NATIONAL WOMEN'S LAW CENTER

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Protecting Caregivers from Workplace Discrimination

Providing care—for children, parents, or chosen family—is part of daily reality for millions of people across the country. For decades, working families have been balancing care needs and workplace responsibilities. Unfortunately, caregivers, particularly women, still face discrimination in the workplace, stemming in part from outdated stereotypes regarding gender norms and expectations around "women's work." And while the COVID-19 pandemic elevated the conversation around caregiving to national news, in some ways, the pandemic has increased caregiver discrimination and worsened workplace conditions that disproportionately harm women as family caregivers.[1] As the pandemic landscape continues to evolve and workplaces rethink how business gets done, it is important to understand the particular needs of, and legal protections for, caregivers.

This resource explains the basics of what caregiver discrimination is, and what legal protections exist to protect caregivers from sex discrimination and other unlawful treatment in the workplace.

What Is Caregiver Discrimination?

Caregiver discrimination—sometimes called "family responsibilities discrimination"—is a form of employment discrimination against working people based on their caregiving responsibilities. Examples of caregiver discrimination could include refusing to promote mothers of young children; refusing to hire a candidate because they mentioned that they are the primary caretaker for an aging parent; or refusing a father's request for time off to care for a new child when mothers are provided such time off. In the context of COVID-19, discrimination against caregivers could include an employer disciplining a mother who missed a deadline because her children were in remote school more severely than employees who missed deadlines for other reasons.

Discrimination against caregivers harms all workers, but these discriminatory workplace practices particularly harm women, especially women of color. Women still shoulder the bulk of caregiving responsibilities,[2] and Black women and Latinas are especially likely to be both breadwinners and caregivers for their families.[3]

Legal Protections for Caregivers

Although no federal law explicitly prohibits discrimination against caregivers, Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, the Family and Medical Leave Act, and a handful of other federal laws contain provisions that have been interpreted by courts to prohibit caregiver discrimination in some contexts. In addition, there are many state and local laws that specifically prohibit discrimination against parents or caregivers in the workplace.[4]

TITLE VII OF THE CIVIL RIGHTS ACT: Title VII affords protections to employees from discrimination based on a protected statuses of race, national origin, religion, and sex. While "caregiver" and "family responsibility" status are not explicitly protected classifications under Title VII, federal courts have understood the law to protect caregivers experiencing discrimination under the "sex-plus" theory of discrimination or sex stereotyping theories.[5] Under the sex-plus theory of discrimination, employees who believe they have suffered an adverse employment action—like being fired, passed over for a promotion, or not being hired—because of their gender plus another factor may allege a violation of Title VII. For example, in Phillips v. Martin Marietta Corp., one of the seminal cases on caregiver discrimination, the Supreme Court agreed that a female employee stated a valid claim of sex-plus discrimination under Title VII against her employer when the employer refused to hire women with pre-school-aged children but did hire men with pre-school-aged children.[6]

Title VII also prohibits employment discrimination based on sex stereotypes.[7] Negative stereotypes about the competency of caregivers in the workplace often underlie cases of caregiver discrimination. For example, in Back v. Hastings on Hudson Union Free School District,[8] the Second Circuit Court of Appeals ruled that denial of employment opportunities based on stereotypical assumptions about a mother's commitment to her job constituted unlawful sex discrimination. Elana Back was denied a permanent teaching position by supervisors who told her that it was "not possible for [her] to be a good mother and have this job" and that they "did not know how she could perform her job with little ones."[9] Courts regularly rely on the long history of "societal stereotypes regarding working women with children" when reviewing cases of caregiver discrimination and sex-based stereotyping.[10]

The Equal Employment Opportunity Commission (EEOC) has also issued guidance addressing the disparate treatment of caregivers. The EEOC's guidance is intended to "illustrate circumstances in which stereotyping or other forms of disparate treatment may violate Title VII or the prohibition under the ADA against discrimination based on a worker's association with an individual with a disability."[11] An example of disparate treatment of caregivers that could violate Title VII includes if an employer asked female applicants, but not male applicants, whether had young children or about their child care responsibilities, or if an employer assigned women with caregiving responsibilities to less prestigious or lower-paid positions. In March 2022, the EEOC also issued technical assistance addressing potential discrimination related to caregiving responsibilities stemming from the COVID-19 pandemic.[12]

