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It’s About More Than You

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Even as things come back to “normal” (or the “new normal”), the lingering effects of the COVID-19 pandemic will long be felt. One of those effects is the number of charges of discrimination and corresponding litigation being filed by employees who had to care for family members during the pandemic. Consider this scenario:

- Employee works for a large company that has too many employees to be covered by the Families First Coronavirus Cares Act. Employee was deemed an essential worker throughout the pandemic, and the employee’s job duties could not effectively be performed remotely.
- As a result, opportunities for the employee to work remotely were limited or nonexistent. Employee has a young child who suffers from asthma and was exposed to COVID-19 at day care.
- The child was required to quarantine, prohibited from attending day care for 10 days, and suffered significant breathing issues after the quarantine ended. Employee, the sole caregiver, was required to stay home.
- After the child recovered, employee claims to have lost job opportunities, was penalized for taking too many days off, was required to exhaust accrued vacation, and eventually to take unpaid leave.
- Employee claims discrimination because of his “association with a person with a disability. ”He files an EEOC charge to that effect, and claims violations of state and federal law.

The COVID-19 scenario above – one of what will assuredly be an infinite variety – is a good reminder of a provision of the Americans with Disabilities Act (ADA) that prohibits discrimination on the basis of association. Specifically, the ADA says that disability discrimination may consist of “excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association.” 42 U.S.C. § 12112(b)(4).

This provision is not frequently invoked, but a recent case serves as a good compliance reminder.

On June 25, 2021, the U.S. Court of Appeals for the Eleventh Circuit (covering Alabama, Florida, and Georgia) declined applying the “association” theory to a Florida state law prohibiting disability discrimination on the basis of association *(Carolina Rose Matamoros v. Broward Sheriff’s Office,* No. 19-13448), but expressly cited the “association” provision of the ADA as a viable basis for employees to allege discrimination. The case is a good reminder that employers must think about more than the individual employee. Federal law also extends to those with whom the employee is associated.

So what is an employer to do?

1. If actions are to be taken against an employee for excessive absence or tardiness, do you know why the employee is absent or tardy? Is the reason that the employee is caring for another? If so, ensure you are applying the absence policy equally to all employees. For example, the following reasons for absences should typically be treated the same – i) employee is sick with the flu for two weeks; ii) employee is caring for a child sick with the flu; iii) employee is absent the equivalent of two weeks in a six-month period to care for a child that suffers from asthma.

2. In making the inquiry above, recognize that the ADA does not specify how closely the employee must be related to or associated with the individual. Indeed, the EEOC takes the position that a family relationship is not even required. The key is indiscriminate enforcement of your policies.

3. Even though the ADA does not require an employer to provide a reasonable accommodation to an employee because of their relationship or association with an individual with a disability, think practically about what can be done to assist an employee who is trying to care for another. A claim for discrimination based on association may well be avoided by working with the employee to allow them flexibility to care for another. Be creative and think broadly about what can be done so the employee can continue to effectively work while still meeting the obligation of caring for a person with a disability.

The scenario and case above is just another example of the need for employers to be aware that employees face challenges at work when trying to meet the needs of an individual with a disability with whom they may be associated or with whom they have a relationship. And employers cannot simply dismiss these considerations because the ADA’s legal protections extend beyond employees that suffer from disabilities.

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