

Protecting Parents During Covid-19: State and Local FRD Laws Prohibit Discrimination at Work

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Cynthia Thomas Calvert
Principal, Workforce 21C
Senior Advisor, The Center for WorkLife Law

About the Center for WorkLife Law

The Center for WorkLife Law at the University of California, Hastings College of the Law, is a nonprofit research and advocacy group devoted to women's economic advancement and eradicating employment discrimination against caregivers. WorkLife Law's hallmark is its ability to translate research into social, organizational, and legal change. WorkLife Law takes an interdisciplinary approach that brings together a range of stakeholders, including employers and employees and their lawyers, to find solutions that work. WorkLife Law pioneered the research behind family responsibilities discrimination, and has worked with the Equal Employment Opportunity Commission, the U.S. Department of Labor, federal and state legislators, employment lawyers (both plaintiffs' and defense) social scientists, bar associations, unions, advocacy groups, and others to identify and prevent FRD and to remove barriers to equal employment for workers with caregiving responsibilities. WorkLife law maintains a database of FRD cases, runs a hotline for employees who believe they may be facing such discrimination (hotline@worklifelaw.org; 415-703-8276), and provides resources for employers and HR professionals. WorkLife Law has published extensively on FRD, including the legal treatise Family Responsibilities Discrimination (Bloomberg BNA Books 2014 & supp. 2016). More information about WorkLife Law can be found at worklifelaw.org.

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I. Introduction

Employers who make it harder for parents to work during the Covid-19 pandemic may be more exposed to legal liability than they think. They may know they can be sued for family responsibilities discrimination under a patchwork of federal laws that provide parents with only incomplete protection. **What many employers do not know is that almost 30% of the American workforce is also protected by state and local laws that offer parents stronger protections against discrimination.** Some of the state and local laws even allow employees to sue their employers for unlimited damages and attorneys' fees.

The pandemic has put employees' family obligations front and center. Employees request flexibility to provide care to children engaged in remote learning, children make unexpected appearances on video calls, and flexing work schedules around family care needs has become commonplace. This state of affairs is very different from the pre-pandemic norm of hiding, or at least downplaying, the existence family responsibilities while at work.

The high visibility of caregiving responsibilities can trigger biases against caregivers that lead to family responsibilities discrimination (FRD) – and, indeed, that is what employees report is happening:

- The mother of a young infant was furloughed at the start of the pandemic. When the rest of the staff was called back, she was told to stay on unemployment.
- A retail employee who had always worked the same part-time schedule to fit her childcare needs was told it was no longer an option due to the pandemic. After she voiced her childcare concerns, her hours were cut to zero with no explanation.

- A white-collar employee who regularly worked from home before the pandemic to care for her daughter with a disability was ordered back to work in person. When she explained the risk to her immunocompromised daughter's life, she was fired.
- A breastfeeding employee was forbidden from turning off her video camera during team meetings to nurse her infant, even though her employer permitted her coworkers to turn off their cameras for other personal reasons.¹

Employers and their lawyers may not see any potential legal liability in these actions. In their view, the economic emergency created by the pandemic might be a legitimate business reason for changing schedules or reducing employee headcount. Moreover, federal discrimination law does not include “parenthood” as a protected category. But federal law is only the beginning of the analysis.

At least 195 state and local jurisdictions have enacted laws outlawing discrimination against parents. Nearly 50 million employees are covered by one of these laws.

Typically, these state and local FRD laws prohibit discriminatory treatment based on “familial status” or “family responsibilities.” Many of them allow employees to sue in court for uncapped damages. Most apply to employers of all sizes, and some provide protections also to employees who care for aging parents or other family members with disabilities. Employers who choose to furlough or lay off employees because they are a parent or expecting to be one, may well run afoul of one of these laws.

As conflict between employees' work and family care continues to grow in the coming months of the pandemic, state and local FRD laws are going to play a prominent role in jurisdictions where they have been enacted.

After providing some background about FRD and the state and local laws designed to outlaw it, this paper will look at what these laws mean during the Covid-19 crisis and beyond for employers and employees and the agencies that enforce the laws. It will conclude with action steps for employers and employees and for advocates who work to prevent FRD.



II. Family Responsibilities Discrimination

Bias against workers because of their family caregiving responsibilities was widespread long before the pandemic. The Covid-19 crisis has drastically magnified the problem. Caregiver bias generally stems from assumptions about how caregivers will act – such as mothers will prioritize their families over work – or how they should act – such as fathers should not take time off from work to care for their children. The most common assumption made about caregivers is that they will not be committed to their jobs, and therefore are not valuable employees. The pandemic has highlighted the caregiving role many employees play at home, triggering these negative assumptions.

When these assumptions affect personnel decisions, including who gets hired, promoted, called back from furlough, or terminated, it can lead to FRD, also known as caregiver discrimination.

FRD is employment discrimination because of an employee's family caregiving, and it affects workers who are pregnant, have young children, or care for aging parents or other relatives with disabilities or serious health conditions.

Assumptions about caregivers are often compounded by racial and ethnic biases. For example, employers that prioritize the caregiving needs of White women while devaluing those of Black women may discourage Black women from taking childcare leave. Claims of both FRD and race discrimination could result. Assumptions about caregivers may also vary by sexual orientation, age, national origin, and other protected categories.

The large number of caregivers in the workplace makes FRD an important issue for employers. About 43% of American workers are family caregivers,

providing care to either a child (38 million²) or an adult with a disability or who needs assistance due to advanced age (30 million³). The number of caregivers in the workforce is rising and expected to continue to rise.⁴ FRD is found in every industry and at every organizational level. Pre-pandemic research shows that the number of FRD lawsuits against employers has been rising, as have the dollar amounts of settlements and verdicts.⁵ **WorkLife Law experts expect caregiver discrimination stemming from the pandemic to lead to a further significant uptick in FRD claims in coming years.**

Employees who sue their employers typically bring claims under federal laws (and similar state laws), but their protection against FRD is far from complete (see box). As a result, many parents and other caregivers are left with little protection against pandemic-related FRD.

FEDERAL LAWS AND FRD

No one federal law explicitly prohibits FRD. Although a patchwork of statutes protects many family caregivers, these statutes cover only some workplace scenarios and caregiving categories. Here are the main sources of federal protection:

Title VII of the Civil Rights Act of 1964 and the Pregnancy Discrimination Act: Title VII bans employment discrimination based on sex, race, color, religion, and national origin. It is a useful tool against FRD when bias against caregivers is rooted in gender bias. For example, employers may assume that mothers will be unreliable employees because they will be distracted by their children, or that fathers don't need the ability to balance work with childcare because childcare is "women's work." By prohibiting discrimination rooted in sex-based stereotypes, Title VII protects primarily parents of young children and pregnant women. It applies to employers with at least 15 employees. Before suing their employers, employees must file a charge with the Equal Employment Opportunity Commission (EEOC). Damages are capped based on employer size.

