FAMILY RESPONSIBILITY DISCRIMINATION:

Caregiver Discrimination

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EMPLOYMENT LAW – WHAT'S NEW?

I. FAMILY RESPONSIBILITY DISCRIMINATION "FRD"

- New theory based on old law.
- Increasing numbers of employees are bringing claims for discrimination and retaliation based on their responsibilities for caring for family members. This includes both children and elderly parents.
- "Key reason" for possible increase in claims relates to employer's flexibility with work place schedules. Therefore, if an employer departs from this practice, a claim may arise.
- In May 2007, the EEOC adopted enforcement guidelines on FRD. *See* EEOC website at **http://www.eeoc.gov**

II. UNLAWFUL DISPARATE TREATMENT OF CAREGIVERS

Federal EEO laws do not prohibit discrimination against caregivers per se, but the following circumstances might constitute unlawful disparate treatment.[1]

A. Sex-Based Disparate Treatment of Female Caregivers

1. Title VII or the ADA may allow a worker with caregiving responsibilities to claim unlawful disparate treatment.
    - Evidence must establish that adverse action taken against a caregiver was based on sex.
2. Relevant evidence on disparate treatment of female caregivers may include the following:
    - Application/interview questions which ask about marital status, childcare, children or other caregiving responsibilities;
    - Stereotypical or derogatory comments by decision makers or other officials regarding working mothers, pregnancy, or other female caregivers;

[1] Please note that an employer may also have specific obligations towards caregivers under other federal statutes, such as the Family and Medical Leave Act, or under state or local laws. For further information on FMLA and ADA, see http://www.dol.gov/esa/whd/fmla and http://www.eeoc.gov/policy/docs/fmlaada.html

- Less favorable treatment soon after pregnancy awareness;

- Less favorable treatment after they assume caregiving responsibilities in absence of any decline in work performance.

3. Comparison to Male Co-Workers

   - Employment decisions that discriminate against caregiving workers are prohibited by Title VII if the actions are based on sex or other protected activities. E.g., "sex plus".

   - Some courts and commentators have used the term "sex plus" to describe cases in which the employer discriminates against a sub class of women or men, i.e., sex plus another characteristic, such as caregiving or marriage. *Phillips v. Martin Marietta Corp*., 400 U.S. 542 (1971). (Employer had a policy of not hiring women with preschool age children.)

4. Unlawful Gender Role Stereotyping of Working Women

   - Title VII does not permit employers to treat female workers less favorably based on an assumption that a particular female worker will assume caretaking responsibilities or that it will interfere with her work performance. *Lust v. Sealy, Inc*., 383 F.3d 580, 583 (7th Cir. 2004).

B. Pregnancy Discrimination

1. Title VII prohibits sex discrimination and specifically prohibits employment decisions based on pregnancy, even where an employer does not discriminate against women generally.

2. Title VII prohibits an employer who bases an adverse employment decision on stereotypical assumptions about the effect of pregnancy on job performance and cannot treat a pregnant worker as temporarily unable to perform job duties less favorably than workers whose job performance is similarly restricted because of other medical conditions.[2]

NOTE: EEOC will generally regard a pregnancy related inquiry as evidence of pregnancy discrimination if the employer makes an unfavorable job decision affecting a pregnant worker. Pregnancy testing also implicates ADA.

[2] For further information, see "Questions and Answers on the Pregnancy Discrimination Act," 29 C.F.R. Part 1604, Appendix (1978)

Employers should be strongly discouraged from making pregnancy related inquiries or conducting pregnancy tests.

C. Male Caregiver Discrimination

Potential Title VII violations could occur where employers treat either sex more favorably with respect to other kinds of leave, such as childcare or elderly parents.

NOTE: Ensure that any leave specifically provided to women alone is limited to the period of incapacitation related to pregnancy and child birth.

D. Discrimination against Women of Color

Race or National Origin discrimination may be a further employment barrier faced by women of color who are also caregivers. *See*, EEOC Compliance Manual: Race Discrimination, Volume 2, Section 15-1V, C "Intersectional Discrimination" (2006), http://www.eeoc.gov/policy/docs/race-color.html#IVC

E. Unlawful Stereotyping for Caregiver - ADA

Americans With Disabilities Act, 42 U.S.C. § 12112(b)(4) prohibits discrimination because of the disability of an individual with whom the worker or employee has a relationship or association, i.e., child, spouse or parent.

- Employer may not treat a worker less favorably based on stereotypical assumptions about the worker's ability to perform job duties satisfactorily while also providing care to a relative with a disability.

- *See*, Questions and Answers About the Association Provision of the ADA at http://www.eeoc.gov/facts/association_ada.html

F. Hostile Work Environment

- Employer may be liable if offensive comments or other harassment because of race, sex, association with an individual with a disability or any other protected characteristic occurs to an employee with caregiving responsibilities. However, the conduct must be sufficiently severe or pervasive to create a hostile work environment.

- 29 U.S.C. § 1630.8 makes it unlawful for an employer to "deny equal jobs or benefits to, or otherwise discriminate against, a

worker based on his or her association with an individual with a disability.

Retaliation provisions under the EEO statutes protect individuals against any form of retaliation.

- The U.S. Supreme Court in *Burlington Northern and Santa Fe Ry Co. v. White*, 126 S.Ct. 2405 (2006) noted:

  "A schedule change in an employee's work schedule may make little difference to many workers, but may matter enormously to a young mother with school age children."

- The EEOC statutes would prohibit such a retaliatory schedule change or any other act which would deter a working mother or other caregiver from engaging in protected activity.

G. Applicable Statutes

1. Family Medical Leave Act, 29 U.S.C.A. §2611

- Applies to employers with 50 or more employees during each of the 20 or more calendar work weeks in current or preceding calendar year.

