

THE SILVER TSUNAMI: EMPLOYMENT LAW REFORM TO PROTECT FAMILY CAREGIVERS OF THE AGING POPULATION

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The imminent aging of the “baby boom” generation will magnify the need for eldercare, much of which will come from family members who also work outside the home. Current laws are inadequate to protect many working family caregivers from family responsibilities discrimination (FRD): the unfair treatment of workers with family caregiving responsibilities. When FRD causes caregivers to leave the workplace, there can be financial penalties for both the caregivers—especially women—and their employers. This Essay proposes that states can resolve these issues by adding family caregivers as a protected class to state antidiscrimination laws and provides examples of such legislative efforts.

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INTRODUCTION

As the United States population ages, with those over eighty-five years old the most rapidly-growing segment,¹ working family members will increasingly be called upon to provide care for elder relatives.² Conflicts inherent in such dual roles may lead to family responsibilities discrimination (FRD)—the unfair treatment of workers with family caregiving responsibilities³—as employees strive to meet both the expectations of their employers and the needs of aging parents, grandparents, spouses, and spousal family members. Current workplace and public policies do not adequately protect workers from this form of discrimination.⁴

The need for eldercare will intensify in the coming years. Researchers project that the number of Americans age sixty-five and older will more than double by 2060 from 46,000,000 to over 98,000,000.⁵ Sixty-nine percent of those people will need help with daily living.⁶ For three-quarters of them, the assistance they require will come from family members,⁷ “primarily from

¹ John W. Rowe et al., *Preparing for Better Health and Health Care for an Aging Population*, in VITAL DIRECTIONS FOR HEALTH AND HEALTH CARE 97, 97 (Victor J. Dzau et al., Nat'l Acad. of Med. eds., 2017), <https://nam.edu/wp-content/uploads/2018/02/Vital-Directions-for-Health-and-Health-Care-Final-Publication-022718.pdf>; see also JENNIFER M. ORTMAN ET AL., U.S. CENSUS BUREAU, AN AGING NATION: THE OLDER POPULATION IN THE UNITED STATES 6 (2014), <https://www.census.gov/prod/2014pubs/p25-1140.pdf> (reporting that the number of people aged eighty-five and over is projected to grow from 5,900,000 in 2012 to 8,900,000 in 2030 and 18,000,000 in 2050, the fastest projected growth rate of any age group through 2050).

² U.S. DEP'T OF LABOR, NAVIGATING THE DEMANDS OF WORK AND ELDERCARE 8 (2016), <https://www.dol.gov/sites/default/files/NavigatingTheDemandsOfWorkAndEldercare.pdf> (finding that the responsibility to care for the aging baby boom generation “will fall largely on the shoulders of their children, grandchildren, spouses, friends, neighbors, and other loved ones, many of whom are also working and may be supporting families of their own”).

³ JOAN C. WILLIAMS ET AL., AARP PUB. POLICY INST., INSIGHT ON THE ISSUES NO. 68, PROTECTING FAMILY CAREGIVERS FROM EMPLOYMENT DISCRIMINATION 1 (2012), http://www.aarp.org/content/dam/aarp/research/public_policy_institute/health/protecting-caregivers-employment-discrimination-insight-AARP-ppi-ltc.pdf (“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.”).

⁴ See, e.g., U.S. DEP'T OF LABOR, *supra* note 2 (discussing the package of policies that would prevent FRD but which are not required in most workplaces or jurisdictions).

⁵ Mark Mather et al., *Aging in the United States*, 70 POPULATION BULL., no. 2, Dec. 2015, at 1, 2–3 & fig.1, <https://www.prb.org/wp-content/uploads/2016/01/aging-us-population-bulletin-1.pdf>.

⁶ Sean Fahle & Kathleen McGarry, *Women Working Longer: Labor Market Implications of Providing Family Care*, in WOMEN WORKING LONGER: INCREASED EMPLOYMENT AT OLDER AGES 157, 159 & n.1 (Claudia Goldin & Lawrence F. Katz eds., 2018) (“The activities of daily living (ADLs) include basic tasks such as bathing, eating, dressing, and toileting.”).

