Legal Matters®

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EEOC provides new guidance on caregiver discrimination concerns

As every employer has seen, the COVID-19 pandemic has caused changes to employees' work locations, schedules and job status, affecting their work and personal obligations.

This has resulted in competing job and caregiving demands for millions of Americans who must care for children, spouses, parents and other loved ones.

The U.S. Equal Employment Opportunity Commission, the federal agency that investigates and addresses job discrimination in all its forms, is well aware of the temptation of employers to take negative employment actions against those workers whose caregiving responsibilities potentially create inconveniences for them.

That's why the EEOC has issued updated guidance for employers about the different contexts in which caregiver discrimination can arise. It's also why it's critical that every employer be aware of these various contexts.

Here's a helpful summary of some of the guidance the EEOC has provided.

First, it's important to note that being a caregiver does not automatically bar an employer from taking adverse action. But employers may not discriminate based on a worker's membership in a "protected class" like race, religion, sex, disability, age or pregnancy. Usually a caregiver discrimination case falls into one of these areas.

For example, it's prohibited under federal law to discriminate in the

workplace based on sex. Still, some employers engage in stereotyped thinking and pass over female job applicants or overlook female employees for promotion because they assume they're more likely to need to stay home if their kids get sick or have to attend school remotely. Similarly, an employer may deny caregiving leave to a male employee based the stereotyped assumption that his spouse can handle the situation, while granting leave to female workers under the same scenario. These would both be actionable discrimination cases.

Meanwhile, an employer could face claims of disability discrimination under a variety of scenarios. For example, denying unpaid leave to care for a

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Office birthday party disaster serves as warning to employers

Some people see an office birthday celebration as a morale boost amid a dreary workday. Others view the cake in the conference room as a borderline depressing ritual of forced cheer that they want no part of. But however you view the office birthday party, it's important to find out how the honoree feels about it before throwing one, and to respect their wishes if they're not interested.

Otherwise, it can result in disaster for your company, as a Kentucky employer recently found out.

In that case, Kevin Berling, a lab worker at a diagnostics company, asked his office manager not to throw a birthday celebration for him as it did for other employees. Apparently Berling suffered from anxiety and panic attacks and told the manager a birthday celebration would trigger traumatic childhood memories of his parents' divorce.

The office manager was not at work on Berling's birthday and did not tell the rest of the staff not to throw a party. Berling's co-workers decided to plan a surprise celebration at lunch. He caught wind of it, suffered a panic attack and spent the lunch period taking refuge in his car.

Unfortunately, that wasn't the end of it. Berling's managers subsequently called him into a meeting where they criticized his reaction and accused him of "stealing his co-workers' joy" and "being a little girl."

This apparently led to another panic attack, which Berling tried to de-escalate by clenching his fists. His managers became alarmed and claimed they feared a violent response. They told him to leave the property and fired him several days later.

Berling responded with a lawsuit alleging disability discrimination. He also alleged that he was retaliated against for asking for a reasonable accommodation for his disability. A jury ruled in his favor, awarding him a substantial sum for emotional distress and lost wages.

Although the case presents an unusual set of facts, employers who want to avoid a similar fate need to listen to their employees, watch for indications of potential disabilities and be alert for when an employee is requesting a reasonable accommodation, even if he or she doesn't use those exact terms. Employers also need to be aware that as more companies return to work in person, employees may be very cautious about interactions like office birthday celebrations.

'On-call scheduling' can help employers, but beware 'predictability' laws

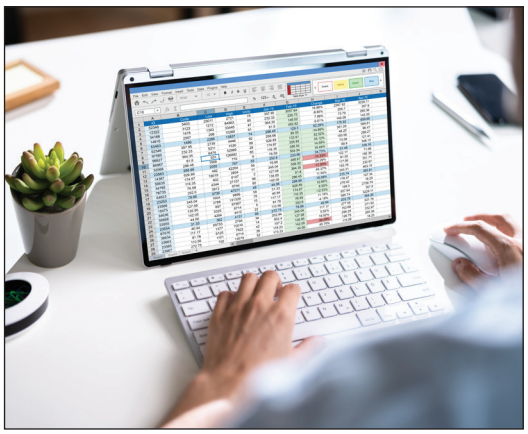
If you are an employer in the hospitality industry, you're well aware of how tough it is to schedule the right number of workers on a given day, particularly in light of ongoing labor shortages and record turnover rates.

To deal with this, many employers have enacted "on-call" scheduling policies to address unpredictable levels of customer traffic and last-minute staffing shortages caused when workers either call in sick or don't show up.

With on-call scheduling, the employer designates certain workers to be available to report to work on either short notice or no advance notice at all if needed. Such employees call at a certain time to see if they should report. They're also sent home first if things aren't as busy as expected.

