

[Alerts and Updates]

EEOC Issues Guidance on Employer Best Practices for Workers with Caregiving Responsibilities

April 27, 2009

On April 22, 2009, the U.S. Equal Employment Opportunity Commission (EEOC) issued a technical assistance document on best practices to avoid discrimination against workers with caregiving responsibilities. This document, "Employer Best Practices for Workers with Caregiving Responsibilities" (Best Practices Guidance), supplements the May 23, 2007, guidance issued by the EEOC on how disparate treatment of employees who are caregivers (of children, parents or disabled family members) may violate federal antidiscrimination laws.

Similar to its 2007 guidance on this topic, the EEOC's Best Practices Guidance does not create a new federal protected class based on caregiving responsibilities. Rather, it provides recommendations and suggestions for how employers might make their workplaces more hospitable to employees with caregiving responsibilities while reducing the employers' risk of EEO violations.

The best practices are broken down into three categories: General; Recruitment, Hiring and Promotion; and Terms, Conditions and Privileges of Employment.

- Under the General category, the EEOC makes recommendations regarding employer EEO policies, including their content, manager compliance and response to complaints brought under such policies. For example, the Best Practices Guidance suggests that employers include in their EEO policies language that addresses the types of conduct that might constitute unlawful discrimination against caregivers based on characteristics protected by federal antidiscrimination laws. The guidance also recommends that employers incorporate in their EEO training programs information regarding the legal obligations that may impact decisions about the treatment of workers with caregiving responsibilities.
- Under the Recruitment, Hiring and Promotion category, the EEOC recommends that: employers make hiring and promotion decisions based on criteria that are job-related; that they take appropriate steps to ensure that hiring and promotion decisions are made for legitimate, nondiscriminatory reasons and are well documented; and that they put systems in place to ensure that information regarding job openings is available to all employees. The Best Practices Guidance also suggests that employers consider implementing recruitment practices that target individuals with caregiving responsibilities who are looking to return to the workforce, as well as identifying and removing barriers to reentry.
- Under the Terms, Conditions and Privileges of Employment category, the EEOC makes recommendations regarding: permitting flexible scheduling of employee shifts; allowing optional rather than mandatory overtime (or, alternatively, providing advance notice of the need for overtime so that caregivers can make alternate arrangements for care); and permitting leave for caregiving. The Best Practices Guidance also recommends: providing opportunities to all employees with respect to training, professional development and assignments; monitoring compensation practices and performance appraisal systems for potential discrimination against caregivers; and permitting flexible work arrangements. While equal treatment is the goal, the Best Practices Guidance explains that this may not always be possible. It gives the example of an employer who refuses an employee's request to work on a project from home where necessary files and equipment are stored at the job site and impromptu team meetings occur frequently, and states that this refusal is justified.

The Best Practices Guidance specifically states that "[b]est practices are proactive measures that go beyond federal non-discrimination requirements." Nevertheless, employers who take such proactive measures can cite them in defense of their commitment to equal employment opportunity in the event their policies are ever challenged before administrative or judicial tribunals.

To the extent employers heed the EEOC's advice and consider implementing or enhancing policies or practices that benefit employees with caregiving responsibilities, they should do so with care to avoid creating unintended legal risks. A policy or practice intended to benefit caregivers could have the unintended consequence of discriminating against employees who are not caregivers, based on their protected status. For example, an employer that offers flexible work arrangements only to those employees who have primary childcare responsibilities may be discriminating against its male employees. In addition, policies and practices that benefit employees with caregiving responsibilities may implicate any number of other federal, state and local employment laws (e.g., wage and hour laws).

Employers should not implement new policies or practices for caregiving employees without reviewing them with counsel to ensure that they do not have the unintended result of conflicting with existing policies and practices or impinging on the protected rights of other employees.

The Best Practices Guidance is available on the EEOC's website (www.eeoc.gov), along with related hearing testimony and the EEOC's May 2007 guidance on this topic.

For Further Information

Duane Morris' employment attorneys can assist clients in reviewing new policies or practices for caregiving employees, to help ensure that they only implement those best practices that make good business sense for their workplaces.

If you have questions regarding the EEOC's "Employer Best Practices for Workers with Caregiving Responsibilities," about policies and practices that benefit employees with caregiving responsibilities or about caregiver discrimination, please contact any [member](#) of our [Employment & Immigration Practice Group](#) or the attorney in the firm with whom you are regularly in contact.