The Americans with Disabilities Act: In addition to barring discrimination against employees based on their disabilities, the ADA prohibits discrimination against employees based on their association with others who have disabilities. "Disability association" discrimination can arise when employers treat employees unfairly or fire them because of their status as a caregiver for someone with a disability (whether or not that person is the employee's relative). The ADA does not, however, require employers to provide employees accommodations that would enable them to provide care. It applies to employers with at least 15 employees. Before suing their employers, employees must file a charge with the EEOC. Damages are capped based on employer size.

The Family and Medical Leave Act: The FMLA provides eligible employees up to 12 weeks per year of unpaid, job-protected leave to care for family members with serious medical conditions. The FMLA bars employers from interfering with

employees' right to take FMLA leave and from retaliating against employees for using or requesting this leave. It covers caregiving for only immediate family members and only if they are seriously ill. To be eligible, employees must work for an employer with 50 or more employees within 75 miles of their worksite and must have been employed by the employer for a year and have worked at least 1250 hours in the prior year. As a result, the law covers only about 60% of all employees.

The Families First Coronavirus Response Act: Enacted to respond to the needs of working parents during the pandemic, the FFCRA provides up to 12 weeks of partially paid leave to eligible employees who are not able to work or telework because their child's school or childcare provider is unavailable due to coronavirus. The law also allows employees to take two weeks of leave to care for another individual who has been advised by a health care provider to self-quarantine (but the total weeks for both types of leave cannot exceed 12 weeks). Like the FMLA, the FFCRA protects employees from interfering with employees' right to take leave and from retaliating against employees for taking protected leave. The law applies to state and local government agencies and to private businesses unless they have more than 500 employees, which excludes millions of employees from coverage.

Most state anti-discrimination laws prohibit sex and pregnancy discrimination like Title VII, and some prohibit disability association discrimination like the ADA as well. Some states also have family and medical leave laws that either mimic the FMLA or are similar but with greater applicability and benefits. In addition, some states and localities have paid sick day laws, which may require employers to provide a number of paid days off to care for a child when they are ill or school is closed. A number of jurisdictions have also passed laws during the pandemic to provide paid time off for Covid-19 caregiving needs. The protection against FRD under most of these state laws is limited in the same way as under federal law.

III. State and Local FRD Laws

Overview

Our research found 195 state and local jurisdictions have laws that prohibit employers from discriminating against employees because they are parents. Four states have such laws: New York, Delaware, Minnesota, and Alaska. The local jurisdictions with such laws include some of the largest cities in the U.S.: New York City, Chicago, Washington, D.C., Boston, San Francisco, and Philadelphia . Some of the country's smallest jurisdictions have FRD laws as well: Crested Butte, Colorado, Grinnell, Iowa, and Stroudsburg, Pennsylvania. **Close to 50 million employees - almost a third of the workforce - work in a jurisdiction that has an FRD law that bans discrimination against parents.**

These FRD laws provide far greater protection for parents and other caregiving employees than the federal laws in several key respects.

First, they apply to more types of caregiving than the patchwork of federal laws:

- They cover all parents, regardless of their gender or the health/disability status of their child. The laws typically protect employees from discrimination based on “familial status” (usually defined as caring for minor children).
- Almost 20% of the laws (n=35) also protect employees who care for other family members by prohibiting discrimination based on “family responsibilities” and similar terms (usually defined as caring for members of the employee’s extended family, which could include parents or grandparents and other relatives, in addition to children).

Second, the FRD laws typically apply to more

employees within their jurisdictions.

- Almost all apply to small employers with just a few employees, as well as to large employers.
- None of the laws requires employees to have been employed for a certain period of time to be covered.

Third, the FRD laws often include more robust enforcement mechanisms than federal law, which makes them riskier for employers:

- About a third of the FRD laws (n=59) allow employees to sue their employers in court, without having to first file a complaint with the EEOC or a state or local equal employment opportunity agency. The other two-thirds of the laws are typically either enforced by a local or state agency or allow employees to sue their employers in court after first filing a complaint with a local or state agency.
- Often the FRD laws contain no caps on the amount of damages an employee can win in court, and many require employers to pay the attorney’s fees of employees who prove their claims.

State and local FRD laws provide complete and strong protection against FRD. It is surprising, then, that so few employees and employers – and so few of their lawyers – know about these laws. A deeper look at the laws is in order.

The State laws

Four states – Alaska, Delaware, Minnesota and New York – prohibit FRD against employees because they have minor children. The FRD law in Delaware goes further to also protect employees caring for adult relatives.

- **Alaska** prohibits discrimination based on parenthood.⁶ It applies to all employers. Employees may sue their employers in court or file an administrative complaint with the Alaska State Commission for Human Rights. Compensatory and punitive damages are available, and punitive damages are capped. Attorney's fees are available to the prevailing party.
- **Delaware** added to its discrimination law that it is unlawful for an employer to discriminate against an individual “because of the individual's family responsibilities,”⁷ and it defines “family responsibilities” as “the obligations of an employee to care for any family member who would qualify as a covered family member under the [federal] Family and Medical Leave Act.”⁸ This means that the prohibition on FRD protects parents of minor children and those employees who care for their own spouse or parent who has a serious health condition. The law applies to employers of four or more employees. Employees can sue their employers in court after first using the administrative process of the state's Office of Anti-Discrimination. Compensatory and punitive damages are available but capped. The prevailing party may recover attorney's fees.
- **Minnesota** prohibits employers from discriminating on the basis of “familial status,”⁹ which means living with minor children or being pregnant or in the process of obtaining

legal custody of a minor.¹⁰ It applies to all employers, and also prohibits employers from asking job applicants about their familial status. Employees can sue their employers in court or file a complaint with the Minnesota Human Rights Agency. Compensatory and punitive damages are available and are capped. Attorney's fees are available.

- **New York State** prohibits employers from discriminating on the basis of “familial status,”¹¹ which is defined as living with minor children or being pregnant or in the process of obtaining legal custody of a minor.¹² It applies to all employers in the state. The law prohibits harassment based on familial status, as well as discrimination. Employees and independent contractors can sue employers in court for compensatory damages. If they prevail against a private (non-governmental) employer, they can also recover uncapped punitive damages and attorney's fees.

