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## The GSH 60-Second Memo

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### The Brother's Keeper: Federal Protection of Employees with Caregiver Responsibilities

By Alejandro Valle, Esq.

Federal law currently provides explicit anti-discrimination protection on the basis of a variety of specific classifications, for example: race, gender and national origin (Title VII); age, if over 40 years old (ADEA); disability (ADA); active military service (USERRA); and, starting on November 21, 2009, even on the basis of genetic information (GINA, or Genetic Information Non-Discrimination Act). There is currently no explicit protection of so-called "caregivers" under any federal anti-discrimination statute.<sup>[1]</sup> However, in 2007, the Equal Employment Opportunity Commission, or EEOC - the federal agency charged with enforcement of many federal anti-discrimination laws - issued guidelines that explained how caregiver protections can be gleaned from laws already in existence.

Earlier this year, in April 2009, the EEOC built upon its earlier set of guidelines by issuing "best practices" aimed at offering practical tips for how employers can be proactive with regard to caregiver protections at the workplace.<sup>[2]</sup> These best practices provide great insight into how the EEOC will assess traditional EEO claims that have caregiver implications. While the guidance provided in these best practices do not have the force and effect of

direct statutory authority, employers should bear in mind that courts often turn to the EEOC for guidance regarding interpretation of federal anti-discrimination laws. Familiarity with these suggested best practices is therefore advisable for all employers.

Before discussing the EEOC's suggested best practices further, it is important to define what is meant by the term "caregiver." This is not a specifically defined term, but is instead a broad concept that applies to anyone with responsibility for providing care to another family member. Typical examples are: mothers and fathers who care for their children; children who care for elderly parents or other relatives; and those who care for a disabled relative (bear in mind, also, that the ADA provides explicit prohibition against discrimination based upon an employee's association with a disabled person). This is not an exhaustive list. There can be many more examples of so-called caregivers for EEOC purposes.

The best practices issued by the EEOC are generally aimed at ensuring that caregivers, especially those within particular protected groups (such as females or minorities) are not treated differently compared to other employees without caregiver responsibilities, or compared to other employees in other groups that also have caregiver responsibilities. For example, caregiver discrimination might exist when a female candidate who has young children is denied a promotion that is given to a candidate without young children, or to a male candidate even though he has young children, as well. The guiding principle behind these protections is that employers should not make assumptions about employees with caregiver responsibilities based upon stereotypes, such as that a woman with young children would be averse to a job that requires traveling or long hours, or that a man does not need as much time off work as a woman to care for children. Employment decisions should be based upon demonstrated performance and not upon stereotypes and assumptions, according to the EEOC.

The best practices do clearly state early in the document that they are "proactive measures that go beyond federal non-discrimination requirements." Indeed, a striking example from the best practices, which might surprise most employers, is the suggestion that employers go so far as to advertise open positions in parenting magazines and other publications and web sites that are actually directed at caregivers. This is an extreme example and certainly more than the law actually requires. However, this and other examples are indicative of how broadly the EEOC views federal protections and how high a standard EEOC investigators and directors are likely to apply to employers when assessing EEOC charges with caregiver implications. The more proactive the employer, the more likely a favorable assessment might result from the EEOC.

Practically speaking, what do the EEOC's recommended best practices mean for employers? Employers should look at their internal policies and consider implementing policies and training that, for example:

- Provide examples (from amongst those found in the EEOC's

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best practices document) of situations that might constitute caregiver discrimination;

- Prohibit the use of stereotypical and derogatory comments about pregnant employees or employees with caregiver responsibilities;
- Prohibit inquiry into the caregiver responsibilities of job applicants or promotion candidates;
- Provide flexible work arrangements and job-sharing arrangements without penalizing (in terms of compensation or future job prospects) those who pursue such arrangements;
- Prohibit employment decisions based upon assumptions and stereotypes as opposed to qualifications, actual business needs, historical performance and proven track record;
- Ensure that job opportunities are communicated to all employees regardless of caregiver responsibilities;
- Prohibit retaliation against those who report or provide information in connection with a report of suspected caregiver harassment or discrimination; and
- Identify contacts to which employees can report suspected caregiver discrimination issues, or request caregiver-based work arrangements such as flexible hours or job sharing.

Even with the guidance of the EEOC's best practices, it is not always clear how an employer should proceed in the context of caregiver employees. For example, there is some contradiction in telling employers they should not make assumptions about what caregiver employees want or need but then prohibiting employers to ask employees or prospective employees specific questions about their caregiver responsibilities. The employer has to walk the fine line between respecting and being flexible around their employees' caregiver responsibilities, on the one hand, and being overly inquisitive about them, on the other. As usual, employment counsel should be consulted when particular situations present difficulties.

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[1] Certain caregivers do have the right under the FMLA, or Family and Medical Leave Act, to 12 weeks of unpaid leave, and to protection against retaliation for taking such leave. However, anti-discrimination protections for caregivers, as discussed in this article, are broader than just the right to unpaid leave to care for a seriously ill spouse, child or parent.

[2] See [www.eeoc.gov/policy/docs/caregiver-best-practices.html](http://www.eeoc.gov/policy/docs/caregiver-best-practices.html)

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