⁷ See *Caregiving*, FAMILY CAREGIVER ALL., <https://www.caregiver.org/caregiving> (last visited May 22, 2018) (defining family caregiving as unpaid, “informal” care for adult family members with chronic illnesses or conditions that prevent them from performing activities of daily living).

wives and daughters”⁸: sixty percent of family caregivers are women.⁹

Because the majority of family caregivers also work, with over half working full time,¹⁰ they are frequently strained by the twofold demands of their employers and their family members.¹¹ In a recent study, six in ten working caregivers reported “having to make a workplace accommodation as a result of caregiving, such as cutting back on their working hours” or “taking a leave of absence.”¹² When employers deny leave, or retaliate for taking leave, employees experience discrimination based on their family responsibilities.¹³ Yet, “[w]ith very few exceptions, most federal and state statutes do not expressly prohibit FRD,”¹⁴ forcing plaintiffs to file claims under other antidiscrimination theories such as sex discrimination or association with a person with a disability, or to claim violations of the Family and Medical Leave Act.¹⁵

Antidiscrimination theories based on factors other than family responsibilities may not fully address the circumstances of employees caring

⁸ Fahle & McGarry, *supra* note 6; *see also Women and Caregiving: Facts and Figures*, FAMILY CAREGIVER ALL., <https://www.caregiver.org/women-and-caregiving-facts-and-figures> (last updated Feb. 2015); *cf.* U.S. DEP’T. OF LABOR, *supra* note 2, at 11 (explaining that among working caregivers, women are more likely than working men to provide daily care, but men are more likely to have provided eldercare for at least ten years).

⁹ NAT’L ALL. FOR CAREGIVING & AARP PUB. POLICY INST., CAREGIVING IN THE U.S. 2015, at 6 (2015) [hereinafter CAREGIVING IN THE U.S. 2015], <http://www.aarp.org/content/dam/aarp/ppi/2015/caregiving-in-the-united-states-2015-report-revised.pdf>; *cf.* BUREAU OF LABOR STATISTICS, U.S. DEP’T OF LABOR, UNPAID ELDERCARE IN THE UNITED STATES—2015–2016 tbl.1 (Sept. 20, 2017), <https://www.bls.gov/news.release/pdf/elcare.pdf> (finding that 56% of eldercare providers are women).

¹⁰ CAREGIVING IN THE U.S. 2015, *supra* note 9, at 10.

¹¹ *See generally* LYNN FRISS FEINBERG, AARP PUB. POLICY INST., SPOTLIGHT NO. 19, THE DUAL PRESSURES OF FAMILY CAREGIVING AND EMPLOYMENT 2–4 (2016), <https://www.aarp.org/content/dam/aarp/ppi/2016-03/The-Dual-Pressures-off-Family-Caregiving-and-Employment.pdf>; U.S. DEP’T OF LABOR, *supra* note 2, at 8.

¹² CAREGIVING IN THE U.S. 2015, *supra* note 9, at 10–11.

¹³ WILLIAMS ET AL., *supra* note 3, at 4 (citing examples of employees denied leave because the employee’s other parent was still alive, or fired when the employee took leave to care for a dying parent or requested leave to care for a chronically ill parent).

¹⁴ *Id.* at 6; *see also* STEPHANIE BORNSTEIN & ROBERT J. RATHMELL, CTR. FOR WORKLIFE LAW, UNIV. OF CAL. HASTINGS COLL. OF LAW, CAREGIVERS AS A PROTECTED CLASS?: THE GROWTH OF STATE AND LOCAL LAWS PROHIBITING FAMILY RESPONSIBILITIES DISCRIMINATION 4 (2009), <http://worklifelaw.org/pubs/LocalFRDLawsReport.pdf> (“Existing federal statutory law does not explicitly prohibit employers from discriminating against employees based on family responsibilities, like it does based on sex, race, religion, disability, national origin, and age. . . . [And] all but a handful of state anti-discrimination laws do not expressly prohibit employment discrimination based on family responsibilities. . . .”).

¹⁵ BORNSTEIN & RATHMELL, *supra* note 14 (“Nevertheless, employees have successfully brought lawsuits for FRD using a variety of legal theories under existing federal law, including sex discrimination under Title VII of the Civil Rights Act, violations of the Family and Medical Leave Act, associational discrimination under the Americans with Disabilities Act . . . and violations of ERISA.”).

for older family members. For instance, a stroke or a broken bone from a fall may not necessarily be considered a disability *per se*, but it is nonetheless an urgent health crisis requiring immediate attention from the working family member.¹⁶ Sex discrimination provisions may not offer protection when male and female elder caregivers equally face the employer's resistance to accommodation. And many workers are ineligible for protections under the federal Family and Medical Leave Act due to limitations on its scope.¹⁷

In this Essay, I propose that the simplest and most effective way to shield elder caregiving employees from FRD is to add family caregivers as a protected class to existing state antidiscrimination statutes. In Part I, I will explore the obstacles that can be insurmountable for family caregivers when they try to fulfill both their workplace expectations and their family responsibilities. Part II will then show how existing federal, state, and local laws do not adequately address these concerns. Lastly, Part III will argue in favor of AARP's recommendation that states fill the gaps left by current laws by adding family caregivers as a protected class to their existing antidiscrimination laws.