- Employers must provide up to 12 work weeks of leave during any 12-month period. *See*, 29 U.S.C. § 2612(a).

- Employer must maintain coverage under any "group health plan".

- Employer can require, or employee can elect, to substitute accrued paid vacation leave, personal leave or family leave for part of the leave.

- Employee is entitled to reinstatement to the position held before the leave or an equivalent position with benefits, pay and other terms and conditions of employment. *See*, 29 U.S.C. § 2614(a).

- Leave can be taken intermittently or on a reduced leave schedule when medically necessary.

2. Minnesota Parental Leave Act, Minn. Stat. §181.940, subd. 3

- Applies to a company with 21 or more employees on at least one site.

- Must provide up to 6 weeks unpaid leave, unless a longer period is agreed to by the employer.

- Not required to pay the cost of insurance or healthcare while the employee is on leave but must continue to make coverage available under any group insurance policy or plan.

- Minn. Stat. § 181.943 allows reduction by any period of paid parental or disability leave, but not accrued sick leave.

- Employee entitled to return to former position, or position with comparable duties, number of hours and pain in Minn. Stat. § 181.942, subd. 1.

3. Minnesota Sick or Injured Child Care Leave Act,

- Requires 21 or more employees on at least one site. Minn. Stat. §181.941, subd. 3.

- Leave is available on the same terms as sick leave for employee's own illness or injury. May use personal sick leave benefits for absences due to the illness of that employee's child for such "reasonable periods" as may be necessary. *See*, Minn. Stat. § 181.9413.

- Employer must provide leave for such "reasonable periods" as the employee's attendance may be necessary.

- Act does not address insurance coverage since the leave is the employee's personal sick leave benefits.

- Employer must permit the employee to use accrued sick leave to care for sick child.

- Entitled to return to former position, or position with comparable duties, number of hours and pay. *See*, Minn. Stat. § 181.942, subd. 2.

III. MENTAL ILLNESS AND CHEMICAL DEPENDENCY UNDER THE ADA

- **Reasonable Accommodation Requirements.**

1. Covered employers are those who have 15 or more employees, including part time, who work for 20 or more calendar weeks in the current or preceding calendar year. *See*, 29 C.F.R. § 1630.2(e).

2. Employer has a legal obligation to provide a reasonable accommodation only if the impairment rises to the level of a "disability" as defined by the ADA.

3. If employee articulates there is a physical or mental impairment, learning disability or medical problem which indicates a **potential** ADA disability basis for the requested accommodation.

   NOTE: The ADA disability will be determined by how severely the medical problem limits the employee's life functions, not by the medical diagnosis.

4. Employer must usually take the imitative to explore reasonable accommodations if necessary for possible or known mental disabilities (including chemical abuse).

   Employees are less likely to request an accommodation with mental impairments, either because employee is unaware of own mental health problem/learning disabilities, or is afraid to raise issues, or denies there is a problem. Some courts hold that the burden falls on the employer to initiate a discussion of the issue. *See*, 7th Circuit case of *Bultmeyer v. Fort Wayne Community Schools*, 100 F.3d 1281 (7th Cir. 1996).

5. Three criteria to determine if symptoms are severe enough to meet ADA disability requirement:
   - Has a physical or mental impairment that substantially limits one or more "major life activities"; or
   - Has a record (history of such an impairment); or
   - Is regarded (perceived as having such an impairment.

   29 C.F.R. § 1630.2(g)-(l)

6. Major life activities, include breathing, walking, seeing, hearing, speaking, learning, performing manual tasks, caring for oneself and working. 29 C.F.R § 1630.2(i).

7. Drug and alcohol misuse.

   - Current abuse of alcohol will always be an ADA disability if the symptoms are severe enough to meet the criteria outlined above. Misuse of alcohol without severe enough impact on the employee's major life activities is not an ADA disability.

   - Casual or recreational use is not protected by law. *See*, *McLeod v. City of Detroit*, 39 Fair Empl.Prac.Cas. 225 (E.D. Mich. 1985). Illegal use of drugs is not an ADA-disability and no reasonable accommodation is required. 29 C.F.R. § 1630.30(a)

   - **Rehabilitated** drug abusers and **certain drug abusers currently in treatment or rehab** may be ADA-disabled. These individuals may be entitled to ADA rights and protections if they now meet, or met, the legal disability requirement. *See*, EEOC Guidelines at http://www.eeoc.gov. *See*, Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under The Americans with Disabilities Act.

IV. EMPLOYER VICARIOUS LIABILITY

- **Co-Worker v. Supervisor:**

  The Eighth Circuit held that employer could not be vicariously liable for any sexual harassment of employee by male worker who was not her supervisor. *See Merritt v. Albemarle Corp.*, 496 F.3d 880 (2007).

  To prevail on vicarious liability and establish harasser is employee's supervisor, plaintiff must show:

  Male co-worker had authority to take tangible employment actions such as:

  - hiring
  - firing
  - promoting
  - reassign to significantly different duties
  - "team leader" with authority to assign employee to particular tasks will not be enough to make that person a supervisor

V. NEW LEGISLATION

A. Minn. Stat. § 181.9631, Notice of Employee Rights

An employer as defined under § 181.960, subd. 3, (private employer with 20 or more employees) shall provide written notice to a job applicant upon hire of the rights and remedies provided in §§ 181.960 to 181.965.

- Takes effect January 1, 2008

B. New Federal Minimum Wage

New poster required to reflect mandatory changes to the federal minimum wage. The law went into effect July 24, 2007 and all employers, regardless of size, are required to post the most recent minimum wage poster along with the 5 other required federal posters.

NOTE: Post all 6 mandatory posters from federal agencies, or post one convenient poster which includes all six in one. Call 1-800-226-2327 and/or your state labor office.