

BG Client Alert - Pandemic-Era Requests for Workplace Accommodations by Caregivers: Navigating Employer Liability Under New EEOC Guidance and Applicable Law

03.16.2022

On March 14, 2022, the Equal Employment Opportunity Commission (EEOC) issued new technical assistance guidance entitled “The COVID-19 Pandemic and Caregiver Discrimination Under Federal Employment Discrimination Laws.” In doing so, the EEOC recognized that “[t]he COVID-19 pandemic has significantly impacted employees’ work and personal obligations” and “required millions of Americans with caregiving responsibilities for children, spouses, partners, older relatives, individuals with disabilities, or other individuals to quickly adjust to vastly changed circumstances.”

As the EEOC noted in its new guidance, in addition to unlawful discrimination against caregivers based on the protected characteristics of the caregiver employees themselves, discrimination against caregiver employees is also unlawful if it is based on the “employee’s **association with** [emphasis added] an individual with a disability.” Examples of employer misconduct provided by the EEOC that may give rise to associational disability discrimination claims by caregivers under such circumstances include, but are not limited to: (1) declining “to hire an applicant because her wife has a disability that puts the applicant’s wife at higher risk of severe illness from COVID-19,” (2) “[q]uestioning, without merit, the professional dedication of employees caring for individuals with disabilities who are at higher risk of severe illness from COVID-19,” and (3) “mocking such employees on that basis for taking pandemic precautionary measures to avoid infection.”

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Although the new EEOC guidance provides that such caregivers generally don't have a right under the federal Americans with Disabilities Act (ADA) to receive reasonable accommodations such as telework, flexible schedules, or reduced travel or overtime not offered to other employees just because of their status as caregivers, the agency nonetheless recognizes that such employees—i.e., those “who live in households with persons who are immunocompromised”—“may be reluctant to return to the workplace,” and may have additional rights under state or local laws. As such, to avoid exposure to associational disability discrimination claims, employers should pay special attention to any requests for reasonable accommodation made by caregiver employees, should evaluate whether any applicable state or local laws would impose upon them an obligation to engage in an interactive process with such employees to determine whether such an accommodation can be made without undue hardship, and should carefully consider into how to best respond to any such requests.

Indeed, a review of the applicable law makes clear that employers must tread carefully when navigating these issues to avoid liability. For example, some recent (albeit pre-pandemic) court decisions interpreted the California Fair Employment and Housing Act (FEHA) to provide caregiver employees with the right to bring claims against employers for failure to accommodate or engage in an interactive process, even where the plaintiff employee does not suffer from a disability themselves.^[i] Moreover, even in jurisdictions where a caregiver employee does not have any such legal right under state or local law to receive workplace accommodations because of their association with a disabled person, an employer's response to such a request may nonetheless give rise to retaliation claims or associational disability claims based upon alleged disparate treatment theories if not handled properly.^[ii] Employees themselves at heightened risk of severe outcomes from COVID have been successful in asserting claims under their long-term disability policies as well.

Employers and individuals who have questions about requests for accommodations made by caregiver employees, associational disability discrimination claims, or who need advice as to how best to navigate the various legal issues that may arise in the workplace relating to COVID-19 should contact one of the experienced attorneys in Bailey Glasser's Labor & Employment Practice Group. Employees who are unable to work because of COVID and who have been denied coverage under their long-term disability policies should contact Bailey Glasser's ERISA Practice Group.

^[i] See *Castro v. Classy, Inc.*, No. 3:19-CV-02246-H-BGS, 2020 WL 996948, at *5 (S.D. Cal. Mar. 2, 2020) (denying employer's motion to dismiss the employee's failure to accommodate and failure to engage in interactive process claims under FEHA premised upon the employees request for a reasonable accommodation to work from home and take care of her disabled child).

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[ii] See e.g., *Kelleher v. Fred A. Cook, Inc.*, 939 F.3d 465, 469 (2d Cir. 2019) (“Though the ADA does not require an employer to provide a reasonable accommodation to the nondisabled associate of a disabled person, an employer’s reaction to such a request for accommodation can support an inference that a subsequent adverse employment action was motivated by associational discrimination”); *Castro v. Classy, Inc.*, No. 3:19-CV-02246-H-BGS, 2020 WL 996948, at *6 (S.D. Cal. Mar. 2, 2020), citing *Pardi v. Kaiser Found. Hosp.*, 389 F.3d 840, 849–50 (9th Cir. 2004) (“Plaintiff’s request for a reasonable accommodation to work from home and take care of her disabled child is considered protected activity”).

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