I

FAMILY CAREGIVING AND WORK

A. *The Modern Workplace*

Many workplace expectations of employees are based on a 1950s' breadwinner-homemaker model that assumes someone is at home to care for family members.¹⁸ Times have changed: While only 34% of women worked outside the home in 1950, 57% participated in the labor force in 2014,¹⁹ and the "average" family caregiver today is a forty-nine-year-old employed woman.²⁰ The percentage of women aged fifty-five and older who participate

¹⁶ 42 U.S.C. § 12102(1)(A) (2012) (defining "disability" as "a physical or mental impairment that substantially limits one or more major life activities," which may not necessarily include an injury or health event from which the patient can recover).

¹⁷ Family and Medical Leave Act of 1993, 29 U.S.C. § 2611(2) (2012). To be eligible, an employee must have been employed for at least twelve months and 1250 hours of service during the previous twelve months at a site employing at least fifty employees. *Id.* This only covers about half of the workforce. WILLIAMS ET AL., *supra* note 3, at 8.

¹⁸ See WILLIAMS ET AL., *supra* note 3, at 6; Anne-Marie Slaughter, Opinion, *A Toxic Work World*, N.Y. TIMES (Sept. 18, 2015), <https://www.nytimes.com/2015/09/20/opinion/sunday/a-toxic-work-world.html> (problematizing the "workplace designed for the 'Mad Men' era, for 'Leave It to Beaver' families in which one partner does all the work of earning an income and the other partner does all the work of turning that income into care" which "do not fit the realities of our lives").

¹⁹ *Women's Labor Force Participation*, STATUS OF WOMEN IN THE STATES, <https://statusofwomendata.org/earnings-and-the-gender-wage-gap/womens-labor-force-participation> (last visited May 24, 2018).

²⁰ WILLIAMS ET AL., *supra* note 3, at 2; see also CAREGIVING IN THE U.S. 2015, *supra* note 9,

in the labor force has grown especially quickly in recent years: 26% of such women were in the workforce in 2000, rising to nearly 35% in 2014.²¹ Labor force participation of women ages fifty-five to sixty-four is projected to expand from 58% in 2016 to 63% by 2024, and from 74% to 77% for women ages forty-five to fifty-four.²² Meanwhile, the so-called “baby boomers” began turning sixty-five in 2011, with 43,000,000 estimated to have reached that age by 2012.²³ That number is predicted to rise swiftly to 55,000,000 by 2020 and 72,000,000 by 2030.²⁴ As the silver tsunami swells in the coming years, the pool of available family caregivers who remain outside the workforce is projected to simultaneously shrink. The impending clash between women’s increasing participation in the labor force and a rapidly-aging population of baby boomers will affect both families and workplaces.

Already, the double responsibilities of caregiving and work pose challenges for employees,²⁵ particularly women.²⁶ In one study, more than half of the caregivers reported that their caregiving had an adverse effect on their careers.²⁷ Twenty-six percent of them claimed that they had missed career opportunities, 52% reported reducing their hours, 55% left their jobs, and 11% asserted that they were terminated as a result of their long-term caregiving situation.²⁸ Unsurprisingly, figures for terminations and attendance warnings are higher among higher-hour caregivers.²⁹ Additionally, “research shows that workers who make their caregiving responsibilities known on the job, for example by requesting family leave or a flexible work schedule, often encounter bias based on assumptions that they are less competent than other workers or not committed to their jobs.”³⁰

at 6, 10.

²¹ *Women’s Labor Force Participation*, *supra* note 19.

²² *Labor Force Participation Rate by Age and Sex*, U.S. DEP’T OF LAB.: WOMEN’S BUREAU, https://www.dol.gov/wb/stats/NEWSTATS/latest/Lf_age_sex_2016_txt.htm (last visited May 24, 2018).

²³ ORTMAN ET AL., *supra* note 1.