As convenient as on-call scheduling may sound, however, many people say these policies cause disproportionate hardship for low-wage earners who often work more than one job and already have trouble planning for transportation and childcare needs.

With this in mind, a number of cities, including New York, Seattle and San Francisco, have passed "predictive scheduling" laws that require employers to post schedules a certain amount of time in advance and pay employees additional compensation or "predictability pay" for last-minute schedule changes. Meanwhile,



California has a law in place where any employee sent home after working less than half the scheduled workday must be paid two-to-four more hours' worth of wages depending on the situation. While the laws work differently in different locations, they generally apply to large businesses, like retail stores, bars and restaurant chains.

If your company operates in a place with predictive scheduling laws, talk to an employment attorney to make sure you're in compliance. An attorney may also be able to help identify other policies that will provide you with flexibility without any of the issues that go along with on-call scheduling.

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Beware potential 'cat's paw' liability when making layoffs

A Massachusetts court has ruled that a fired worker could sue for age discrimination over a round of layoffs allegedly tainted by age bias at upper levels of the company, even though the manager conducting the layoff relied on nondiscriminatory criteria in selecting workers to be cut.

54-year-old Mark Adams was in the last of three "reductions in force" at Schneider Electric USA's Boston office between April 2016 and January 2017.

The manager in charge of the RIF allegedly targeted workers who spent a majority of their time supporting different teams and whose loss would impact his team's goals the least. In selecting the cuts, the manager made a spreadsheet of pros, cons and salaries of different workers and identified Adams, who had been pulled from an initiative he liked to work on one he didn't like, as one of the workers to be laid off.

Adams ultimately brought an age discrimination claim in state court, pointing out that despite the manager's use of neutral criteria, 22 of the 24 workers fired in the three RIFs were over age 50 and one of the others was over 40.

Additionally, post-RIF email exchanges suggested that corporate higher-ups viewed the "aging" Boston workforce as a liability and that the layoffs were to make room for "younger talent."

The company argued that any ageist comments in the emails were "stray remarks" made by non-decisionmakers after the fact and that a number of older workers did survive the RIF. Accordingly, said the company, no jury could possibly find that the RIFs were motivated by anything other than cutting costs.

But the court found that Adams presented enough facts to proceed to a jury under a "cat's paw" theory of liability — a theory that executives motivated by discriminatory intent influenced a neutral decisionmaker like Adams' manager to take an adverse action against him.

While Adams still has to convince a jury to rule in his favor, just having to defend a case like this will cost the employer considerable time, expense and stress. It's a good lesson in why it's so important to consult with an employment lawyer to ensure your own layoff processes are free of any inference of discriminatory intent.

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relative with "long COVID" symptoms while approving unpaid leave for other conditions could qualify as disability discrimination. So could denying a promotion to a worker with a family member whose condition worsened during the pandemic if this was done under the assumption that the employee won't have as much time to devote to the job.

Meanwhile, employers who engage in certain behaviors could potentially face consequences under federal law. For instance, an employer who criticizes a male employee for leaving to care for a child or asks intrusive questions of an LGBTQ+ worker who requests leave to care for a same-sex spouse or partner could face claims of gender-based harassment.

There are many other situations where negative treatment of a caregiver could result in liability under discrimination law. That means it's critical for every employer to have up-to-date discrimination and harassment policies regarding caregiver issues and to make sure all managers are properly trained. Consulting with a local employment attorney to review your policies and practices would be very helpful in this regard.

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NLRB strikes down Tesla uniform policy

A recent 3-2 decision by the National Labor Relations Board highlights the limits of trying to suppress worker speech with overly broad "uniform" policies.

The case arose from union organizing activity at electric automaker Tesla's factory in Fremont, California, where, in the spring of 2017, production workers began wearing black cotton shirts with a small United Auto Workers logo on the front and a large one on the back. Management claimed this violated the company's uniform policy that required "team wear" that included black cotton shirts with the Tesla logo and black cotton pants with no buttons, rivets or exposed zippers.

Before workers started wearing the UAW logos, workers often wore shirts that weren't black or with logos unrelated to Tesla. But the company allegedly started enforcing the uniform policy more strictly when workers sported the union logos.

Ultimately supervisors threatened to send two workers home for wearing union clothing. The workers challenged this decision as an unfair labor practice.

The NLRB ruled in the workers' favor, citing long-standing legal precedent that it is "presumptively unlawful" for employers to restrict union clothing without special circumstances that justify the ban. In this case, the board ruled, Tesla made no showing of such special circumstances.

In light of this ruling, it's a good idea for employers to talk to a labor attorney to review any written dress code policies to ensure they're not violating employees' rights to display union insignias. This ruling — which reversed an earlier ruling involving Wal-Mart — is also a sign that the NLRB is taking a pro-labor stance in these types of disputes, which is all the more reason to consult with a local lawyer.