Additionally, **Connecticut** prohibits employers from asking employees about their family responsibilities,¹³ an administrative regulation in **New Jersey** prohibits discrimination against state employees based on their familial status,¹⁴ and state employees in **Wisconsin** are also protected from discrimination based on familial status.¹⁵ California passed an anti-FRD bill in 2007, but it was vetoed by then-governor Schwarzenegger.

The Local Laws

At least 190 local jurisdictions (cities, towns, villages, and counties) have laws that prohibit discrimination against employees because of parenthood or family caregiving. The majority (n=103) apply only to parents. Others (n=35) cover parents and employees who care for other family or family-like members, and the remainder (n=52) do not say which caregivers are covered.

The laws prohibit discrimination based on the employee's status as a parent or caregiver and are not limited to situations in which the employee is caring for a family member with a serious or disabling condition. Most (n=140) apply to both private and government employers, usually with as few as one employee.



LOCAL JURISDICTIONS WITH FRD LAWS

Alaska

- Anchorage
- Angoon
- Galena
- Juneau
- North Slope Borough
- Sitka
- Tanana
- Unalakleet

Arizona

- Buckeye
- Sedona
- Tempe
- Tolleson
- Tucson

California

- Diamond Bar
- Palo Alto
- San Francisco

Colorado

- Crested Butte
- Denver
- Telluride

District of Columbia

Connecticut

- Waterbury

Florida

- Boynton Beach
- Delray Beach
- Jupiter
- Key West
- Leon County
- Margate
- Mascotte
- Miami Beach
- Miami-Dade County
- Monroe County
- Mount Dora
- North Port
- Orange County
- Osceola County
- Palm Beach County
- Panama City Beach
- Tampa
- Volusia County
- Wellington
- West Palm Beach

Georgia

- Atlanta
- Chamblee
- Dunwoody

Illinois

- Bloomington
- Carbondale
- Champaign
- Chicago
- Cook County
- Elgin
- Kildeer
- Oak Park
- Urbana
- Wheeling

Indiana

- Kokomo
- Michigan City
- Valparaiso
- Zionsville

Iowa

- Cedar Rapids
- Davenport
- Grinnell

Kansas

- Junction City
- Mission
- Topeka
- Westwood Hills
- Winfield

Kentucky

- Covington
- Paducah

Maine

- Bangor
- Orono

Maryland

- Annapolis
- Frederick County
- Gaithersburg
- Harford County
- Howard County
- Montgomery County
- Prince George's County
- Rockville

Massachusetts

- Boston
- Cambridge

Michigan

- Adrian
- Albion
- Ann Arbor
- Battle Creek
- Cadillac
- Canton Charter Township
- Delta Charter Township
- Detroit
- Farmington Hills
- Fenton
- Ferndale
- Howell
- Huntington Woods
- Jackson
- Kalamazoo
- Lansing
- Lansing Charter Township
- Linden
- Marquette
- Meridian Charter Township
- Mount Pleasant
- Nottawaseppi Huron Band of the Potawatomi
- Oshtemo
- Pleasant Ridge
- Portage
- Royal Oak
- Shelby Charter Township
- Southfield
- Trenton
- Union Charter Township
- Westland
- Ypsilanti

Minnesota

- Minneapolis
- Moorhead
- St. Paul

Missouri

- Columbia
- St. Louis

Montana

- Butte-Silver Bow County

New Jersey

- East Orange
- Elizabeth
- Maywood
- Newark
- Passaic
- Rocky Hill
- Wanaque

New Mexico

- Angel Fire

New York

- Cazenovia
- Ithaca
- New York City
- Rye Brook
- Suffolk County
- Westchester County

Ohio

- Akron
- Athens
- Bexley
- Bowling Green
- Cleveland Heights
- Columbus
- Kent
- New Carlisle
- Olmsted Falls
- St. Clairsville
- Xenia

Oklahoma

- Mounds
- Norman
- Okmulgee

Oregon

- Beaverton
- Benton County
- Corvallis
- Eugene
- Hillsboro
- Multnomah County
- Portland
- Salem
- Springfield

Pennsylvania

- Abington
- Allegheny County
- Bridgeport
- Churchill
- Conshohocken
- Doylestown
- Easton
- Folcroft
- Harrisburg
- Kennett Square
- Lancaster
- Lansdowne
- New Britain
- Newtown
- Philadelphia
- Phoenixville
- Pittston
- Reading
- State College
- Stroudsburg
- West Chester
- Wilkes-Barre

South Dakota

- Brookings
- Vermillion

Texas

- Fulton

Virginia

- Norfolk

Washington

- Spokane
- Tacoma

West Virginia

- Charles Town
- Moundsville

Wisconsin

- De Pere
- Madison
- Milwaukee
- Mount Horeb
- Racine

More details about the laws are available at worklifelaw.org/get-help/state-local-frd-laws/.

IV. State and Local FRD Laws Provide More Protection to Parents in the Workplace

FRD Laws Cover More Types of Caregiving

State and local FRD laws prohibit discrimination based on employees' "familial status," "family status," "family responsibilities," or "caregiver status." The key to understanding the types of caregiving covered by a particular law is how the law defines these terms.

The most commonly used term is "familial status" (n=133), which is nearly always defined as caring for minor children living in the same household as the employee or being pregnant or in the process of obtaining legal custody of a child. This mirrors the definition of the same term in the federal Fair Housing Act.¹⁶ In practice, familial status protections cover parents, guardians, and pregnant employees.

The terms "family status" and "family responsibilities" have varying definitions and are typically defined more broadly. "Family status" sometimes refers to living with minor children or being pregnant, but it can also refer to ties to relatives by blood or law.¹⁷ The term "family responsibilities" is most often defined as an employee's support of someone dependent on the employee.¹⁸ For example, the District of Columbia, which prohibits employment discrimination based on "actual or perceived" family responsibilities, defines "family responsibilities"¹⁹ as "the state of being, or the potential to become, a contributor to the support of a person or persons in a dependent relationship, irrespective of their number...."²⁰ This definition is broad and covers parents and many other family caregivers because it is not limited to particular family relationships or particular types of "support." The term is not always defined so broadly, however. Delaware defines it as family members who are covered by the federal FMLA (children, parents, spouses)²¹ and State

College, PA defines it as caring for a family member of any age, in the past, present or future.²²

Two local FRD laws — in San Francisco²³ and New York City²⁴ — use the term "caregiver status." San Francisco's law covers caregiving for children and aging parents, and for adults related by blood or marriage who have a serious health condition. New York City's law covers caregiving for children and adults who are in a family or family-like relationship with the employee. Several other laws are similarly broad,²⁵ reflecting an understanding that not every family consists of two adult parents and their minor children.



