

Litigation or Clarification?

The Impact of Family Responsibilities Discrimination Laws

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About the Center for WorkLife Law

The Center for WorkLife Law is a research and advocacy organization that seeks to advance gender, racial, and class equity in employment and education. We collaborate with employees, employers, attorneys, and government officials to identify practical and legal solutions to work-family issues. More information about WorkLife Law can be found at worklifelaw.org.

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Summary of Key Research Findings

The number of employees in the U.S. workforce with family caregiving responsibilities has grown significantly in recent decades.¹ This trend is fueled by a sharp increase in eldercare and changing gender norms around who provides care.² In response, states around the country are considering adding “employees with family responsibilities” as a new class of workers protected from employment discrimination.

In response, four states and 191 local jurisdictions have passed laws protecting employees from family responsibilities discrimination.³ Employees covered by these laws can include mothers, fathers, pregnant and breastfeeding people, and individuals who care for elders or disabled family members. At the federal level, Senator Cory Booker introduced the Protecting Family Caregivers from Discrimination Act in 2020.⁴

This report explores one important legislative consideration: whether and to what extent family responsibilities discrimination laws increase litigation against employers.

Researchers at the Center for WorkLife Law at the University of California, Hastings Law conducted an in-depth review of lawsuits filed against businesses in the four states that have family responsibilities discrimination statutes – Alaska, Delaware, Minnesota, and New York – to determine the likelihood that a private employer will be sued.

Key Findings

- Researchers identified a total of 71 lawsuits filed against private employers over all four states, averaging one lawsuit per state per year.
- The annual likelihood a company will be sued under a family responsibilities discrimination law is essentially zero (0.001%). A business owner is over 5 times more likely to be struck by lightning in their lifetime.⁵
- Even in New York state, where there is a robust plaintiffs’ bar, only 1 out of every 42,278 businesses has been sued on average per year.
- The rates in the other states are significantly lower: Delaware and Alaska have each had only 2 lawsuits filed.

WorkLife Law’s data show that the passage of family responsibilities discrimination statutes does not meaningfully increase litigation rates. This may be because explicitly labeling the protected category of workers provides clarity that may help employers avoid litigation.

Background on Family Responsibilities Discrimination —————

Family responsibilities discrimination – also called caregiver discrimination – occurs when an employee with unpaid family caregiving responsibilities is terminated or suffers some other negative employment action due to discrimination instead of actual job performance.⁶ Caregiver bias often stems from assumptions about how caregivers will act (for example, that mothers will prioritize their children over work) or how they should act (for example, that fathers should not take time off to care for their kids). Most commonly, employers assume caregivers will not be committed to their jobs, and therefore are not valuable as employees. These assumptions affect personnel decisions, including who gets terminated, hired, furloughed, and promoted.

Family responsibilities discrimination affects employees of every income level, race, gender, and industry. Working mothers and pregnant people, though, are most likely to experience it, with low-wage earners and people of color disproportionately impacted.⁷ One study found mothers were 79% less likely to be recommended for hire, half as likely to be promoted, and offered an average of \$11,000 less in salary for the same position as similarly qualified non-mothers.⁸ The experience under COVID showed the steep economic costs when women are pushed out of the workplace because of caregiving.⁹

Family responsibilities discrimination has occurred more frequently over the past several decades as most working families have all adults in the paid workforce,¹⁰ men have taken on more family care responsibilities,¹¹ and the number of aging parents needing assistance has grown.¹² Today, over 1 in 5 Americans are caregivers for “an adult or child with special needs,” according to AARP and the National Alliance for Caregiving.¹³ When employers are not attuned to how bias against caregivers impacts personnel decisions, they face unnecessary attrition,¹⁴ diminished productivity,¹⁵ and lowered employee morale¹⁶ — all of which in turn harm the economy and community at large.¹⁷ In response, lawmakers at the state and federal levels are considering new legal protections for employees with family responsibilities.¹⁸

Existing Laws Prohibiting Family Responsibilities Discrimination

No federal law expressly prohibits discrimination on the basis of family responsibilities. However, Alaska, Delaware, Minnesota, New York, and over 190 local jurisdictions have enacted laws making it illegal to discriminate against an employee because they care for a child or other family member.¹⁹ Nearly 30% of the American workforce is covered by one of these laws.²⁰

In the absence of a national law explicitly prohibiting it, a collection of complicated legal theories has been increasingly relied on by employees facing discrimination at work due to family responsibilities:

- **The Americans with Disabilities Act** prohibits discrimination against employees because they are associated with a person who has a disability, such as disabled children, parents, and other family members needing care.
- **The Family and Medical Leave Act** prohibits retaliation against employees who take job-protected leave to care for seriously ill family members.
- **Title VII of the Civil Rights Act** prohibits sex discrimination, which can include adverse employment decisions that rely on gender-based stereotypes about how family caregivers will behave, i.e., stereotypes about the roles mothers and fathers play at work and home.
- **The Employee Retirement Income Security Act** prohibits employers from interfering with certain employer-provided health benefits, which can include negative employment actions taken because an employee's disabled family member will use the benefits.

