

## EEOC Issues Guidance on Caregiver Discrimination

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### KEY TAKEAWAYS:

- Caregiver discrimination is not by itself unlawful under federal or Michigan law, but it can be when it is based on protected characteristics.
- Employment decisions based on gender stereotypes are illegal even if they seek to benefit the employee or are well-intentioned.
- Caregiver discrimination can also take the form of unlawful differential treatment when it affects individuals associated with a person who has a disability.

On March 14, 2021, the U.S. Equal Employment Opportunity Commission (EEOC) updated its technical assistance guide, ***What You Should Know About COVID-19, and the ADA, the Rehabilitation Act, and Other EEO Laws*** and issued a technical assistance document, entitled ***The COVID-19 Pandemic and Caregiver Discrimination under Federal Employment Discrimination Law***. This technical assistance document details recommended best practices for employers managing workers with family caregiver responsibilities. According to the EEOC:

- Caregiver status is not a protected characteristic under federal law. However, caregiver discrimination violates federal law when it is based on a protected characteristic like sex or disability.
- A caregiver is not only limited to individuals who care for children but also includes workers with any type of caregiving responsibilities, including caring for spouses, partners, relatives, individuals with disabilities and others.
- Employers are not required to excuse poor performance that may result from an employee's caregiving duties, as long as similarly-situated employees are treated consistently. As always, it is a best practice to document any performance or disciplinary warnings issued to employees.
- Employers must be mindful of situations when caregiver discrimination might be unlawful sex discrimination:
  - Employers must not base employment decisions on gender stereotypes. An employer cannot refuse to hire or promote a female employee based on the speculation that a woman will be more focused on her children or caring for family members than her work. An employer likewise cannot deny male employees leave or flexible schedules based on the assumption that they are the breadwinner of their family, rather than one who performs the caregiving duties.
  - Sex discrimination includes discrimination based on sexual orientation. Employers cannot employ more burdensome procedures when it comes to their LGBTQ workers, such as requiring proof of a marital or family relationship to the individual requiring care if such information is not requested from other employees with similar needs.
  - Sex-motivated decisions are unlawful, even if they aim to benefit an employee. An employer cannot decline to give female employees work assignments that require overtime or travel on the assumption that female caregivers prefer not to work extra hours or be away from their families. Nor can an employer treat a female employee more favorably because of caregiving responsibilities, like being more lenient with its attendance policy, compared to male employees.

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- Employers must not discriminate against a caregiver who is associated with an individual with a disability. For example:
  - Employers cannot deny an employee's request for unpaid leave to care for a disabled family member while allowing other employees to go on unpaid leave for other personal responsibilities unless there are other legitimate business reasons to deny the leave that are unrelated to the employee's association with an individual with a disability.
  - Denial or exclusion of benefits may also be analyzed as an unlawful discrimination claim. For instance, an employer cannot refuse to hire an applicant because their family member is disabled or add the applicant's family member to the company health care plan based on the fear that its health insurance costs will rise.
- While federal law does not require employers to accommodate employees with caregiving responsibilities, employers must treat employees who are unable to perform their job duties because of pregnancy, childbirth, or related medical conditions the same as other employees who may be temporarily unable to perform their duties for other reasons.

If you have any questions about this technical assistance document or how it may impact your workplace, please contact the authors of this alert or your Miller Canfield attorney.

*This information is based on the facts and guidance available at the time of publication and may change.*