An Inclusive Definition of Family in NYC

The New York City Human Rights Law prohibits discrimination because of the employee's "actual or perceived" caregiver status. It defines "caregiver" as "a person who provides direct and ongoing care for a minor child or care recipient." A "care recipient" is a person with a disability who 1) is a covered relative or a person who lives with the employee and 2) relies on the employee for medical care or the needs of daily living. Covered relatives include spouse, partner, parent, sibling, grandparent, parents of the employee's spouse or partner, or "any other individual in a familial relationship with the employee." This definition is very broad and should cover all family members who rely on an employee for medical care or help with everyday needs.

Laws with expansive definitions of family beyond a two-parent nuclear family provide better coverage of often-marginalized employees. People of color are more likely to live with extended families. LGBTQ employees are more likely to rely on chosen families for care. Broader definitions recognize and provide equal legal protection for all family structures.

FRD Laws Cover More Types of Employers and Employees

Some state and local FRD laws cover only government employees (n=37).²⁶ Most FRD laws cover both government and private employers (n=144), and a few apply only to private employers (n=10).

FRD laws often apply to small as well as large private employers, covering private employers with as few as one employee (n=88).²⁷ This is broader coverage than provided by federal laws, which apply to private employers only if they have at least 15 employees (Title VII sex and pregnancy discrimination and ADA disability discrimination) or 50 employees (FMLA) or fewer than 500 employees (FFCRA).

The FRD laws may also apply to labor unions and employment agencies,²⁸ and companies and individuals who contract with a city.²⁹ In some jurisdictions, the FRD laws apply to individual supervisors and others who control an employee's work conditions,³⁰ which means that an employee may be able to sue their supervisor as well as their employer. The federal Title VII and the ADA do not allow employees to sue individuals.

The FRD laws apply to all employees of covered employers, with no requirement that employees have to work a certain length of time in order to be covered. In addition, most apply to job applicants as well as employees.³¹ The FMLA, by contrast, applies only to employees who have been employed by their employer for a year and who worked at least 1250 hours in the preceding year. The provision of the FFCRA that provides parents with 10 weeks of partially paid leave for childcare (if needed due to pandemic-related school closures or daycare unavailability) applies only to employees who have worked for their employer for at least 30 days.

FRD Laws Cover a Wider Range of Workplace Situations

State and local FRD laws usually apply to any employer conduct that affects an employee's employment, from hiring and compensation to working conditions and

termination. For example, this law is specific about prohibited conduct:

An employer shall not discriminate against an individual with respect to recruitment, employment, compensation, work classifications, promotion or demotion, termination, or a term, condition or privilege of employment.

Discriminate [means] to make a decision, offer to make a decision or refrain from making a decision based in whole or in part on the ... familial status ... of an individual.³²

Although the federal laws (Title VII sex and pregnancy discrimination law, the ADA disability discrimination law, the FFCRA and FMLA) also apply to a wide variety of employer actions, the FRD situations they cover are limited to those that are related to sex or gender stereotyping, the disability of the employee's family member, or instances of retribution for the employee having taken protected leave. To illustrate this difference, imagine a large national employer who calls back from furlough many employees but does not recall any employees who are parents. The employer probably would not be held liable for violating the federal laws because men and women with children are being treated the same

Discrimination v. Accommodation

Saying an employer cannot discriminate against a caregiving employee is different from requiring employers to accommodate a caregiving employee by providing flexible schedules, leave, or other adjustments that will make it easier for them to combine working and family care. Advocates say that laws that do not require accommodation don't do enough to make sure that caregiving employees can remain employed: An employer may not be able to refuse to hire an applicant because they have a young child, but what good will that do if once the person is hired they are given a schedule that they cannot work or told they will be fired if they miss even one day of work during their probationary period?

The line between discrimination and accommodation can be blurry. If an employer gives a parent a schedule they cannot work due to childcare and refuses to change it but allows other employees with similar jobs to choose their own schedule, that might be evidence that the employer is discriminating in violation

of an FRD law. But if the employer does not allow anyone to choose their schedule and has a legitimate, nondiscriminatory business reason for assigning a particular schedule to a parent, then the employer is not required to accommodate the parent with a schedule they can work – unless, that is, the parent works in a jurisdiction that requires employers to accommodate caregiving employees.

Only one jurisdiction – Milwaukee, Wisconsin – requires an employer to accommodate an employee's familial status, unless to do so would create a hardship for the employer.* Most are silent on the topic, except Delaware, which states that its FRD law does not “create any obligation for an employer to make special accommodations for an employee with family responsibilities, so long as all policies related to leave, scheduling, absenteeism, work performance, and benefits are applied in a nondiscriminatory manner.”**

* MILWAUKEE, WIS., CODE OF ORDINANCES §109-9.

** 19 DEL. CODE § 711 (K).

(no sex discrimination, arguably) and the children do not have a disability (no disability association discrimination) or a serious health condition (no FMLA discrimination), and the employer is too large for the employees to have rights under the FFCRA. Under an FRD law that protects parents, however, the employer probably would be liable for violating the law because it is treating parents differently from other employees.

The FRD laws also frequently prohibit retaliation, such as negative treatment in response to making a complaint of discrimination or participating as a witness in a legal proceeding about FRD.³³ Further, the FRD laws may prohibit aiding and abetting,³⁴ which occurs when someone assists another in carrying out discriminatory actions. Retaliation claims and claims of aiding and abetting generally can be brought against both employer organizations and individuals.

FRD Laws May Provide Stronger Enforcement Mechanisms

Laws are of little use unless there is a way to make sure that employers follow them. Most FRD laws can be enforced by state and local equal employment or human rights agencies, which investigate claims of discrimination and take steps to remedy illegal activity. Many local FRD laws also authorize employees to bring private lawsuits against their employers, either as an alternative or in addition to the agency administrative process.

Some FRD laws (n=31) require that employees file an administrative complaint (called “exhaustion”) before filing a lawsuit in court, but – unlike the federal Title VII and ADA – many (n=59) allow employees to file in court without first filing with an agency.³⁵ Depending on the jurisdiction, courts may be able to order the employer to stop discriminating, pay the employee damages (including back wages and compensatory damages, which can

include emotional distress damages), and pay the employee’s attorney’s fees. One in five jurisdictions (n=37) also allow courts to order the employer to pay punitive damages.³⁶

Unlike many federal laws, state and local FRD laws often do not cap the amount of damages that employers may have to pay employees (n=93).³⁷ This makes them powerful deterrents against discrimination.



