereotypes employers may rely upon in making job-related decisions concerning caregivers, whether male or female, or people of color. The EEOC concludes the background section by encouraging employers to adopt best practices to "make it easier for all workers… to balance work and personal responsibilities."

B. Unlawful Disparate Treatment of Caregivers

The May 23 Guidance provides an analytical framework for evaluating claims of unlawful disparate treatment and retaliation under Title VII of the Civil Rights Act of 1964, and the Americans with Disability Act of 1990. The EEOC breaks down those claims into seven categories, applies the law to a number of fact patterns, and indicates which are likely to be considered violations of the law.

1. Sex-Based Disparate Treatment of Female Caregivers. Much of the analysis of legal claims in the May 23 Guidance concerns the sex-based, disparate treatment of female caregivers under three primary theories. The first is unlawful, disparate treatment of female caregivers as compared with male caregivers. For example, an employer may not discriminate in hiring against a qualified woman with children where similarly qualified males selected for the position had children also, even though more than half of those selected were women. This is the so-called "sex-plus" theory of gender discrimination (in the example, having children was the "plus" characteristic).

The second theory of unlawful, sex-based, disparate treatment of caregivers is unlawful gender stereotyping of working women. Employers may run afoul of the law in various ways, including:

- *Gender-Based Assumptions about Future Caregiving Responsibilities – e.g.*, where the employer asks only female candidates how many children they have or plan to have.

- *Mixed-Motive Cases – e.g.*, where facts of the last example apply, but the employer consistently relies on a non-discriminatory criterion like relevant experience to break the tie between similarly-situated candidates and would have reached the same decision even in the absence of the candidate's sex as a motivating factor.

- *Assumptions about the Work Performance of Female Caregivers – e.g.*, a new mother is given less challenging job assignments based on sex-based assumptions or speculations about her commitment to her job; is held to a higher standard of review than others who did not participate

in a flex-time arrangement; is transferred to another position for the purportedly benevolent reason that the supervisor wants to give her more time to spend with her children – even in the absence of a request for such a transfer; or is not given a more challenging assignment that requires travel because the employer believes it would not be fair to the female employee's children for her to be away from home.

• *Effects of Stereotyping on Subjective Assessments of Work Performance – e.g.*, a female employee is not selected for a position because she arrives late for a meeting twice per month due to caregiving responsibilities, even though the male candidate who is selected consistently arrives late for the meeting because he is perceived to be more dependable than she.

2. Pregnancy Discrimination. Another category of unlawful sex discrimination identified by the EEOC is pregnancy discrimination. Such discrimination might include making assumptions about an employee's ability to do certain tasks because she is pregnant. It might also involve imposing a pregnancy test on an employee or making a pregnancy-related inquiry and then taking an adverse employment action against the pregnant employee. Another instance of pregnancy discrimination occurs when an employer refuses to provide a pregnant employee with an accommodation when she cannot perform certain functions of her job, even after providing such accommodations to others who were not pregnant.

3. Discrimination against Male Caregivers. The next category of unlawful sex discrimination discussed in the May 23 Guidance involves gender-based stereotypes that adversely affect men. These include perceptions that a man who works part-time in order to provide care for a family member is not living up to expectations of being a breadwinner. Such discrimination also may occur where an employer fails to provide leave to a male employee if it regularly provides similar leave to female employees.

4. Discrimination against Women of Color. An additional category of unlawful, sex-based, disparate treatment involves discrimination against women of color. This discrimination occurs when, for example, a woman of color with caregiving responsibilities is not allowed to use leave that her white coworkers typically use for the same purposes. It also occurs when a waitress of color, who is pregnant, is told by the employer that she will spoil the appetites of customers if she serves food to them while pregnant.

5. Unlawful Caregiver Stereotyping under the Americans with Disabilities Act. Another category of unlawful sex-based discrimination occurs when an employer stereotypes a caregiver in violation of the ADA. For example, an employer refuses to hire a person whom she knows must care for a disabled child because she assumes that the candidate would be unable to perform the job while fulfilling caregiving responsibilities. Such a practice violates the ADA's prohibition on discriminating against a person

because of that person's association with a disabled person.

6. Hostile Work Environment. Yet another category of unlawful disparate treatment of caregivers under either Title VII or the ADA is the hostile work environment. This might occur if a caregiver employee is subjected to offensive conduct because of race, sex (including pregnancy), or association with an individual with a disability. A hostile environment would exist where an employee becomes pregnant and her supervisor berates her constantly for having another child and repeatedly tells her that she will never become a supervisor because of it, the employee complains to her second-level manager, who dismisses the complaint as a personality conflict.

