New York City Makes "Caregivers" the Newest Class of Protected Employees

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Effective May 4, 2016, New York City employers with four or more employees are prohibited from firing or refusing to hire an individual, and from discriminating against an individual in compensation or terms and conditions of employment because of the individual's actual or perceived "caregiver status." This amendment to the New York City Human Rights Law defines "caregiver" as a "person who provides direct and ongoing care for a minor child or a care recipient."

A "minor child" is defined as a child, whether a biological, adopted or foster child, a legal ward, or a child of a caregiver standing in loco parentis, who is under the age of 18. A "care recipient" is defined as a person with a disability who: (i) is a covered relative, or person who resides in the caregiver's household; and (ii) relies on the caregiver for medical care or to meet the needs of daily living." A "covered relative" is defined to include a caregiver's child, spouse, domestic partner, parent, sibling, grandchild or grandparent, or the child or parent of the caregiver's spouse or domestic partner, or any other individual in a familial relationship with the caregiver as defined by the rules of the Commission on Human Rights.

The law, however, does not define the term "direct and ongoing care," leaving its meaning susceptible to undoubtedly conflicting interpretations amongst employers and employees. This also makes it particularly difficult for employers to know what employees may be entitled to protections under this new law, and the answer depends on information employers traditionally consider the employee's personal business.

The question of exactly what employees are covered by this new law aside, the even bigger question for employers is just what protections does this law afford caregivers? At a minimum, the law prohibits employers from taking adverse employment actions, retaliating against, or treating these employees disparately because they have caregiver responsibilities. But does this law imposes any affirmative obligations on employers to make special accommodations for employees with caregiver responsibilities? For example, while it is clear that employers cannot deny a caregiver's request for time off if such requests are regularly granted to similarly situated employees without caregiver responsibilities, it is not clear whether employers now have an obligation to grant a caregiver's request for time off that relates to his/her caregiving responsibilities that would otherwise be denied for an employee without caregiving responsibilities. What about where a caregiver's essential job responsibilities include working unpredictable hours, or late nights, if necessary? Does an employer now have to alleviate the employee from these responsibilities if they conflict with the employee's caregiving responsibilities?

The New York City Commission on Human Rights (the "Commission") has publicly stated that the

purpose of the amendment is to eliminate caregivers' fears of losing their jobs, or not receiving the same opportunities at work because of their family obligations. This seems to suggest that there is at least some expectation, at least by the Commission, that employers must now allow for some degree of flexibility when applying its policies to employees with caregiving responsibilities.

Consider the situation where two employees are competing for a promotion. One employee has caregiver responsibilities, so he/she cannot work late nights or weekends, while another employee without caregiver responsibilities puts in late night and weekend hours, which results in more output and a higher quality of work than his/her competitor. If the employer promotes the non-caregiver based on merit, which is at least partially credited to the late night and weekend hours, does this deprive the caregiver of an opportunity because of his/her caregiving responsibilities?

While this new law raises many unanswered questions for employers, at a minimum, employers should give serious consideration to whether any of their policies, particularly their attendance and leave policies, have a disparate impact on employees with caregiving responsibilities. Employers should also provide training to supervisors and managers so that they understand they cannot treat employees with caregiving responsibilities less favorably when it comes to performance management, time off requests, or other terms and conditions of employment.