V. State and Local FRD Laws and the Pandemic: What Employers, Employees, and Enforcement Agencies Need to Know

The media are saturated with stories about parents and other family caregivers who are facing discipline, harassment, and termination during the pandemic.³⁸ Allegations have arisen that some employers are using the pandemic as an excuse to get rid of employees such as parents and other marginalized employees.³⁹ Even if this is true, legal experts are split on whether the parents and caregivers can successfully sue their employers using the patchwork of federal laws that protect caregivers – but they are not split on the limited nature of those federal laws and the lack of clarity it creates for employers and employees about when a particular law has been violated.⁴⁰

The state and local FRD laws are models of clarity by contrast, with short and direct statements that employers are not to discriminate against parents or, in some jurisdictions, other caregivers. They unambiguously state the rights of parents to fair treatment. Parents in jurisdictions that have FRD laws are entitled to be chosen for furlough or layoff using the same criteria as applied to other employees. They are entitled to work from home or work a flexible schedule on the same terms as other employees. They are entitled not to be fired simply because they have children. It is reasonable to expect that more employees will be turning to these laws as they need them.

Employers in jurisdictions with FRD laws may benefit from the clarity of the laws as well. The laws' clear statements of who is covered and what conduct is prohibited eliminate a lot of guesswork and make it easier for supervisors to comply with the laws. Employers that are aware of the prohibitions of the FRD laws can ensure that parents are treated fairly

as they choose whom to layoff or who gets to work a flexible schedule.

Employers and employees may find that the clarity will help them reach speedier and cheaper resolutions when violations do occur. Employees (or their lawyers) may be able to resolve discriminatory situations quickly and informally by pointing to the laws. For example, an employee covered by an FRD law who is denied the ability to work remotely because they have children can point to the law and ask their employer to reconsider their request to work from home using the same criteria as are applied to non-parents. As another example, employees covered by an FRD law who were targeted for layoff because of childcare needs can ask their employer to comply with the law and rehire them long before anyone thinks about going to court.

The prevalence of FRD during the pandemic points to need for action by state and local agencies that enforce FRD laws. It gives enforcement agencies an opportunity to head off discrimination before it happens by educating the public about the laws' requirements. This is already being done in New York City where the Commission on Human Rights has posted on its Covid-19 web page information reminding everyone that discrimination based on an employee's caregiver status violates the City's FRD law:

... discrimination based on an employee's status as a caregiver is unlawful, and employers must ensure that they are not discriminating against caregivers if they are providing accommodations to other employees beyond what is legally required. For example, it is illegal

for an employer to fire an employee based on the assumption that the employee would be less available to work during the pandemic because they have a spouse with pre-existing conditions for whom they provide care.

... For example, it would be illegal for an employer to provide an employee with minor schedule adjustments for attending grad school and not for caregiving responsibilities. In addition, other laws may govern parents' and caregivers' ability to stay home to care for children and may protect against retaliation for choosing to do so.⁴¹



Other things enforcement agencies can do to educate employers and employees include creating fact sheets and FAQs about their FRD laws and making an on-demand webinar for employers about what their FRD law covers. Enforcement agencies may also want to take this opportunity to train their investigators and other personnel about how to recognize and investigate FRD situations so they are prepared for pandemic-related discrimination claims.

The pandemic also presents an opportunity for enforcement agencies to seek amendment of their jurisdictions' laws to include prohibitions against FRD or to expand or clarify existing prohibitions. Laws that cover parents can be broadened to cover other types of family caregivers. Laws that do not define "family" can be amended to clarify coverage. Laws can be expanded to cover city contractors. Fair treatment of parents and other family caregivers is important to communities at large: Eliminating discrimination against parents and caregivers prevents loss of income and health insurance, housing instability, and food insecurity. It also prevents harm to the mental and physical well-being of employees and their family members.

What about the Employer's Side?

Without a doubt, employers need to have employees who can get the work done. They need to be able to set parameters for performance and have the tools necessary to encourage improvement. Fortunately, they can do so without discrimination – in fact, their businesses are likely to be stronger going forward if they prevent FRD. Here's why:

Caregiving and other nonwork life activities are a fact to which businesses have to adapt. Very few employees are able to devote themselves 100% to work over the long term, and work models based on that type of devotion are out of touch with the workforce. Businesses that don't adapt will face unnecessary and expensive turnover.

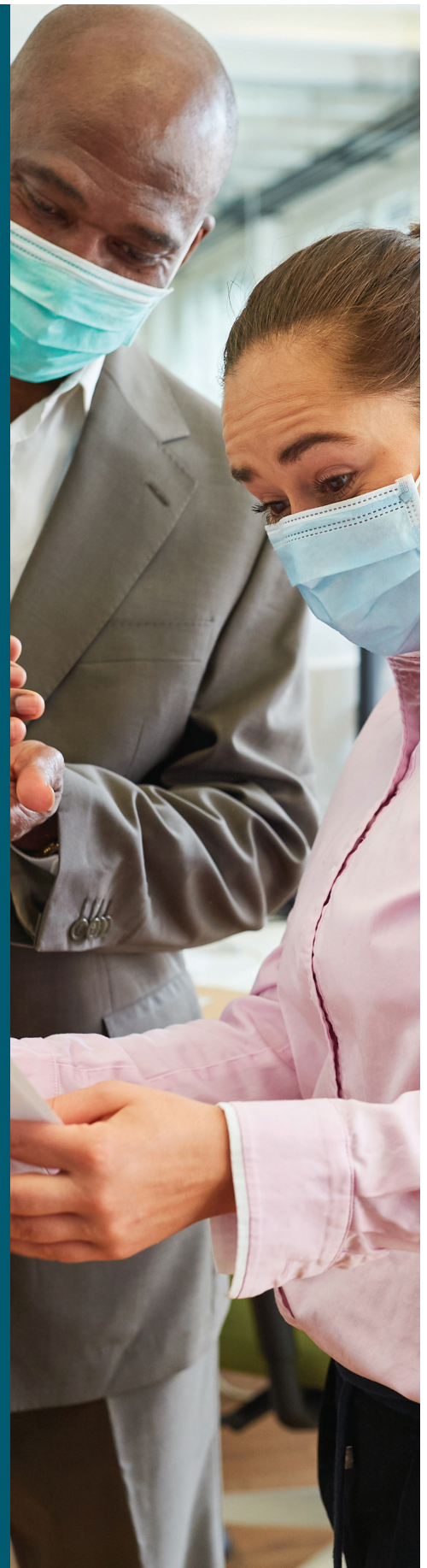
Reducing the stress on employees caused by a clash of demands at work and home frees them to focus on work and be more productive during work hours. It also improves morale as co-workers are freed from the distress of watching their colleagues struggle.

Employers that structure expectations appropriately and provide the type of support that caregivers need, such as flexible work and benefits, will be able to retain their good, trained employees. Experienced employees are more productive and have deeper relationships with customers, and happy employees tend to be more loyal and better brand ambassadors.