7. Retaliation. An employer may not take an action against an employee that would be reasonably likely to deter someone from engaging in protected conduct. If an employee testifies about actions taken against a pregnant employee by the employer, and is then disciplined by the employer, for example, the employer has engaged in unlawful retaliation.

C. Practical Considerations to Avoid Employer Liability

Any employer that believes the EEOC's new emphasis on family responsibility discrimination is a passing fad does so at its peril. In May 2007, for example, an Ohio jury returned a $2.1 million verdict against Kohl's Department Stores and in favor of a ten-year employee who aspired to raise a family while holding down her assistant manager job. Another $840,000 may be awarded for attorneys' fees. Over a two-month period, five store manager positions apparently went to less qualified men, or to women with no children, or to mothers who assured their bosses that they would have no more children. Kohl's allegedly terminated the employee when she was pregnant after her bosses asked her inappropriate questions such as, "You're not going to get pregnant again, are you?" "Did you get your tubes tied?" "I thought you couldn't have any more kids." "Are you breast feeding?" "Are you having any more kids?" and "Have kids, or run a business. You have a choice. Why should my or any other business suffer because a 'Manager' wants time off to have a family? It does not make sense. Kohl's should just say 'Screw hiring women'....."

The issuance of the new Guidance does not appear to herald the birth of a new era in civil rights law. Indeed, the EEOC stated that the new Guidance on the Unlawful Disparate Treatment of Workers with Caregiving Responsibilities "is not intended to create a new protected category." But FRD claims are gaining increasing exposure, fueled in part by the efforts of advocacy organizations, the increasing tension between job and caregiving responsibilities of workers, and the media response. The May 23 Guidance will focus and help equip EEOC attorneys and investigators, and plaintiffs' attorneys on establishing additional claims against employers they probably did not spot or pursue previously.

If efforts to remedy family responsibility discrimination through traditional channels do not bear measurable fruits in the legal arena, advocates may well turn to state and federal legislative changes to fill the gap. Such laws are already on the books in states and localities, including Alaska and the

District of Columbia, which prohibit employment discrimination based on "parenthood" and "family responsibilities," respectively. Others may follow. At the federal level, the efforts to protect caregiving workers may take the form of intensified efforts to seek passage of legislation requiring employers to give qualifying employees paid leave rather than the unpaid leave currently required under the Family and Medical Leave Act of 1990.

In the meantime, the May 23 Guidance should lead employers to convert their heightened awareness into tangible measures to help prevent disparate treatment discrimination claims against caregivers in the workforce:

- Acknowledge both the importance of family and caregiving responsibilities and the need to perform the duties of the job.

- Evaluate leave and other policies, procedures and practices to ensure they do not embody differences in treatment that are based on sexually or racially discriminatory assumptions or stereotypes. As the EEOC suggests, for example, "…avoid a potential Title VII violation [by carefully distinguishing] between pregnancy-related leave and other forms of leave, ensuring that any leave specifically provided to women alone is limited to the period that women are incapacitated by pregnancy and childbirth [including postpartum period when a women remains incapacitated due to childbirth]."

- When assessing a prospective or current employee for a job, raise, promotion, demotion, discipline, termination or other employment decision, focus on the objective qualifications of a person to do the job and the performance of the individual under consideration.

- Eliminate or minimize as much as possible reliance on subjective or speculative judgments about a worker's job qualifications, performance, caregiving responsibilities, and the impact of any such responsibilities on performance. As the May 23 Guidance states, "[e]mployment decisions based on an employee's actual work performance, rather than assumptions or stereotypes, do not generally violate Title VII, even if an employee's unsatisfactory work performance is attributable to caregiving responsibilities." Accordingly, employers should focus always and again on the facts of performance rather than on explanations of any changes in performance that relate or may relate to caregiving responsibilities.

- Train all employees to know what are and are not appropriate comments and actions toward coworkers regarding their family and caregiving responsibilities.

- Train supervisors to identify potential disparate treatment or harassment of caregivers, seek advice from human resources

professionals or counsel to address issues.

• Ensure there is an effective complaint mechanism in place for investigating and responding to allegations of FRD, and publicize it to all employees.

• Instill in all employees the duty and importance of reporting concerns about possible disparate treatment of others and the employer's duty not to retaliate against someone who has complained.

• Investigate all complaints, whether formal or informal, whether asserted by an employee or on his or her behalf, and do so promptly, completely and fairly.

• Take remedial action, if any, that may be appropriate.
