Employees as Caregivers

by Jennifer Shaw and Alexander Sperry

Key Points
- Don’t discriminate against caregivers.
- Caregiver lawsuits can prove costly.

An employer is looking to fill a vacant position. It has narrowed its applicant search to two female candidates.

Both applicants appear equally qualified for the job, possessing similar academic credentials, work experience and skills.

However, during the interviews, the employer learns that one of the applicants is married and has three small children, while the other applicant is single and has no children.

If the employer decides not to hire the married woman with small children because the employer assumes she will need time off from work because she’s a caregiver, is the employer in “trouble”?

In short, the answer is “Yes” if the hiring decision is based on the stereotype that the single woman will be more dedicated to her job than the married woman with dependents because the married woman may have to take time off to act as a caregiver.

The applicant could sue the employer for “marital status” and “caregiver” discrimination. “Caregiver” discrimination? You may have never heard of the term, but it is receiving increased attention on a state and federal level.

The National Library of Medicine (NLM) defines “caregivers” as people who take care of other adults, often parents or spouses, or children with special medical needs. According to the NLM, some caregivers may be family members, while others may be professionals who are paid for caregiver services.

Caregivers often help with:
- Going to the toilet, bathing and dressing;
- Eating; and
- Providing company and emotional support.

Changing Demographics

It is no secret that employee demographics are rapidly changing. During the last several years, the number of family “caregivers” in the workplace has increased significantly.

The federal Equal Employment Opportunity Commission (EEOC) recently reported that women continue to be the primary caregivers for most family members, including children, parents, in-laws and spouses. Men are doing their part as well, of course. Statistics show the amount of time men spend on childcare nearly tripled between 1965 and 2003.

According to the EEOC, nearly one-third of families have at least one family member with a disability, and about one in 10 families with children under 18 years of age include a child with a disability.

In addition, many employees find themselves in the “sandwich generation”—those individuals between the ages of 30 and 60 who face significant work responsibilities, along with childcare and eldercare duties.

Savvy employers should take note of these statistics. With the number of working caregivers on the rise, the frequency of litigation involving such employees has also increased dramatically.

According to a 2010 report issued by the Center for WorkLife Law, part of the University of California Hastings College of the Law, which studied some 2,100 lawsuits filed by employees with family caregiving obligations, these types of cases have risen nearly 400 percent over the past decade, in contrast to the overall decrease in employment discrimination filings during this same period.

Particularly alarming, this same report found that employees filing caregiver discrimination claims succeed in recovering the majority of the time, with the average verdict or settlement amounting to $500,000 or more.

Laws Protecting Caregivers

The above statistics indicate employers may not fully appreciate their legal responsibilities to employee caregivers. Indeed, the source of caregiver protections can be confusing.

No federal laws explicitly outlaw discrimination against family caregivers. Though several states passed some form of legislation addressing caregiver discrimination, California (at least so far) has not been one of them. Recent attempts to amend California’s Fair Employment and Housing Act (FEHA) to include “familial status” as a protected class have failed, even as recently as this past year.

So what are the caregiver lawsuits based on? The answer lies in existing federal and state statutes, such as Title VII of the Civil Rights Act of 1964 and the FEHA, which already prohibit forms of discrimination affecting caregivers.

Under these laws, caregivers may belong to one or more “protected classes,” including marital status, pregnancy and gender. So if an employer routinely fires or demotes expectant mothers, that could be considered illegal pregnancy discrimination.

Likewise, if an employer treats female employees with children differently than male employees with children, this could be gender discrimination. These protections run both ways, too.

Treat all employee complaints of caregiver discrimination seriously, and do not retaliate against employees.
An employer who denies male caregivers the same level of benefits as female caregivers (e.g., flexible work schedules, telecommuting opportunities, etc.) could be equally guilty of sex-based decision-making.

The EEOC published an Enforcement Guidance providing detailed examples of potential legal violations in this area. These hypotheticals cover discrimination against women with young children (as opposed to pregnancy-based issues), discrimination based on employee participation in flexible work arrangements (because of the presumption that caregiving makes an employee less dedicated), denying part-time work to males because of sex-based stereotypes, and denying jobs to applicants who care for individuals with disabilities.

In addition to these anti-discrimination statutes, many state and federal laws also provide protections for employees who must tend to personal and family-related matters. These include the Family and Medical Leave Act (FMLA), the Americans With Disabilities Act (ADA), the California Family Rights Act (CFRA) and the California Pregnancy Disability Leave law, which prohibit discrimination or retaliation against employees who take statutorily protected leave.

For instance, a male employee who is criticized in a performance review for “being too distracted” after taking periodic leaves of absence to care for an elderly parent, may be able to prevail on a FMLA/CFRA-based retaliation claim.

**Emerging Trends**

In its 2010 report, the Center for WorkLife Law identified certain consistencies in the recent caregiver discrimination cases. First, the Center used the term “new supervisor syndrome” to identify a common source of potential liability that arises when new supervisors are brought in to lead an organization. In such cases, the new leadership will often feel pressure to make changes to improve efficiencies and cut costs.

As a result, employees with family caregiving responsibilities, such as those who have been working flexible schedules, or who have recently taken family medical leave, may be viewed as less productive. Of course, employers would be wise to closely monitor the personnel decisions of new supervisors to ensure an absence of illegal bias.

The Center for WorkLife Law also identified an increase in claims filed by female employees who become mothers to more than one child. According to the report, this apparent “second child bias” is based on the assumption that the employee will no longer be able to balance her workload when she becomes burdened with the additional responsibilities of caring for multiple children.

Of course, this is illegal stereotyping. The focus instead must be on whether the individual can adequately perform the requirements of the position. In this respect, it is important to remember that “benevolent” employment decisions are not always lawful.

For example, deciding not to promote a qualified female employee to a job that requires travel merely because she has young children or a disabled spouse — even when well-intended to help the employee avoid hardship — can be evidence of discriminatory motive.

**Conclusion**

Evolving workplace demographics are an ongoing challenge for most employers. Because employee lifestyle issues can hinder work performance, it can be tempting to take such matters into consideration when making employment decisions. This can obviously lead to trouble, however.

To avoid potential liability, including claims for caregiver discrimination, employers must make consistent, performance-based and well-documented workplace decisions.

This will help insulate the employer from liability, particularly when an employer makes an adverse employment decision that coincides with an event such as an employee’s pregnancy or request for time off to care for a relative with a disability.

**What You Should Do**

- Train managers and supervisors to recognize common instances in which caregiver discrimination can arise, and behave in ways that avoid potential claims.
- Avoid the “perception” of illegal caregiver discrimination. For example, supervisors must be trained not to comment on the reliability or dedication of working parents (male or female).
- Avoid inquiries about marital status or caregiver obligations during interviews. If an applicant happens to volunteer caregiving information, the employer must disregard that information in making the hiring decision.
- Give work assignments without regard to caregiver obligations, barring a specific arrangement requested by the employee.
- Consider adopting a policy that explicitly forbids caregiver discrimination, which may include adding “familial status” or “familial responsibilities” as separate protected classifications in employer equal employment opportunity policies.
- Review other policies and practices (including those regarding hiring, promotion, employee attendance, leaves of absence and benefits) to ensure they do not negatively impact employees with family caregiving responsibilities.
- Treat all employee complaints of caregiver discrimination seriously, and ensure employees do not suffer retaliation for raising such issues.

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