As the company's reputation for supporting caregivers grows, it will improve the quality of its workforce by having more applicants from which to choose. It will also improve its ability to attract new customers who want to be associated with a company that treats people well.

Employers that prevent FRD avoid costly and time-consuming litigation, and the negative publicity that it can generate.

Some suggestions for managing caregiving employees without discrimination are presented on the next page.



VI. Action Steps to Prevent FRD

The easiest way to manage parents and other caregiving employees without discrimination is prevention. State and local FRD laws can be a significant step toward prevention because they offer clear statements of what behavior is illegal, educate employers and employees about FRD, and provide an incentive for employers to improve their policies and train their supervisors to reduce the effects of bias on family caregivers.

What Employers Can Do

An essential first step for employers is to develop a business case for preventing FRD. This will help everyone in the organization to understand the employer's motivation and dedication to making changes. By using the company's unique history, situation and goals, the employer can turn the prevention effort from an "initiative of the month" to a business necessity.

Additional steps include:

- ***Supervisor training.*** Interactions between supervisors and caregiving employees are a key source of FRD claims. Training should include not only what FRD is, but why it happens, steps supervisors can take to minimize the influence of bias on personnel decisions, best practices for managing caregivers, and the business benefits of retaining good workers.
- ***Personnel policies.*** Employers can implement a standalone anti-FRD policy or add family responsibilities as a protected category to an existing anti-discrimination policy. It is important that employers in jurisdictions that have state or local FRD laws use the wording of those laws in the policy (for example, "familial status"). Model policies are available from the Center for WorkLife Law.⁴²

Employers also should review their existing personnel policies to ensure they do not discriminate against caregivers. The following types of policies are often most relevant: attendance; leave; flexible work; compensation, including bonuses; promotion; discipline; termination. It is important to review the wording as well as how the policies are carried out in practice.

- ***Add supports for parents and other caregivers.*** Employers are finding effective ways to support parents and other caregivers, including flexible scheduling, remote work, recording of meetings for later viewing, subsidies for childcare and tutoring, mental health and wellness programs, support groups, and concierge services.
- ***HR oversight program.*** Active oversight by human resources professionals of employment decisions involving caregiving employees can nip problems in the bud. Caregiver bias can be triggered by anything that highlights an employee's family. HR vigilance over personnel decisions made after those highlights can head off problems. If HR notices suddenly negative evaluations, demotion, placement on a performance improvement plan, rigid application of workplace rules, changes in assignments or schedules, or termination, further investigation may be warranted.
- ***Complaint procedure.*** Many employers already have in place a process for responding to employee complaints. Ensuring that the process is able to address FRD is important. Investigators should know why and how FRD arises and be familiar with the triggers and indicators of bias mentioned in the preceding paragraph and frame their inquiries accordingly.

Familiarity with how FRD can violate the law, or otherwise expose employers to liability, is necessary to resolve employee complaints.

- **Work coverage program.** Almost every employee will be a caregiver at some point during his or her career. Employers can plan for each employee's likely absence for family care, which will reduce disruption in the workplace and minimize bias by aligning supervisors' expectations with reality. Work coverage plans should set out how each employee's job would be done during a lengthy absence and should be reviewed and updated regularly.⁴³

Additional prevention resources for employers can be found online.⁴⁴

What Employees Can Do

The unambiguous language that FRD laws typically use to prohibit discrimination can make it easier for employees to resolve instances of unfair treatment informally. For example, an email to HR or a letter from a lawyer or human rights commission pointing to a local statute may be enough for an employer to correct conduct that violates the statute.

Steps employees can take include:

- **Get the facts.** If you think you are facing discrimination based on your family responsibilities, make sure your understanding of the circumstances is accurate. Keep notes about statements and actions that you believe are discriminatory, and about how other people have been treated.
- **Talk with your supervisor.** If you think it would be productive to do so, tell your supervisor that it appears that you are being treated differently (it could be differently from others, or differently from before the time when your family caregiving became known). Try to

have a constructive rather than accusatory conversation and ask if there is something you can be doing better so you can be treated the way you want to be.

- **Talk with HR.** If talking with your supervisor doesn't work, talk to HR and explain that you feel you are experiencing discrimination based on your family status or responsibilities. Be prepared to be specific, and have a concrete step in mind that you would like HR to take (such as to investigate your complaint, remove a disciplinary note from your file, or restore your vacation days). Remember that HR represents the company and what you tell HR will be repeated to your supervisor. The law prohibits your supervisor from retaliating against you for making a complaint, but it happens.
- **File a complaint.** If your company or union has a complaint or grievance procedure, use it if the above steps have not helped.
- **Get help.** If you think you are facing FRD, contact legal experts who can help you assess your situation. Helpful sources of assistance include state and local human rights commissions and the Center for WorkLife Law's free legal hotline (hotline@worklifelaw.org and 415-703-8276). In addition, many lawyers provide free or low-cost initial consultations and most local bar associations offer lawyer referral services. Employees are not required to have a lawyer to file discrimination complaints with state or local agencies, although it is highly advisable.

Employees in jurisdictions without FRD laws can take these same steps and should talk to legal experts about whether they can use the patchwork of federal laws for protection. They can also advocate for the passage of FRD laws for their jurisdiction.

What Advocates Can Do

Advocates can raise public awareness of FRD and of the need for more FRD laws. In addition to providing recourse for employees who have experienced discrimination, FRD laws provide clarity to employers about their legal obligations, reduce the need for litigation, and keep families and communities strong.

Passage of more comprehensive legislation explicitly prohibiting FRD is vital. The first steps toward a federal FRD law have been taken during the pandemic. On June 3, 2020, Senator Cory Booker introduced the “Protecting Family Caregivers from Discrimination Act of 2020.”⁴⁵ If enacted, the bill would prohibit FRD nationwide. It would apply to almost all employers and employees, define “family” broadly to include all family relationships created by blood, marriage, adoption, or close relationship, and permit an employee to file a charge of discrimination with the EEOC or to sue their employer directly in court. Advocates can work to create public awareness of the bill and work for its passage.

Advocates can also work to pass state FRD laws. Several states have so many local jurisdictions with FRD laws that they may be more likely to pass a state law. These include Florida, Illinois, Michigan, Ohio, Oregon and Pennsylvania.

Existing laws can be improved. States that have limited protections that do not protect all family caregivers from discrimination – Alaska, Delaware, Minnesota, and New York – might consider broadening their definitions of the type of caregiving protected. Connecticut’s protection is limited to prohibiting employer inquiries about family responsibilities and might be expanded to include all types of discrimination.

