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Briefly

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OVERVIEW OF THE EEOC'S 2022 CAREGIVING RESPONSIBILITIES GUIDANCE

Over the past several decades, employee caregiving requirements have created operational readiness, employee morale, and employment law liability exposure concerns in workplaces throughout the U.S. In May 2007, the EEOC issued guidance regarding unlawful disparate treatment of workers with caregiving responsibilities. That guidance identified various categories of employees potentially subject to discrimination based upon their need to care for family members. Those categories included female caregivers (as opposed to similarly situated male caregivers), gender role stereotyping of working women, pregnancy discrimination, discrimination against male caregivers, discrimination against women of color, and unlawful caregiver stereotyping under the Americans with Disabilities Act (ADA). The guidance also identified and discussed hostile work environment and retaliation liability exposure issues.

Based on the COVID-related events and disruption that have unfolded since March 2020, the EEOC issued a follow-up technical assistance document on March 14, 2022, entitled *The COVID-19 Pandemic and Caregiver Discrimination*. This document contains eighteen question and answer sections which identify issues of potential concern. This article will cover the highlights of this publication.

As a threshold matter, while the COVID pandemic will hopefully end in the not-too-distant future, it certainly will not be the last time we encounter a pandemic or related type of event which poses a similar set of employee and workplace challenges as those faced during the last two years. Accordingly, it is a good time to evaluate what we have done well as employers with respect to the employee caregiver scenario, as well as what we could have done better - especially considering the current labor shortage, which is a challenge for virtually all employers.

Employers who make negative decisions regarding employees (or applicants) with caregiving responsibilities based on their protected status (race, sex, age, religion, etc.) are likely to encounter liability exposure. Likewise, employers who make negative decisions regarding an employee (or applicant) based on their association with an individual with a disability, as contemplated under the ADA, or other protected status of the individual for whom care is provided, are likely to encounter liability exposure.

The technical assistance provides specific examples regarding unlawful discrimination against female, male, and "LGBTQI+" applicants and employees. A primary takeaway is that decisions about who is hired, what positions they are hired into, what pay and promotional opportunities are (or are not) offered or available, what work schedules are available, what workplace flexibility options are available, and specifically, how an employer works (or fails to work) with an employee who has

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NEW LAW THAT WOULD PROHIBIT FORCED ARBITRATION OF CERTAIN CLAIMS

Mary C. Moffatt

"[A]ny existing mandatory arbitration clauses or contracts (or policies) are now voidable, even if the individual signed the mandatory arbitration agreement before [the Act] officially became law."

On March 3, 2022, President Biden signed into law the "End to Forced Arbitration of Sexual Assault and Sexual Harassment Act" ("EFASASHA"). The law is effective immediately and is actually retroactive so that even if an arbitration agreement was signed or incorporated in an employee policy prior to March 3, 2022, the law still prohibits the forced arbitration of a sexual assault or sexual harassment claim.

Arbitration is an alternative to litigation as a means of resolving disputes. In recent years, mandatory arbitration agreements in the workplace have been heavily criticized particularly with respect to sexual harassment and similar claims, arguing that such agreements enable employers to settle such claims without the public scrutiny (and potential backlash) of litigation.

However, many employers maintain mandatory arbitration provisions for their employees, contractors, and vendors, because it is often viewed as beneficial to both parties, more efficient, and generally faster and less expensive than a matter litigated in court.

In addition, the process has traditionally been considered just as fair as a matter in court because it is presented to a neutral arbitration hearing officer or panel of officers. The arbitrators are chosen by the parties, review and analyze the materials filed by both parties, and the case is then presented to the arbitrator or arbitration panel for a decision, which is referred to as the "award." The arbitration process is generally confidential, which means the materials submitted to the arbitrator or arbitration panel, the final decision or 'award,' the allegations of the complaining party, and the defenses to those claims, are not publicly available. The employer will usually raise the arbitration agreement as a defense to a legal action brought by the employee in court, seeking a stay or dismissal of the action and asking the court to compel arbitration.

The EFASASHA provides that, at the election of the employee, in cases of sexual harassment or sexual assault disputes (or the election of the named representative of a class or in a collective action alleging such conduct), no pre-dispute arbitration agreement or pre-dispute joint-action waiver shall be valid or enforceable with respect to a case which is filed under Federal, Tribal, or State law and related to the sexual assault dispute or the sexual harassment dispute. Thus, any existing mandatory arbitration clauses or contracts (or policies) are now voidable, even if the individual signed the mandatory arbitration agreement before EFASASHA officially became law.

The EFASASHA also applies beyond employees – it includes clients, customers, patients, and consumers.

