EEOC Issues Guidance on Treatment of Workers with Caregiving Responsibilities California Proposes

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On May 23, 2007, the Equal Employment Opportunity Commission ("EEOC") issued an Enforcement Guidance on Unlawful Disparate Treatment of Workers with Caregiving Responsibilities ("Guidance"). The purpose of the Guidance was to assist employers, employees and investigators in assessing whether a particular employment decision affecting a caregiver might unlawfully discriminate on the basis of prohibited characteristics under federal law. The EEOC has stated that the publication was made necessary as a result of women's increasing participation in the workforce, which has created the potential for greater discrimination against working parents and others with caregiving responsibilities. Although federal statutes do not specif ically prohibit discrimination based solely on parental or other caregiver status, existing federal law, such as Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act 1990 and the Family Medical Leave Act do provide a basis for claims.

The EEOC guidelines encourage employers to adopt practices to make it easier for all workers, whether male or female, to balance work and personal responsibilities. The guidelines also make clear that unlawful disparate treatment occurs whenever a caregiver is subjected to discrimination based on sex and/or race or based on an employee's association with an individual with a disability. The Guidance illustrates various circumstances under which discrimination against a caregiver might violate federal law, such as treating male caregivers more favorably than female caregivers, sex-based stereotyping of women, making assumptions about pregnant workers, discrimination against working fathers, discrimination against women of color and a hostile work environment affecting caregivers.

Seeking to address the same issues more directly, on May 31, 2007, the California Senate voted to bar employers from denying promotions or raises to workers who have responsibilities for caring for children, spouses or parents. The vote was on Senate Bill 836, which would amend the Fair

Employment and Housing Act to include "Familial Status" as an additional basis upon which the right to seek, obtain and hold employment cannot be denied. "Familial Status" is defined to include "being an individual who is or who will be caring for or supporting a family member." The Bill passed and will now proceed to the State Assembly. Similar legislation has passed in Alaska and is being considered in New York and Pennsylvania.

While it is likely that SB 836 will pass the Assembly, the impact this legislation will have remains to be seen. Opponents of SB 836 believe that it will impose new mandates on employers to provide modified schedules to accommodate such activities as baby-sitting or driving children to soccer practice, and will make it difficult for employers to hold employees accountable for poor performance caused by missing too much work in order to attend to these daycare issues. Regardless, it is certain that the proposed legislation combined with the EEOC's Enforcement Guidance will promote a greater sensitivity among plaintiff 's lawyers to the possibility of filing caregiver-based claims. Employers are therefore well advised to reevaluate their decision-making in light of the Guidance and SB 836.

New York Court Holds Employees Waive Attorney-Client Privileges in E-mail Transmitted from Company Computer

In *Long vs. Marubeni America Corporation*, a United States District Court in New York held that communications sent by e-mail by two employees to their attorney from the company's computers were not protected from examination by the company. These communications were not transmitted over the company's e-mail system but rather were transmitted from private password-protected e-mail accounts using company computers. Because the company's computer system maintained residual images of the e-mail in temporary Internet files, the e-mails were accessible to certain company employees. Further, the employees' use of company computers was subject to an electronic communications policy that advised employees that all e-mails sent, received or stored in the company's computer system were the property of the company. The company specifically prohibited use of the computer system for personal purposes and warned that employees should have no expectation of privacy within the system or any e-mail sent or received through the system. The e-mail was discovered in the course of litigation by the company and copies were delivered to the plaintiffs.

In holding that the employee plaintiffs had waived the attorney-client and work-product privileges that would have otherwise applied to these communications to their counsel, the court noted that the plaintiffs could not establish the level of confidentiality required to bring the communications within the privileges. By electing to use the company computers, the employees subjected their communications to potential scrutiny by the company. The fact that the communications were sent from password-protected e-mail accounts and not on the company's e-mail system was irrelevant; the computer policies established by the company which stated that employees would not enjoy any privacy rights when using the company's computers and systems were clear and unambiguous. The plaintiffs' voluntary disregard of this warning stripped the e-mail messages from any confidentiality clause that might have otherwise applied.

The case is interesting as the attorney-client and work-product privileges are among the most important privileges in law. More importantly, the waiver of these privileges in connection with pre-litigation e-mail could allow the defendant company to use the documents defensively in litigation. As these documents were not

intended to be seen by others or used in this manner, the admission of these e-mails into evidence at trial will undoubtedly have a significant impact in favor of the company. While there is not yet a California case that specifically addresses this issue, the case does serve to further underscore the need for California employers to have a strong and well-worded electronic communications policy.n