²⁴ *Id.*

²⁵ *See generally* FEINBERG, *supra* note 11.

²⁶ Yeonjung Lee & Fengyan Tang, *More Caregiving, Less Working: Caregiving Roles and Gender Difference*, 34 J. APPLIED GERONTOLOGY 465, 478 (2015) (“[W]omen still handle the major burden of care, that is, personal needs such as bathing, toileting, and dressing.”); *see also* U.S. DEP’T OF LABOR, *supra* note 2, at 11 (noting that women are more likely than working men to provide daily care, provide more hours of care, and provide more demanding hands-on care).

²⁷ GENWORTH FIN., INC., THE EXPANDING CIRCLE OF CARE: BEYOND DOLLARS 2015 EXECUTIVE SUMMARY 10 (2016), <https://www.princeton.edu/hr/benefits/pdf/genworthbeyonddollars.pdf>.

²⁸ *Id.* at 9–10.

²⁹ FEINBERG, *supra* note 11, at 4 (“Higher-hour caregivers are more likely than lower-hour caregivers to say they have been fired from their job due to their caregiving responsibilities (4 percent v. 2 percent), or given a warning about performance or attendance (11 percent v. 5 percent).”).

³⁰ WILLIAMS ET AL., *supra* note 3, at 6. An example of this type of bias is the case of Jonathan Bell, who requested intermittent leave under the FMLA after doctors found an aneurism in Bell’s

B. Financial Vulnerability for Female Caregivers

Caregiving may create significant financial consequences for workers³¹ since they may be forced to reduce their hours, or even to leave the workforce entirely.³² This pressure disproportionately affects women,³³ as studies indicate that caregiving responsibilities are more likely to affect women's participation in the labor force.³⁴ One reason for this may be that female elder caregivers are more likely to provide time-consuming hands-on care, while male caregivers manage tasks such as home maintenance, which require fewer hours.³⁵

Women who reduce their hours on the job or their years in the workforce make fewer contributions to pensions, Social Security, and other retirement savings vehicles.³⁶ According to one study, women who provide care to an elderly parent reduce their hours of work by approximately 40%,³⁷ and “increasingly, working women over 50 are leaving their jobs” to care for family members.³⁸ Leaving the workforce to care for a family member creates distinct financial risks for these women because age discrimination often bars them from jobs when they later wish to return to work and resume making an income.³⁹ Creating laws that protect working caregivers could make it possible for female caregivers to remain in their existing jobs and

father and recommended an immediate operation. Already in poor health, the senior Bell quickly declined, requiring his son to consult frequently with the doctors and spend time at the hospital. Bell's manager decided two weeks later to terminate him, based on a belief that Bell's work attitude was lackadaisical. Bell's father died just six days later. *Bell v. Prefix, Inc.*, 321 F. App'x. 423, 424–26 (6th Cir. 2009).

³¹ U.S. DEP'T OF LABOR, *supra* note 2, at 20–21.

³² *Id.* at 14, 20.

³³ *Id.* at 8, 20.

³⁴ Lee & Tang, *supra* note 26, at 468 (“Although the number of male caregivers is increasing recently, given that family caregivers are predominantly women, caregiving responsibilities are more likely to affect women's labor force participation.” (citing Miriam J. Hirschfeld & Daniel Wikler, *An Ethics Perspective on Family Caregiving Worldwide: Justice and Society's Obligations*, 27 GENERATIONS, no. 4, Winter 2003–2004, at 56)).

³⁵ U.S. DEP'T OF LABOR, *supra* note 2, at 11.

³⁶ *Women and Caregiving: Facts and Figures*, *supra* note 8.

³⁷ Fahle & McGarry, *supra* note 6, at 160 (citing Richard W. Johnson & Anthony T. Lo Sasso, *The Impact of Eldercare on Women's Labor Supply*, 43 INQUIRY 195, 204 (2006)).

³⁸ John Schall, *Caregiving Is Forcing Women 50+ to Leave the Workforce*, NEXTAVENUE (Oct. 10, 2016), <http://www.nextavenue.org/caregiving-forcing-women-50-leave-workforce/>.