PREGNANCY DISCRIMINATION ACT: Pregnancy discrimination is closely related to caregiver discrimination and may be referred to as part of caregiver or family responsibilities discrimination.[13] However, these types of discrimination claims are treated slightly differently under federal law. The Pregnancy Discrimination Act of 1978 (PDA) amended Title VII to add pregnancy to the definition of sex discrimination. Specifically, the PDA provides that discrimination on the basis of sex includes adverse treatment because of pregnancy, childbirth, or related medical conditions; and workers affected by pregnancy, childbirth, or related medical conditions have the right to be treated the same as other employees who are not pregnant but are "similar in their ability or inability to work."[14]

Pregnancy discrimination and caregiver discrimination can interact in some instances of workplace discrimination—e.g., if an employer transferred a female employee who recently returned from pregnancy-related medical leave to a less desirable position based on the assumption that new mothers will be less committed to their jobs.[15] However, if an employee is treated "less favorably not because of the prior pregnancy, but because of the worker's caregiving responsibilities," that discrimination falls outside the protections of the PDA.[16] For more information on pregnancy discrimination and accommodation, please review Pregnant at Work? Know Your Rights.

PREGNANT WORKERS FAIRNESS ACT: The Pregnant Workers Fairness Act (PWFA) provides pregnant workers with the right to reasonable workplace accommodations for known limitations due to pregnancy, childbirth, or related medical conditions, unless the accommodation poses an undue hardship to the employer. It applies people who need accommodations because they are pregnant or have just given birth, or who need accommodations because of medical conditions related to pregnancy. It also prohibits retaliating against someone because they have asked for an accommodation. Although the PWFA is not strictly a protection against caregiver discrimination, workers with caregiving responsibilities might be entitled to workplace accommodations that can help. For example, under the PWFA, an employer could be required to modify an employee's schedule to allow them time to attend doctor's appointments to manage post-partum depression. For more information on the PWFA, please review Pregnant Workers Fairness Act: Know Your Rights.

PROVIDING URGENT MATERNAL PROTECTIONS (PUMP) FOR NURSING MOTHERS ACT: The PUMP Act is an update to the 2010 Break Time for Nursing Mothers law, which amended the Fair Labor Standards Act (FLSA) and requires covered employers of all sizes to provide a reasonable amount of break time and a clean, private space for lactating workers to express milk. The pumping space cannot be a bathroom. Under the FLSA, workers are protected from retaliation after filing a complaint. Employers with fewer than 50 employees may be exempt if providing this time and space would pose an undue hardship. For more information on FLSA protections for lactation, you can review the Department of Labor's Power to Pump resource page.

AMERICANS WITH DISABILITIES ACT: Caregiver discrimination does not only impact mothers and other workers with children. People caring for loved ones with disabilities may also be subject to caregiver discrimination. Those workers may be protected under the "associational discrimination" provision under the Americans with Disabilities Act of 1990 (ADA) and the ADA Amendments Act of 2008 (ADAAA). The ADA was passed to protect people with disabilities from discrimination in jobs, school, housing, and other aspects of public life. In 2008, Congress passed the ADAAA to expand and strengthen these legal protections against discrimination by broadening the statutory definition of disability.

In addition to protecting individuals with disabilities from discrimination themselves, the ADA also protects caregivers from "associational discrimination." The purpose of the prohibition on associational discrimination is to protect people who associate with or care for people with disabilities from discrimination based on stereotypes. In the case of caregivers, the ADA could protect an employee who was not hired because the employer assumed that they would be an unreliable employee or frequently absent because of their need to care for a family member with a disability.[17] For example, in a case from 2019, a father whose daughter had a disability was fired after missing work to provide care for his daughter.[18] His employer refused to grant requests for a shift change and told him to "leave his personal problems at home." The court ruled that the employee's complaint supported an inference of associational discrimination under the ADAAA.

