

Caregiver Discrimination – Employer Best Practices

This article addresses the emerging issue of caregiver responsibilities discrimination, also referred to as family responsibility discrimination.

What is Caregiver Responsibilities Discrimination? Caregiver Responsibilities Discrimination (CRD) is discrimination against workers who have caregiver responsibilities. This can include individuals such as pregnant women, mothers and fathers of young children, parents of disabled children, and workers who care for their aging parents or sick spouses.

What law protects a worker from CRD? There is no federal law that expressly prohibits CRD, but workers have successfully used at least five federal statutes in lawsuits against employers: Title VII of the Civil Rights Act of 1964, the Pregnancy Discrimination Act, the Family Medical Leave Act, the Americans with Disabilities Act, and the Equal Pay Act.

While there is no specific federal law prohibiting CRD, the Equal Employment Opportunity Commission (EEOC) has issued enforcement the guidelines as a proactive measure to address this emerging discrimination issue. The EEOC has also published a document entitled “Employer Best Practices for Workers with Caregiving Responsibilities” to supplement the previous guidance with suggestions for best practices that employers may adopt to reduce the chance of violating the rights of employees and applicants.

What employment practices are encompassed within CRD? There are many forms of discrimination against applicants and employees with caregiving responsibilities:

- Questioning job applicants about plans to have children or about family obligations as a factor in hiring decisions
- Giving promotions to women without children or to fathers rather than to more qualified mothers
- Refusing to give parents flexible work schedules to meet child care needs when flexible schedules are given to non-parents
- Refusing to let a worker periodically leave work early to take a parent or child for medical treatment while permitting another worker to leave early to attend to personal business
- Stereotyping – making assumptions that a mother will not want to travel, that a father should not have childcare responsibilities, or that a pregnant worker will not be able to handle her job duties

Am I protected if my policies and practices are always evenly enforced? CRD can also exist when seemingly neutral policies (such as restrictions on leave, attendance policies, promotion guidelines, work schedules, etc) have a disparate impact on workers with caregiver responsibilities. For example, a company institutes a new policy that anyone refusing overtime on two consecutive occasions, with as little as one hour’s notice of the need for overtime, will be

terminated. The policy is evenly enforced and the first five employees terminated under the new policy are mothers with childcare responsibilities. Unless the employer can show that the policy is job-related and exists for a business necessity, the employer may be found to have discriminated based on caregiver or gender.

Does CRD mean that parents and other caregivers should get preferential treatment in the workplace? No. Caregivers should be treated the same as any other employee, without regard to their caregiving responsibilities. If an employer would hold open the job of an employee who is recovering from a heart attack or back surgery or other temporary medical condition, then the employer should also hold open the job of a woman who is on leave for childbirth. If an employer allows some employees to take time off during the week to play golf, teach, or participate in volunteer activities, the employer should also allow employees to take some time off during the week for child-related activities or to take an aging parent to the doctor.

What are the “best practices” recommended by the EEOC to reduce the incidence of caregiver discrimination?

1. Develop, disseminate, and enforce a strong EEO policy. If you already have a policy that prohibits discrimination, one option is to amend the policy to include caregiver responsibilities discrimination. Another option is to include a catch-all provision in the EEO policy that prohibits discrimination on the basis of any characteristic protected by federal, state or local statute or law.
2. Be aware of, and train managers about, the legal obligations in the treatment of employees with caregiver responsibilities. Training should include a description of common stereotypes about caregivers, and provide examples of prohibited conduct.
3. Respond to complaints efficiently and effectively. Investigate complaints, take corrective action, and implement preventive measures to resolve the situation and prevent future problems.
4. Protect against retaliation. Provide clear and credible assurances that if employees make complaints or provide information related to complaints about unfair treatment of caregivers, the employer will protect them from retaliation. Ensure that these anti-retaliation measures are enforced.
5. Review employment policies and practices related to hiring, promotion, pay, benefits, attendance, and leave to determine whether they disadvantage employees with caregiver responsibilities.
6. Ensure that job openings, acting positions, and promotions are communicated to all eligible employees regardless of caregiving responsibilities. Do not assume that certain employees (for example, mothers of young children or single parents) will not be interested in positions that require significant travel or working long or unusual hours.
7. Ensure that employment decisions are well-documented and transparent.

8. Monitor compensation practices and performance appraisal systems for patterns of potential discrimination against caregivers.
9. Focus on an applicant's qualifications for the job in question. Do not ask applicants or employees questions about their children, plans to start a family, pregnancy, or other caregiving-related issues during interviews or performance reviews.
10. Review workplace policies that limit employee flexibility. Are fixed hours and/or mandatory overtime necessary for your business operations? Would a system of voluntary overtime work? In the case of mandatory overtime, can employees schedule overtime in advance so they can arrange for child care or other caregiving responsibilities?

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