³⁹ See, e.g., AARP, STAYING AHEAD OF THE CURVE 2013: AARP MULTICULTURAL WORK AND CAREER STUDY PERCEPTIONS OF AGE DISCRIMINATION IN THE WORKPLACE—AGES 45–74, at 2 (2014), http://www.aarp.org/content/dam/aarp/research/surveys_statistics/econ/2013/Staying-Ahead-of-the-Curve-Age-Discrimination.pdf (finding that nearly one in five older workers indicated that they were not hired for a job because of their age); Henry S. Farber et al., *Factors Determining Callbacks to Job Applications by the Unemployed: An Audit Study 5* (Nat'l Bureau of Econ. Research, Working Paper No. 21689, 2015), <http://www.nber.org/papers/w21689.pdf> (finding that workers in their fifties were “significantly less likely to receive a callback than workers in their thirties and forties”).

achieve financial security.

There is evidence that becoming a caregiver in midlife “may substantially increase women’s risk of living in poverty in old age.”⁴⁰ Women are more likely than men to leave the workforce early for caregiving responsibilities,⁴¹ and the impact of lost wages and Social Security benefits on the median woman is estimated to be \$274,044, compared to \$233,716 for a man.⁴² This disparity may be one reason that women aged sixty-five and over are 30% more likely than men to live in poverty,⁴³ especially since women caregivers who stop working have 4.7 times the risk of living in poverty versus non-caregivers who stop working, and a 73% greater likelihood of receiving public assistance.⁴⁴

C. *The Impact on Business*

The sacrifice of employment for caregiving penalizes not only workers, but also employers. A recent meta-analysis indicates that it costs businesses about 20% of an employee’s annual salary to replace that employee.⁴⁵ Although replacement costs vary widely depending upon the status of the

⁴⁰ LYNN FEINBERG & RITA CHOULA, AARP PUB. POLICY INST., FACT SHEET NO. 271, UNDERSTANDING THE IMPACT OF FAMILY CAREGIVING ON WORK 2 (2012), http://www.aarp.org/content/dam/aarp/research/public_policy_institute/ltc/2012/understanding-impact-family-caregiving-work-AARP-ppi-ltc.pdf.

⁴¹ Amanda Hess, *Women Are More Likely to Care for Aging Parents—and Drop Out of the Workforce to Do It*, SLATE: XX FACTOR (Nov. 21, 2013, 3:06 PM) (citing Lee & Tang, *supra* note 26), http://www.slate.com/blogs/xx_factor/2013/11/21/elder_caregiving_women_are_more_likely_to_drop_out_of_work_to_care_for_aging.html.

⁴² METLIFE MATURE MKT. INST., THE METLIFE STUDY OF CAREGIVING COSTS TO WORKING CAREGIVERS: DOUBLE JEOPARDY FOR BABY BOOMERS CARING FOR THEIR PARENTS 14 (2011), <http://www.caregiving.org/wp-content/uploads/2011/06/mmi-caregiving-costs-working-caregivers.pdf> (calculating the impact on current and future wages and Social Security benefits of both reduced hours and, in the case of the statistics reported above, labor force exit, based on a national sample of 1112 men and women).

⁴³ BERNADETTE D. PROCTOR ET AL., U.S. CENSUS BUREAU, INCOME AND POVERTY IN THE UNITED STATES: 2015, at 15 (2016), <https://www.census.gov/content/dam/Census/library/publications/2016/demo/p60-256.pdf> (“The poverty rate for women aged 65 and older was 10.3 percent while the poverty rate for men aged 65 and older was 7.0 percent.”).

⁴⁴ Chizuko Wakabayashi & Katharine M. Donato, *Does Caregiving Increase Poverty Among Women in Later Life? Evidence from the Health and Retirement Survey*, 47 J. HEALTH & SOC. BEHAV. 258, 266 (2006).

⁴⁵ HEATHER BOUSHEY & SARAH JANE GLYNN, CTR. FOR AM. PROGRESS, THERE ARE SIGNIFICANT BUSINESS COSTS TO REPLACING EMPLOYEES 1–2, 4–6, 6–8 tbl.1 (2012), <https://cdn.americanprogress.org/wp-content/uploads/2012/11/16084443/CostofTurnover0815.pdf> (noting that in addition to measurable direct costs—such as severance pay, overtime for other staff or temporary staffing, interview costs, and training costs—businesses also experience indirect costs such as lost productivity, reduced morale, lost clients, and lost institutional knowledge, which are harder to measure and thus suggest that this study’s estimate is conservative).

worker and the size of the company, one study calculates that it costs American businesses \$1.5 billion annually to replace women who leave the workplace as a result of caregiving responsibilities and \$1.2 billion to replace men.⁴⁶