This complex web of federal laws, and their state-level equivalents, already prohibit discrimination against family caregivers under many commonly arising circumstances.

Litigation Data

WorkLife Law researchers conducted comprehensive searches to identify cases brought under the four state laws²¹ expressly prohibiting family responsibilities discrimination. Researchers reviewed all complaints and court orders available in Westlaw, Lexis, and Bloomberg Law through 2020 to ensure as many lawsuits as possible were identified.

Researchers identified a total of 71 lawsuits filed against private businesses through the end of 2020. The lawsuits identified by WorkLife Law researchers almost universally also included claims under other employment laws, suggesting plaintiffs could have filed a lawsuit even in the absence of the express family responsibilities discrimination statute.

Lawsuits Brought Under Privately Enforceable Family Responsibilities Discrimination Laws (1975-2016)

	Total lawsuits filed against private employers	Average number of Lawsuits Filed Per Year
All States	71	1.13
Alaska (1975)	2	0.04
Delaware (2016)	2	0.40
Minnesota (2014)	8	1.14
New York (2016)	59	11.80

We can also determine the likelihood that any *individual business* will face a lawsuit in a given year. Based on an analysis from the Kaiser Family Foundation reporting the number of private employers operating in each state,²² WorkLife Law researchers calculated the annual rate at which private businesses were sued under these laws.

Lawsuits Brought Under Privately Enforceable Family Responsibilities Discrimination Laws Against Private Employers (1975-2016)

	Number of Private Employers	Annual Rate of FRD Lawsuits	Annual Likelihood for an Individual Employer
Alaska (1975)	19,742	1 out of every 454,060 employers	0.00022%
Delaware (2016)	23,840	1 out of every 59,599 employers	0.00168%
Minnesota (2014)	146,430	1 out of every 128,126 employers	0.00078%
New York (2016)	498,888	1 out of every 42,279 employers	0.00237%
Average²³ Based on all FRD States		1 out of every 79,365 employers sued	0.00126%

Analysis

These data demonstrate how rare it has been for employers of any size to face lawsuits under a privately enforceable family responsibilities discrimination statute. The annual likelihood an individual business will be sued is 0.001%. A business owner is over 5 times more likely to be struck by lightning in their lifetime.²⁴ Even in New York state, where there is a robust plaintiffs' bar, only 1 out of every 42,279 businesses per year has been sued on average per year since the New York law was enacted in 2016. The odds are significantly lower in other states. Alaska and Delaware each had only 2 lawsuits since their FRD laws were enacted.

At the same time, employees in other states are using the complex web of federal and state laws related to family and medical leave and discrimination (ADA, FMLA, Title VII, ERISA) to sue employers for negative employment actions taken against family caregivers. Unfortunately, employers often misunderstand their obligations under the complicated existing framework and can be caught off guard that their actions are illegal. Managers and HR professionals are not on the lookout for discrimination based on family responsibilities in the same way they are, for example, with discrimination based on race or religion.²⁵

Laws explicitly prohibiting family responsibilities discrimination, like those studied in this report, may address this challenge by clearly labeling the prohibited activity. They eliminate existing ambiguities and provide clarity to employers that family responsibilities discrimination is illegal. Litigation may be *avoided* due to training and increased awareness on the part of employers and the attorneys that represent them.

Business groups have reached this conclusion in the analogous context of pregnancy discrimination. Current federal law does not expressly require accommodation of pregnancy-related conditions, but employers that do not provide reasonable accommodations to pregnant workers who need them may be sued under a complex patchwork of federal and state laws, including Title VII and the ADA. The U.S. Chamber of Commerce²⁶ and leading private-sector employers²⁷ support a federal bill mandating accommodations based on their understanding that employers are already facing lawsuits and would benefit from clarity on their obligations. The U.S. Chamber Executive Vice President and Chief Policy Officer observed,

“By establishing clear guidelines and balancing the needs of workers and employers, this legislation will allow businesses to keep valued employees in the workplace, help ensure healthy pregnancies, and **remove legal ambiguities that have led to litigation.**”²⁸

The litigation data provided by this report suggests that the same principle may apply in the family responsibilities context. When employers have clear standards to meet, as in the four states with laws currently prohibiting family responsibilities discrimination, litigation has been exceedingly rare. The data presented in this study show that privately enforceable Family Responsibilities Discrimination state laws can encourage employer compliance without a significant increase in litigation.

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