The 52 local jurisdictions that have not defined “family” can do so, and definitions of “familial status” in many local laws can be expanded to include all

caregivers. In addition, state and local laws can be expanded to include employers who contract with the government in the same manner as some existing laws (such as those in Mission and Westwood Hills in Kansas and Lansing, Michigan).

Advocates can work for passage of FRD laws in local jurisdictions that do not have them. A good place to start may be with jurisdictions that have statements of policies or purpose that decry FRD or promise equality based on family status but that do not have laws regarding it with respect to employment (such as Michigan, New Hampshire, New Jersey, Pennsylvania, Dubuque, Iowa, and Somerville, Massachusetts). Other jurisdictions that may be ready to adopt an FRD law are those that have laws prohibiting familial status discrimination in housing, but not in employment (such as Covington, Kentucky, Helena, Montana, and Lincoln County, Nevada) and those that prohibit FRD for government but not private employees (such as New Jersey, Wisconsin, Topeka, Kansas, and Annapolis, Maryland).

The Center for WorkLife Law has created a model law, which is available on its website.⁴⁶

Endnotes

1. These descriptions are from employees who have called WorkLife Law's Covid-19 Helpline between June and September 2020, and are used with the employees' permission.
2. Bureau of Labor Statistics, Employment status of the population by sex, marital status, and presence and age of own children under 18, 2018-2019 annual averages (Table 5), <https://www.bls.gov/news.release/fameet05.htm>.
3. National Alliance for Caregiving and AARP, *Caregiving in the U.S. 2020* at 4, https://www.caregiving.org/wp-content/uploads/2020/06/AARP1316_RPT_CaregivingintheUS_WEB.pdf; AARP Public Policy Institute, *Valuing the Invaluable: 2019 Update*, <https://www.aarp.org/content/dam/aarp/ppi/2019/11/valuing-the-invaluable-2019-update-charting-a-path-forward.doi10.26419-2Fppi.00082.001.pdf>.
4. *Id.* at 7.
5. Cynthia Thomas Calvert, *Caregivers in the Workplace: Family Responsibilities Discrimination Litigation Update 2016* (WorkLife Law 2016), <https://worklifelaw.org/publications/Caregivers-in-the-Workplace-FRD-update-2016.pdf>.
6. ALASKA STAT. ANN. § 18.80.220.
7. 19 DEL. CODE § 711(k)(1)(a).
8. 19 DEL. CODE § 710(9).
9. MINN. STAT. § 363A.08.
10. MINN. STAT. § 363A.08 subd. 18.
11. N.Y. EXEC. LAW § 296.
12. N.Y. EXEC. LAW § 292(26).
13. CONN. GEN. STAT. § 46a-60(9).
14. N.J.A.C. 4A:7-3.1.
15. Division of Personnel Management, Wisconsin Human Resources Handbook, chapter 440 (July 2020), https://dpm.wi.gov/Hand%20Book%20Chapters/WHRH_Ch_440.pdf.
16. 42 U.S.C. § 3602(k) (“‘Familial status’ means one or more individuals (who have not attained the age of 18 years) being domiciled with— (1) a parent or another person having legal custody of such individual or individuals; or (2) the designee of such parent or other person having such custody, with the written permission of such parent or other person. The protections afforded against discrimination on the basis of familial status shall apply to any person who is pregnant or is in the process of securing legal custody of any individual who has not attained the age of 18 years.”).
17. *E.g.*, ADRIAN, MICH. CODE OF ORDINANCES § 38-82.
18. *E.g.*, CHAMPAIGN, ILL., CODE OF ORDINANCES § 17-3(15); MONTGOMERY COUNTY, MD. CODE OF ORDINANCES § 27-6.
19. D.C. CODE ANN. § 2-1402.11.
20. D.C. CODE ANN. § 2-1401.02(12).
21. 19 DEL. CODE § 710(9).
22. CODE OF ORDINANCES OF THE BOROUGH OF STATE COLLEGE, PA., CODE § 5-903.
23. SAN FRANCISCO ADMINISTRATIVE CODE §12Z.7.
24. N.Y.C. ADMIN. CODE § 8-107.
25. *E.g.*, MONROE COUNTY, FLA., CODE OF ORDINANCES § 14-41; ADRIAN, MICHIGAN CODE OF ORDINANCES § 38-85.
26. *E.g.*, EAST ORANGE, NJ CODE OF ORDINANCES § 60-126; GALENA, ALASKA CODE OF ORDINANCES § 2.50.020; BUCKEYE, ARIZ. CODE OF ORDINANCES § 3-3-2.
27. *E.g.*, MILWAUKEE, WIS. CODE OF ORDINANCES § 109-9; COOK CNTY., ILL. CODE OF ORDINANCES § 42-35; CODE OF THE CITY OF DUNWOODY, GA. § 24-192.
28. *E.g.*, BANGOR, MAINE CODE OF ORDINANCES § 195-3(F); SPRINGFIELD, OR. MUNICIPAL CODE § 5.554.
29. *E.g.*, MISSION, KAN. CODE OF ORDINANCES § 615.010; ANN ARBOR, MICH. CODE OF ORDINANCES § 9:158.
30. *E.g.*, ALBION, MICH. CODE OF ORDINANCES § 54-26; RACINE, WIS. MUNICIPAL CODE § 62-27.
31. *E.g.*, CEDAR RAPIDS, IOWA CODE OF ORDINANCES § 69.06; DETROIT, MICH. CODE OF ORDINANCES § 23-4-1.
32. UNION CHARTER TOWNSHIP, MICHIGAN CODE OF ORDINANCES §§ 154.002 – 003.
33. *E.g.*, THE PHILADELPHIA CODE § 9-1103(g); TUCSON, ARIZ. CODE OF ORDINANCES § 17-12(h).
34. *E.g.*, CODE OF ORDINANCES OF THE CITY OF GRINNELL, IOWA § 29-10; BRIDGEPORT, PENN. CODE OF ORDINANCES § 40-3(C).
35. *E.g.*, LANSING, MICH. CODE OF ORDINANCES § 297.16; ROCKVILLE, MD., CODE OF ORDINANCES § 11-77.
36. *E.g.*, ST. PAUL, MINN. CODE OF ORDINANCES § 183-202(5); CRESTED BUTTE, COLO. MUNICIPAL CODE § 10-11-60.