The lack of legal protections for family caregivers leaves many workers vulnerable to discriminatory practices, and allows businesses to remain oblivious to how eldercare affects their employees.⁴⁷ Stronger antidiscrimination laws could encourage businesses to create flexible workplace policies, which have been shown to “enhance employee productivity, reduce absenteeism, reduce costs, and appear to positively affect profits.”⁴⁸ Such flexible policies would also help retain talented and knowledgeable workers, saving businesses the time and expense of recruiting, selecting, and training new employees.⁴⁹

II

CURRENT FRD PROTECTIONS

As the pressure on family members to balance work and caregiving has increased, so have discrimination claims involving eldercare. An analysis of 204 such cases found that only twenty-three were filed before 2000, but 181 were filed between 2000 and 2009.⁵⁰ Even so, current federal statutory law does not explicitly prohibit employers from discriminating against employees based on family caregiver status.⁵¹

Instead, workers must file claims under other legal theories such as sex discrimination, discrimination based on association with a person with a disability, or a violation of family and medical leave laws.⁵² Support from the legal system could help working caregivers maintain both their

⁴⁶ METLIFE MATURE MKT. INST. & NAT’L ALL. FOR CAREGIVING, THE METLIFE CAREGIVING COST STUDY: PRODUCTIVITY LOSSES TO U.S. BUSINESS 6 (2006), <http://www.caregiving.org/data/Caregiver%20Cost%20Study.pdf> (finding that although women are more likely than men to be caregivers, male caregivers were just as likely to retire early as a result of caregiving responsibilities). The MetLife study used a higher baseline of 50% of worker salary to estimate costs, versus the Center for American Progress (CAP) meta-analysis. Even if the CAP figure is accurate, the MetLife methodology would still point to greater than \$1 billion in total losses per year. *Id.*

⁴⁷ WILLIAMS ET AL., *supra* note 3, at 12.

⁴⁸ *Employer Best Practices for Workers with Caregiving Responsibilities*, U.S. EQUAL EMP’T OPPORTUNITY COMM’N (2011), <https://www.eeoc.gov/policy/docs/caregiver-best-practices.html> (citations omitted).

⁴⁹ *Id.*

⁵⁰ CYNTHIA THOMAS CALVERT, FAMILY RESPONSIBILITIES DISCRIMINATION: LITIGATION UPDATE 2010, at 16 (2010), <http://worklifelaw.org/pubs/FRDupdate.pdf> (“Most elder care claims are brought under the Family and Medical Leave Act and similar state laws, and employees have also made claims for infliction of emotional distress, wrongful discharge, and discrimination based on association with a disabled person.”).

⁵¹ BORNSTEIN & RATHMELL, *supra* note 14; CALVERT, *supra* note 50, at 11.

⁵² BORNSTEIN & RATHMELL, *supra* note 14.

caregiving roles and their jobs.⁵³ While most claims are based on current federal and state family and medical leave laws, these laws are insufficient to cover the full range of workplace situations.

A. *The Federal Family and Medical Leave Act*

Although the federal Family and Medical Leave Act (FMLA) helps many caregivers by allowing them to take a total of twelve weeks' leave within a twelve-month period to care for a family member with a serious medical condition,⁵⁴ this law only protects about half of the workforce.⁵⁵ For example, employees must work for an employer with at least fifty employees at that site to be eligible for FMLA protections.⁵⁶ Eligibility also requires the employee to have worked at that company for at least twelve months and for at least 1250 hours of service during the previous twelve-month period (an average of twenty-five hours per week for a year).⁵⁷ Furthermore, the FMLA offers no protections for those caregivers “who need accommodations other than leave, such as reduced or flexible schedules, or . . . [the opportunity] to communicate during the workday with a parent’s health care provider.”⁵⁸

B. *State Laws*

1. *State Family and Medical Leave Laws*

As of 2017, only a few states guaranteed greater family and medical leave protection to private-sector employees than that offered by the FMLA.⁵⁹ Maine,⁶⁰ Maryland,⁶¹ and Vermont⁶² extend family and medical leave to work sites with as few as fifteen employees; Oregon grants it to

⁵³ See *id.* at 1–3 (analyzing state and local laws prohibiting FRD).

⁵⁴ Family and Medical Leave Act of 1993, 29 U.S.C. § 2612(a)(1)(C) (2012).

⁵⁵ WILLIAMS ET AL., *supra* note 3, at 8.

⁵⁶ 29 U.S.C. § 2611(2)(B)(ii).