While the ADA does provide some protections against discrimination for people caring for individuals with disabilities, it does not provide an affirmative right to workplace accommodations for caregivers. This means that while a worker with a disability may be entitled under the ADA to reasonable accommodation to address workplace needs arising out of their disability, a worker providing care for a loved one with a disability does not have that same right to accommodation.[19]

FAMILY AND MEDICAL LEAVE ACT: The Family and Medical Leave Act (FMLA) of 1993 gives covered employees the right to take 12 weeks of unpaid, job-protected leave in case of a serious health condition or to care for a family member, including a new baby.[20] The FMLA also prohibits employers from interfering with, restraining, or denying an employee's exercise of their right to take leave under the statute.[21] Caregivers may therefore be protected from discrimination under FMLA if, for example, their employer reduces their work hours, subjects them to disciplinary action, or creates a negative attendance record after an employee takes FMLA leave to provide care for a family member.[22] Unfortunately, the FMLA only covers workers at employers with 50 or more employees, workers who have worked for their current employer for at least 12 months, and who have worked 1,250 or more hours during the past 12 months with that employer. However, under the Pregnant Workers Fairness Act (discussed above), an employer might be required to allow an employee to take time off to physically recover from childbirth, even if she was not eligible for leave under the Family and Medical Leave Act because she had only recently started working for the employer or the employer had fewer than 50 (but more than 15) employees.

State and Local Protections

Through the federal laws described above, workers who are caregivers do have some protections against discriminatory treatment in the workplace. However, because of the gaps in these laws and the difficulty some employees have in proving discrimination because of their caregiving responsibilities, states and cities across the country have passed their own laws to explicitly protect caregivers from discrimination. According to research from the Center for WorkLife Law, almost 200 states, cities, and counties have laws prohibiting caregiver discrimination in some form.[23]

The most common type of caregiver discrimination covered by state and local laws is discrimination against parents, commonly referred to as "parental status" or "familial status." Often, family status is added to existing state and local antidiscrimination laws as an additional protected category, like race, sex, religion, or national origin. However, the term "family status" can be misleading, as it does not cover all types of family relationships. For example, the Minnesota Human Rights Act includes "familial status" as a protected class,[24] but the law narrowly defines familial status to only include parents or legal guardians of minor children.[25] New York state's protection against caregiver discrimination similarly applies only to parents.[26] By contrast, the District of Columbia broadly defines "family responsibilities" to include providing support or care for a dependent, which can include children, parents, or grandparents.[27] Broad and inclusive language better protects caregivers as it is reflective of the lived realities of caregivers.

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The need to manage caregiving responsibilities alongside workplace obligations continues to be a pressing issue for workers. For some, the pandemic may have created new needs; for others, their pre-pandemic reality was already unworkable. Employers and employees alike should know the laws that protect workers with caregiving responsibilities from discrimination.

To learn more, visit our website at www.nwlc.org.

1 Cynthia Thomas Calvert, *Protecting Parents During Covid-19: State and Local FRD Laws Prohibit Discrimination at Work*, Ctr. for WorkLife Law 5 (Nov. 2020), https://worklifelaw.org/wp-content/uploads/2020/11/Protecting-Parents-During-Covid-19-State-and-Local-FRD-Laws.pdf.

2 *See* BLS, *American Time Use Survey, Table 1: Time spent in primary activities and percent of the population engaging in each activity by sex, 2021 annual averages*, U.S. Dep't of Labor (June 23, 2022), https://www.bls.gov/news.release/atus.t01.htm.

3 *See, e.g.*, Sarah Jane Glynn, *Breadwinning Mothers Are Critical to Families' Economic Security*, Ctr. for Am. Progress (March 2021), https://www.americanprogress.org/issues/women/reports/2019/05/10/469739/breadwinning-mothers-continue-u-s-norm.

4 For more background and discussion of the state and local protections against caregiver discrimination, see discussion below and Calvert, supra note 1.