37. *E.g.*, BOROUGH OF KENNETT SQUARE, PENN. MUNICIPAL CODE § 2-67; D.C. CODE ANN. § 2-1403.16.
38. *E.g.*, Allyson Waller, *Woman Says She Was Fired Because Her Children Disrupted Her Work Calls*, The New York Times (July 8, 2020), <https://www.nytimes.com/2020/07/08/us/drisana-rios-lawsuit-hub-international.html>; Jaclyn Diaz, *Airline Sued by Fired Single Mom Over Coronavirus Family Leave*, Bloomberg Law (April 16, 2020), <https://news.bloomberglaw.com/daily-labor-report/airline-sued-by-fired-single-mom-over-coronavirus-family-leave>.
39. *E.g.*, Amanda Arnold, *SoulCycle Is Facing Accusations of 'Blatant Pregnancy Discrimination,'* New York Magazine (August 12, 2020), <https://www.thecut.com/2020/08/soulcycle-accused-of-blatant-pregnancy-discrimination.html>; FP COVID-19 Employment Litigation Tracker Reveals New York Is A Hotspot For Workplace Claims, Fisher Phillips (July 24, 2020), <https://www.fisherphillips.com/resources/alerts-fp-covid-19-employment-litigation-tracker-reveals-new-york>; Gina Hart, Esq., *Hunter Douglas fired immunocompromised employee during pandemic, suit says*, Thompson Reuters (July 6, 2020), <https://www.thomsonreuters.com/content/dam/ewp-m/documents/thomsonreuters/en/pdf/other/articles/hunter-douglas-fired-immunocompromised-employee-during-pandemic-suit-says.pdf>; Diane Marie O'Malley and Breana Burgos, *First Group of COVID-19 Cases Filed in California Federal and State Courts Includes Class and Individual Claims Brought on a Variety of Grounds*, JDSupra (June 4, 2020), <https://www.jdsupra.com/legalnews/first-group-of-covid-19-cases-filed-in-40536/>; Eric Bachman, *COVID-19 Layoff or Pretext for Age Discrimination?*, The National Law Review (May 5, 2020), <https://www.natlawreview.com/article/covid-19-layoff-or-pretext-age-discrimination>.
40. *E.g.*, Robert Iafolla, *Without Child Care, Back-to-Work Parents Have Few Legal Options*, Bloomberg Law (July 7, 2020), <https://news.bloomberglaw.com/daily-labor-report/without-child-care-back-to-work-parents-have-few-legal-options>; Erin Mulvaney, *'Motherhood Penalty' May Fuel Workplace Lawsuits in Pandemic*, Bloomberg Law (April 29, 2020), <https://news.bloomberglaw.com/daily-labor-report/motherhood-penalty-may-fuel-workplace-lawsuits-in-pandemic>; H.V. MacArthur, *Parental Discrimination: What Companies Should Be Considering During And After COVID-19*, Forbes (April 29, 2020), <https://www.forbes.com/sites/hvmacarthur/2020/04/29/parental-discrimination-what-are-the-legal-implications-companies-should-be-considering-during-and-after-covid-19/#5bac105f46e0>; David E. Gottlieb, *Childcare Accommodations and Legal Ramifications During COVID-19*, New York Law Journal (March 19, 2020), <https://www.law.com/newyorklawjournal/2020/03/19/childcare-accommodations-and-legal-ramifications-during-covid-19/>.
41. New York City Commission on Human Rights, *Covid-19 and Human Rights: Employment Protections* <https://www1.nyc.gov/site/cchr/media/covid19.page>
42. The Center for WorkLife Law, https://worklifelaw.org/publications/Model_Policy_for_Employers.pdf.
43. Cynthia Thomas Calvert, *A Simple and Obvious Fix for Caregiver Discrimination*, Workforce 21C (Nov. 19, 2015), <http://www.workforce21c.com/a-simple-and-obvious-fix-for-caregiver-discrimination/>.
44. Workforce 21C, <http://www.workforce21c.com/family-responsibilities-discrimination/>. EEOC, *Employer Best Practices for Workers with Caregiving Responsibilities* (last modified Jan. 19, 2011), <http://www.eeoc.gov/policy/docs/caregiver-best-practices.html>.
45. S-3878, 116th Cong. (2020), <https://www.booker.senate.gov/imo/media/doc/Family%20Caregiver%20Discrimination%20Act.pdf>.
46. The model law is available at <https://worklifelaw.org/get-help/state-local-frd-laws/>.

Appendix: Methodology

This report is based on searches of the laws of almost 12,000 state and local jurisdictions from all 50 states and the District of Columbia. The research was conducted between June 4 and October 15, 2019. The goal of the research was to cast a broad net across all states using several research sources to discover state and local laws that prohibit employment discrimination against some or all types of family caregivers.

A. Data Search

The selection of jurisdictions to research was not random, but rather was based on the availability of information, population size, and likelihood that a relevant law would exist.

Four methods were used to identify relevant state and local laws: review of laws previously identified by research conducted by the Center for WorkLife Law as prohibiting employment discrimination against caregivers; searches of online databases of state and local laws (LEXIS, Municode, American Legal Publishing, eCode360, Code Publishing Company, Sterling Codifiers, Quality Code Publishing, Franklin Legal Publishing); review of the laws of specific jurisdictions, such as the largest cities of each state; and general searches using Google. These methods were supplemented by several communications with local agencies that administer local laws and by searches for cases decided by courts and agencies.

Particular attention was paid to state laws and the laws of the five largest jurisdictions by population in each state. Searches for laws were less extensive in states that had passed laws limiting the ability of local jurisdictions to enact anti-discrimination legislation and in states that have a history of not ensuring equal employment opportunity.

B. Analysis and Reporting

Each relevant law was analyzed to determine the type of caregiving to which it applied, the employers subject to the law, the law's enforcement mechanism, and the law's effective date. All relevant laws were in effect as of 2019, but many did not include a readily identifiable effective date. The relevant laws were reported in a table (available at <https://worklifelaw.org/get-help/state-local-frd-laws/>.) and this report was written to present background information about the topic and the laws, along with context for understanding the laws and suggestions for future legislation.

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About the Author

Cynthia Thomas Calvert is an employment lawyer and a nationally recognized expert on family responsibilities discrimination, or “FRD.” She is the principal of [Workforce 21C](#), which helps employers manage employees who care for family members and pregnant employees. Cynthia is also the Senior Advisor to the Center for WorkLife Law. Her work at WLL includes research, a hotline for employees, and public education about the laws that protect pregnant workers and caregivers. She also advises plaintiffs’ lawyers about how to litigate FRD claims and employers’ lawyers about how to prevent FRD claims. Cynthia was the lead author of the legal treatise *FAMILY RESPONSIBILITIES DISCRIMINATION* published by Bloomberg Books in 2014 and 2016. She is a frequent presenter, is often quoted in the press, and writes extensively about women and caregivers in the workplace.



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