⁵⁷ *Id.* § 2611(2)(A).

⁵⁸ WILLIAMS ET AL., *supra* note 3, at 8.

⁵⁹ See generally THOMSON REUTERS, EMPLOYEE LEAVE AND DISABILITY: LEAVE TO CARE FOR FAMILY MEMBERS OR DEPENDENTS (STATUTES) (2017), Westlaw 0060 SURVEYS 5 (detailing state and federal provisions relating to employee leave to care for family members).

⁶⁰ ME. REV. STAT. ANN. tit. 26, § 844(1) (2017) (“Every employee who has been employed by the same employer for 12 consecutive months is entitled to up to 10 work weeks of family medical leave in any 2 years unless employed at a permanent work site with fewer than 15 employees.”).

⁶¹ MD. CODE ANN., LAB. & EMPL. § 3-802(b)(2) (LexisNexis 2016) (“This section applies to an employer that . . . employs 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year.”).

⁶² VT. STAT. ANN. tit. 21, § 471(1) (2016) (defining an employer, “for the purposes of family leave,” as an entity that “employs 15 or more individuals for an average of at least 30 hours per week during a year”).

those with at least twenty-five.⁶³

The remaining states protect only state employees or those with parental responsibilities. For example, Nevada allows state employees catastrophic leave for serious illness within the employee's "immediate family," but does not expressly define "immediate family."⁶⁴ Courts have defined the term as a matter of law to be only those family relationships within the first degree of consanguinity,⁶⁵ while spouses and in-laws are considered "related by blood or marriage."⁶⁶ A number of states have no leave statutes at all.⁶⁷

2. *Employee Sick Leave*

Another state approach to expanding family leave protections is to guarantee the use of sick leave to care for family members, including parents. The Illinois legislature has recently attempted to expand the availability of family and medical leave in its Employee Sick Leave Act,⁶⁸ but its new law falls short of fully granting the protections working caregivers need. Under the law, employees may use personal sick leave benefits provided by the employer to care for a family member's medical needs.⁶⁹ The law expressly includes parents, stepparents, and grandparents in the definition of family members.⁷⁰

While Illinois should be commended for acknowledging the need for workplaces to accommodate workers who provide family eldercare, the law permits employers to "limit the use of personal sick leave benefits" for such absences to those "that would be earned or accrued during 6 months at the employee's then current rate of employment."⁷¹ Unfortunately, there is no state law in Illinois that requires paid or unpaid sick leave for employees of private employers.⁷² Thus, the law leaves unprotected those family

⁶³ OR. REV. STAT. § 659A.153(1) (2017) ("The [family leave] requirements . . . apply only to employers who employ 25 or more persons in the State of Oregon for each working day during each of 20 or more calendar workweeks in the year in which the leave is to be taken or in the year immediately preceding . . .").

⁶⁴ NEV. REV. STAT. § 284.362(2) (2015) (defining "catastrophe" to mean, among other things, "[t]here is a serious illness, accident or motor vehicle crash . . . which will require a lengthy convalescence in the employee's immediate family . . .").

⁶⁵ *Grotts v. Zahner*, 989 P.2d 415, 416 & n.1 (Nev. 1999).

⁶⁶ *City of Las Vegas v. Eighth Judicial Dist. Court*, 188 P.3d 55, 58–59 (Nev. 2008) ("We conclude that, by its plain meaning, the term 'related by blood or marriage' includes the relationship between a sister-in-law and a brother-in-law.").

⁶⁷ THOMSON REUTERS, *supra* note 59 (at least Indiana, Iowa, Kansas, Michigan, New Mexico, and Wyoming have no provision that would qualify as a leave statute, and other states could potentially fall into that category depending on how that term is precisely defined).

⁶⁸ 820 ILL. COMP. STAT. 191/1 (West Supp. 2018).

⁶⁹ *Id.* 191/10(a).

⁷⁰ *Id.*

⁷¹ *Id.* 191/10(b).

⁷² *Illinois Sick Leave: What You Need to Know*, BLR, <http://www.blr.com/HR-Employment/Benefits-Leave/Sick-Leave-in-Illinois> (last visited May 27, 2018).

caregivers who are not entitled to sick leave, or whose earned sick leave is insufficient to cover their caregiving obligations.