5 *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 544 (1971) (prohibiting sex discrimination on the basis of sex plus family responsibilities); *Back v. Hastings on Hudson Union Free Sch. Dist.*, 365 F.3d 107, 121 (2d Cir. 2004).

6 400 U.S. 542 (1971).

7 *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

8 365 F.3d 107 (2d Cir. 2004).

9 *Id.* at 115; *see also Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971) (*per curiam*) (first recognizing "sex-plus" discrimination in holding that an employer policy of not hiring women with preschool-age children, but no corresponding policy against hiring men with preschool-age children, was sex-based discrimination).

10 *Chadwick v. Wellpoint*, 561 F.3d 38 (1st Cir. 2009).

11 *See* U.S. Equal Emp. Opportunity Comm'n, Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities, No. 915.002 (May 23, 2007), https://www.eeoc.gov/laws/guidance/enforcement-guidance-unlawful-disparate-treatment-workers-caregiving-responsibilities.

12 U.S. Equal Emp. Opportunity Comm'n, The COVID-19 Pandemic and Caregiver Discrimination Under Federal Employment Discrimination Laws, EEOC-NVTA- 2022-1 (Mar. 14, 2022), https://www.eeoc.gov/laws/guidance/covid-19-pandemic-and-caregiver-discrimination-under-federal-employment.

13 *See e.g.* https://worklifelaw.org/publications/Caregivers-in-the-Workplace-FRD-update-2016.pdf (citing cases involving pregnancy as the most common type of family responsibility discrimination claim).

14 42 U.S.C. § 2000e(k).

15 Example taken from EEOC guidance on Pregnancy Discrimination. U.S. Equal Emp. Opportunity Comm'n, Enforcement Guidance on Pregnancy Discrimination and Related Issues, EEOC-CVG-2015-1 (June 25, 2015), https://www.eeoc.gov/laws/guidance/enforcement-guidance-pregnancy-discrimination-and-related-issues#_ftnref81.

16 *Id.*

17 U.S. Equal Emp. Opportunity Comm'n, Questions & Answers: Association Provision of the ADA, EEOC-NVTA-2005-4 (Oct. 17, 2005), https://www.eeoc.gov/laws/guidance/questions-answers-association-provision-ada. Some courts have also referred to this theory of associational discrimination under the ADA as the "distraction" theory because the employee will be inattentive at work due to caring for a dependent with a disability. *See e.g. Larimer v. Int'l Bus. Mach. Corp.*, 370 F.3d 698 (7th Cir. 2004).

18 *Kelleher v. Fred A. Cook, Inc.*, No. 18-2385 (2d Cir. 2019). The Second Circuit vacated the district court's dismissal of the plaintiff's claims and remanded for further proceedings.

19 *See e.g., Larimer*, 370 F.3d at 700.

20 29 U.S.C. § 2612 (2018). The FMLA only applies to private employers with 50 or more employees working at least 20 weeks per year. This means that nearly 45% of workers are not covered by the FMLA. *Key Facts: The Family and Medical Leave Act*, Nat'l Partnership for Women & Families (Jan. 2022), https://www.nationalpartnership.org/our-work/resources/economic-justice/paid-leave/key-facts-the-family-and-medical-leave-act.pdf.

21 29 U.S.C. § 2615(a)(1); 29 CFR § 825.220(a)(1).

22 *See* U.S. Dep't of Labor, Field Assistance Bulletin No. 2022-02 (March 10, 2022), https://www.dol.gov/sites/dolgov/files/WHD/fab/fab-2022-2.pdf for additional descriptions on prohibited employer retaliation under the FMLA.

23 Cynthia Thomas Calvert, *Protecting Parents During Covid-19: State and Local FRD Laws Prohibit Discrimination at Work*, Ctr. for Worklife Law (Nov. 2020), https://worklifelaw.org/wp-content/uploads/2020/11/Protecting-Parents-During-Covid-19-State-and-Local-FRD-Laws.pdf.

24 Minn. Stat. § 363A.08.

25 *Id.*

26 N.Y. Exec. Law § 296.

27 D.C. Code Ann. § 2-1402 (11, 12).