What about claims other than sexual assault or sexual harassment? For now, claims that are subject to mandatory arbitration provisions other than sexual assault and/or sexual harassment are still subject to compulsory arbitration where a policy or contract requires it and of course, subject to other applicable laws. Several bills have been presented in Congress in recent years that prohibit mandatory arbitration policies in a broader context. For example, the Forced Arbitration Injustice Repeal Act (FAIR) and the Arbitration Fairness Act are two examples of legislation that would prohibit a pre-dispute arbitration agreement from being valid or enforceable if it requires arbitration of an employment dispute, consumer dispute, antitrust dispute, or civil rights dispute, which would essentially ban employers from requiring employees to resolve any legal disputes by way of private arbitration. In addition, several states, including California, Maryland, New Jersey, New York, Vermont, and Washington, already have laws that ban mandatory arbitration clauses in employment contracts in certain cases.

While the new law does not require employers to remove or amend existing arbitration provisions in employee handbook policies, or other similar documents, employers should be aware that an individual alleging sexual assault or sexual harassment may choose between utilizing the arbitration process or taking the usual steps along the path to litigation.

Of course, the best way to prevent sexual harassment and/or assault claims from becoming protracted litigated cases is to prevent them from occurring in the first place. Employers should have a strong, effective policy prohibiting harassment in the workplace that is consistently enforced. The policy should provide several avenues for reporting alleged harassment. Finally, an essential element to an effective harassment policy is to conduct employee training on a regular basis for all employees, managers, and supervisors.

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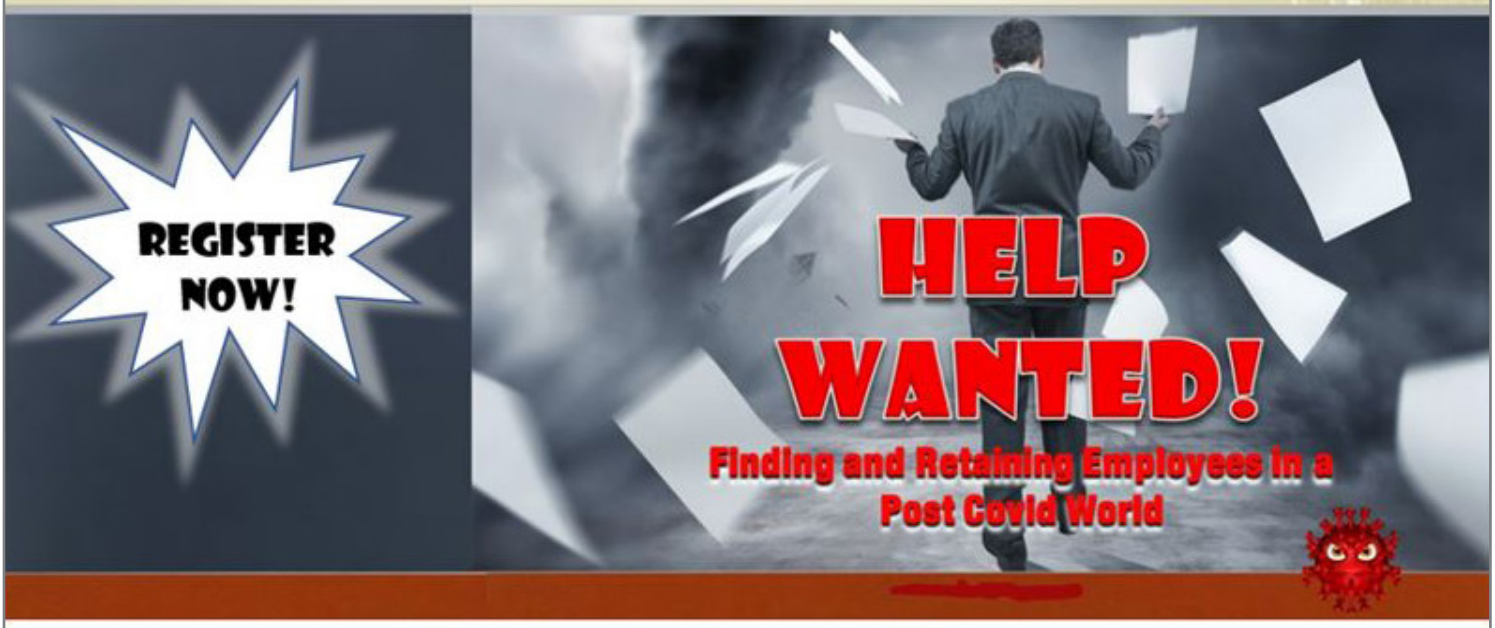

Wimberly Lawson
Labor & Employment Law Update Webinar

Thursday, April 28, 2022 | 9:00 am/C & 10:00 am/E

PLEASE JOIN US **for a *LIVE 3-HOUR WEBINAR.*** As you know, the entire world is adjusting to new and different challenges. We are continuing to feel the ramifications of the pandemic, especially the headaches in dealing with a shrinking labor force. The focus of this seminar is to assist employers and HR managers in finding and retaining good employees.

