

## Protecting Family Caregivers from Employment Discrimination

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**Family caregiving is growing more commonplace as baby boomers age and combine work in the paid labor force with unpaid work as caregivers with eldercare responsibilities. This trend underscores the need to develop public and private solutions to ensure that workers with eldercare responsibilities receive equal employment opportunity and are protected from discrimination in the workplace.**

Family caregiving concerns will have an increasing impact on both employees and workplaces because of the aging of the population and the labor force.

This Fact Sheet summarizes an Insight on the Issues, Protecting Family Caregivers from Employment Discrimination. The report highlights issues affecting working caregivers of older adults. It defines family responsibilities discrimination (FRD), explains why FRD is a policy matter, and describes the types of workplace discrimination encountered by working caregivers.

FRD arises from the unfair treatment of workers with caregiving responsibilities, including workers caring for children, older adults, ill spouses, or other family members with disabilities. While FRD can be applied to workers caring for family members of all ages, this report focuses on workers with eldercare responsibilities.

The report also highlights the limited protections available to working caregivers of older adults under existing

federal laws, discusses more expansive protections by laws in some states, and identifies local laws that protect a limited number of workers caring for older adults. Finally, it addresses FRD in eldercare as an emerging policy issue, and recommends ways to develop policy and practice solutions to protect working caregivers of older adults from employment discrimination.

### What Is Family Responsibilities Discrimination?

FRD is discrimination against workers with family caregiving responsibilities.<sup>1</sup> FRD occurs from treating employees with caregiving responsibilities less favorably than other employees due to unexamined assumptions that their family obligations may mean that they are not committed to their jobs. It occurs in all states and across a broad spectrum of occupations.

The following examples of FRD are based on real cases:

- An employee is fired when he asks for leave to care for his chronically ill father.

- An employee is denied leave when her employer asserts that it is not her responsibility to care for her ailing mother as long as her father is alive.
- An employee is called lazy and then fired after taking leave to care for his mother, who is near death.

### Why Is Family Responsibilities Discrimination a Policy Matter?

With very few exceptions, most federal and state statutes do not expressly prohibit FRD. No laws protect working caregivers of older adults or people with family responsibilities as a specific group or class from discrimination. Rather, FRD-related claims in the workplace have been framed from other legal theories in federal and state law—for example, as sex discrimination, discrimination based on association with a person with a disability, or a violation of state or federal family and medical leave laws.

While the majority of American workers have to balance work with family responsibilities, today's workplaces are still designed around the breadwinner-homemaker workforce of the 1950s. This outdated model assumes that workers have someone at home to take care of family caregiving and domestic responsibilities. Changing workplace demographics have led to more working parents and more workers with eldercare responsibilities.

For many workers experiencing FRD, leaving the workplace is not a viable option, and for some, may affect their financial security and ability to prepare for retirement. In this context, it is imperative that employers not impose job penalties and job loss because a worker has eldercare responsibilities.

### Limited Protections under Federal Employment Laws

Federal equal opportunity policies explicitly prohibit employers from discriminating against employees on the basis of sex, race, religion, disability, national origin, and age. Federal law does not explicitly prohibit discrimination on the basis of caregiver status.<sup>2</sup> Rather, FRD claims are actionable only when discrimination against family caregivers qualifies as discrimination under other federal statutes.<sup>3</sup>

There is limited federal protection for family caregivers who experience FRD. What protections do exist for family caregivers under federal law come from the Family and Medical Leave Act (FMLA), the Americans with Disabilities Act (ADA), the Rehabilitation Act, and the Employee Retirement Income Security Act of 1974 (ERISA). Caregivers who can show that they were treated worse on the basis of their sex or their age are also protected by Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act of 1967 (ADEA).

### Federal Policy Considerations

Given the limited protections in current federal law for FRD, the Equal Employment Opportunity Commission (EEOC) should ensure enforcement of its 2007 guidance on caregiver discrimination (which explicitly encompasses eldercare).<sup>4</sup> The EEOC and the Department of Labor could also conduct a campaign to raise awareness about caregiver discrimination in the workplace.<sup>5</sup>

Other federal policy considerations should include the following:

- Improving the FMLA, such as by expanding its scope to cover all primary caregivers, regardless of family relationship, and to cover

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- workers in smaller businesses
- Providing paid leave to permit working caregivers to care for an ill child, spouse, or parent or to accompany family members to routine medical appointments
- Requiring employers to provide workers with a reasonable number of paid sick days to care for themselves or a loved one

### Limited Protections under State Employment Laws

Protections from FRD have emerged from innovative use of existing statutes by employment lawyers. The result is a complex patchwork of protections under 17 different legal theories using state and federal law.<sup>6</sup>

Four states (Alaska, Connecticut, New Jersey, and Oregon) and the District of Columbia have enacted laws providing explicit protections to family caregivers that go beyond federal law protections. Though Connecticut's law applies in limited circumstances,<sup>7</sup> only that state and the District of Columbia provide protection for all workers with "family responsibilities," which can be construed to include workers caring for aging family members. The other three states provide limited protection for workers with childcare, but not eldercare, responsibilities.