- **The Great Resignation - What is Happening with Our Employees**
- **Increasing the Work Pool with Remote Employees**
- **New Covid Regulations and a Shrinking Labor Pool**
- **The Impact of the Pandemic on the Current Workforce and the ADA**
- **Expectations of Younger Employees**
- **The Digital Connection to a New Workforce**

REGISTRATION FEE: $49.00 per person
DEADLINE TO REGISTER: Friday, April 22, 2022 / 5:00 pm Eastern
HRCI/SHRM: Approval has been requested for 2.50 HRCI and SHRM credit hours

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caregiving responsibilities requires both consistency of process, an appropriate degree of consistency of outcome (which includes a valid quality control check mechanism), and accurate documentation. [Note: The EEOC does not have enforcement authority over the The Family and Medical Leave Act (FMLA), which is implicated in many caregiving responsibility scenarios. Therefore, an appropriate FMLA analysis, should be incorporated into any caregiving decision-making process.]

One of the most common liability exposure pitfalls in this process relates to employer assumptions about what an employee can or cannot or should or should not do as an employee, based on their demographics. As with the ADA reasonable accommodation analysis process, when making decisions related to employees with caregiving responsibilities, assumptions are the root of all evil and should be avoided at all costs. Decisions should instead be based on accurate facts developed during an appropriate analytical process, which includes input from the employee.

Employees with caregiving responsibilities are not entitled to reasonable accommodation, such as remote work, flexible schedules, or reduced travel or overtime work simply based solely on their caregiving status. However, employees who are unable to perform their job duties because of pregnancy, childbirth, or related medical conditions must be treated the same as other people who are temporarily unable to perform job duties.

The technical assistance addresses multiple pregnancy-related discrimination scenarios that have apparently arisen during the COVID pandemic. As noted above, decisions based on assumptions about pregnancy are likely to lead to bad results. Further, while pregnancy in and of itself is not an ADA-protected disability, pregnant employees may have a right under Title VII to modified duties, alternative assignments, or leave, and/or a right to reasonable accommodation under the ADA - depending on the circumstances.

One topic that merits specific attention is discrimination based on an employee's association with an individual with a disability. Title I of the ADA generally deals with the rights of an employee with a "disability." However, the caregiving scenario many times contemplates a family member with an otherwise ADA-protected disability (not the employee's disability) and for whom the employee provides care. An employee with such caregiving responsibilities is not entitled to ADA reasonable accommodation. However, an employer cannot treat such an employee in a less favorable manner then it treats other similarly situated employees who do not have such caregiving responsibilities in any applicable decision-making processes simply based on the employee's caregiving responsibilities.

How this caregiving scenario unfolds over the next few years, especially as it pertains to employees with caregiving responsibilities for family members struggling with the consequences of "long-haul COVID," is to be determined. Furthermore, many such caregiving employees will themselves develop anxiety, depression, and related mental health issues based on the strain of their caregiving responsibilities. If diagnosed with such mental health conditions, the employee would then have an ADA-protected disability which may require reasonable accommodation. The point being, that this scenario can quickly become very complicated both from an operational readiness and legal liability exposure perspective.

A few final points. First, just because an employee has caregiving responsibilities, they do not have a "get out of jail free card" with respect to their employer's stated attendance, performance, and behavioral expectations – provided those expectations are applied in a consistent manner.

Second, harassment directed at employees with caregiving responsibilities is problematic both from a talent retention and legal liability exposure standpoint. Given the frequency with which harassment scenarios crop up workplace, such behavior simply should not be tolerated under any circumstances.

Finally, retaliation against employees with caregiving responsibilities is a legal liability trap. Over the past ten years or so, retaliation claims have been the number-one most filed charge with the EEOC. And retaliation claims tend to be the most difficult to defend, and create the most liability exposure. Accordingly, employers should closely monitor how employees with caregiving responsibilities are functioning and treated in the workplace, to quickly identify and resolve any potential retaliation concerns.

COVID has changed our society in many ways. The issue of employee caregiving responsibilities and how employers handle the same is just one of many such changes that we will have to learn to navigate as we move forward. Common sense and good HR practices will generally enable an employer to successfully navigate caregiving responsibility scenarios.