### A Complex Patchwork of Protections under Local Laws

Local laws are the most common form of employment protection for working Americans caring for older adults. At least 67 localities in 22 different states have local laws that prohibit discrimination against employees with certain family caregiving responsibilities. Some local governments enacted FRD legislation because state and federal laws inadequately protect workers from discrimination.

Of the 67 local ordinances, more than half (37, or 55 percent) cover only childcare. Of the remaining 30 laws, 23 do not define family responsibilities, which leaves room for using those laws to protect employees caring for older adults. Seven have language that explicitly defines family responsibilities in ways that protect working caregivers with eldercare responsibilities.

### Model State Statutory Language

The lack of consistent policy leaves many working caregivers unprotected from FRD. It also leaves many managers and supervisors unaware of how eldercare affects their employees.

Because each state has its own statute prohibiting employment discrimination based on protected classifications—such as sex, race, national origin, religion, and disability—the most efficient means of addressing FRD is to add family caregivers as a protected class to existing state law, rather than introducing a stand-alone statute. A stand-alone statute likely would sharply limit the scope of antidiscrimination protections offered as the result of the legislative process.

An amended state statute addressing FRD would benefit employees by filling the gaps in legal protections, most notably by adding protections for employees responsible for the care of older adults. Such a state statute might well benefit employers, too.

Legislation to prohibit workplace discrimination against family caregivers would not give any group special rights. It would simply require employers to treat workers with caregiving responsibilities the same way they treat other employees. Such legislation would address the fact that employers sometimes impose unwarranted penalties on workers with caregiving responsibilities due to

stereotypes that such employees are less competent or less committed to work.

on other protected classifications apply to protect family caregivers as well.<sup>8</sup>

A simple, straightforward state statute would—

- Add the term “family caregiver status” to the list of status characteristics upon which employers are prohibited from basing discriminatory employment decisions under state law;
- Define the term “family caregiver” for the purposes of employment antidiscrimination protections as “a person who cares for a family member”;
- Define “family member” as “a person who is related by blood, legal custody, or marriage, a domestic partner, or a person with whom the caregiver lives in a familial relationship”; and
- Ensure that antiretaliation provisions that protect discrimination complaints based

### Best Practices for Reducing FRD in the Workplace

In addition to public policy solutions, employers can provide equal employment opportunity for employees with family responsibilities by adopting six key practices:

1. Adopt a model policy for preventing FRD.
2. Provide workplace flexibility.
3. Establish effective and predictable scheduling of hourly jobs.
4. Develop and provide education and training to supervisors and managers.
5. Offer eldercare support, resources, and referral services to employees.
6. Implement recruitment practices for people with eldercare responsibilities.

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### Endnotes

<sup>1</sup> S. Bornstein and J. Weber, *Addressing Family Responsibilities Discrimination*, Policy Briefing Services, Work-Family Information for State Legislators, issue 16 (Boston, MA: Sloan Work and Family Research Network, and San Francisco, CA: WorkLife Law, University of California, Hastings College of Law, 2008).

<sup>2</sup> U.S. Equal Employment Opportunity Commission, *Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities* (Washington, DC: Equal Employment Opportunity Commission, May 2007).

<sup>3</sup> K. L. Bogas and C. Croson, “Family Responsibilities Discrimination,” *Labor and Employment Law, Michigan Bar Journal*, January 2009.

<sup>4</sup> U.S. Equal Employment Opportunity Commission, *Enforcement Guidance*.

<sup>5</sup> H. Boushey and A. O’Leary, *Our Working Nation: How Working Women Are Reshaping America’s Families and Economy and What It Means for Policymakers: A Policy Roadmap* (Washington, DC: Center for American Progress, March 2010).

<sup>6</sup> Joan C. Williams, *Statement before the Meeting of April 17, 2007, Washington D.C. on Perspectives on Work/Family Balance and the Federal Equal Employment Opportunity Laws*, U.S. Equal Employment Opportunity Commission, <http://www.eeoc.gov/eeoc/meetings/archive/4-17-07/williams.html>.

<sup>7</sup> Connecticut’s antidiscrimination provisions prohibit employers from requesting or requiring employee information related to “familial responsibilities” unless the information is directly related to a bona fide occupational classification. See Conn. Gen. Stat. § 46a-60(a)(9) (2012).

<sup>8</sup> Antiretaliation provisions prohibit employers from retaliating against employees who attempt to exercise their rights under the antidiscrimination statutes, and against coworkers who stand up for a coworker who is attempting to exercise his or her rights under the statute.

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