Similar to Illinois, Minnesota expressly guarantees employees the right to use personal sick leave benefits to take care of parents and parents-in-law.⁷³ But, as in Illinois, Minnesota employers “are not required to provide personal sick leave benefits.”⁷⁴

3. *State Antidiscrimination Statutes*

While a few states’ antidiscrimination statutes include language related to family caregiving, these laws narrowly address parenting roles rather than broader family responsibilities. For instance, Alaska includes pregnancy and parenthood as protected classes in its state employment antidiscrimination law, but makes no reference to other caregiving roles.⁷⁵ Connecticut prohibits an employer from requesting or requiring information concerning an employee’s or prospective employee’s “child-bearing age or plans, pregnancy, function of the individual’s reproductive system, use of birth control methods, or the individual’s familial responsibilities.”⁷⁶ New Jersey prohibits discrimination and harassment in the context of public employment based on “familial status,”⁷⁷ with familial status similarly defined in terms of parenthood.⁷⁸ These state statutes are inadequate to protect workers responsible for the care of adult family members.

4. *Case Studies of Family Responsibilities Discrimination*

Antidiscrimination statutes must include language that specifically

⁷³ MINN. STAT. ANN. § 181.9413(a) (West 2018) (“An employee may use personal sick leave benefits provided by the employer for absences due to an illness of or injury to the employee’s . . . parent, mother-in-law, father-in-law, grandchild, grandparent, or stepparent . . .”).

⁷⁴ MINN. DEP’T OF LAB. & INDUS., A GUIDE TO MINNESOTA’S LAWS ABOUT SICK AND SAFE LEAVE, https://www.dli.mn.gov/sites/default/files/pdf/sick_leave.pdf.

⁷⁵ ALASKA STAT. § 18.80.220(1) (2016).

⁷⁶ CONN. GEN. STAT. ANN. § 46a-60(9) (West Supp. 2018). The term “familial responsibilities” is not defined within § 46a-60(9) of the Connecticut statutes. *Id.* However, § 46a-64b(5) defines “familial status” in this way: “‘Familial status’ means one or more individuals who have not attained the age of eighteen years being domiciled with a parent or another person having legal custody of such individual or individuals . . .” *Id.* § 46a-64b(5). Given the context of the surrounding language of § 46a-60(9), “familial responsibilities” appears narrowly intended to protect the parents of minors from discrimination. *See id.* § 46a-60(9).

⁷⁷ N.J. ADMIN. CODE § 4A:7-3.1(a) (2018).

⁷⁸ *See Dictionary of CSC Terms*, N.J. CIVIL SERV. COMM’N, <http://www.nj.gov/csc/about/about/terminology/definitions.html> (last visited May 27, 2018) (defining familial status as “[b]eing the natural parent of a child, the adoptive parent of a child, the foster parent of a child, having a ‘parent and child relationship’ with a child as defined by state law or having sole or joint legal or physical custody, care, guardianship, or visitation with a child” and extending it further to cover “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”).

protects workers who provide eldercare because employers may be less sympathetic to such workers' accommodation requests than to leave-of-absence requests for other reasons. A simple case study starkly illustrates this difference in treatment. The plaintiff in *Robinson v. T-Mobile*, Rachel Robinson, took an FMLA leave due to complications with her pregnancy, and the company promoted her upon her return.⁷⁹ Robinson received a different response the following year when she requested FMLA leave to care for her mother who had developed a brain tumor.⁸⁰ This time, her manager questioned the severity of her mother's illness, and pressed her to take only intermittent leave so that she could fulfill her work responsibilities.⁸¹ When her mother was released from the Intensive Care Unit, Robinson requested and received a complete leave of absence for ten days.⁸² She returned to work and told her manager that she wished to request additional leave because her mother would need further intensive care and she was her mother's only caregiver.⁸³

At this request, her manager replied that she was crossing a line in which she was choosing her personal life over her professional one.⁸⁴ He fired Robinson the next day, claiming that she had been delinquent and dishonest in fulfilling reporting requirements associated with her position.⁸⁵ The court held that there was sufficient evidence to deny T-Mobile's motion for summary judgment on her claim that the company interfered with her right to take FMLA leave,⁸⁶ and ultimately the parties settled.⁸⁷ However, this case highlights the special vulnerability of employees who care for elders—even when such workers qualify for FMLA leave.

Moreover, courts have been unwilling to construe broader family responsibilities language to encompass eldercare. For instance, the District of Columbia's Human Rights law prohibits employment discrimination for "family responsibilities,"⁸⁸ defined as "the state of being, or the potential to become, a contributor to the support of a person or persons in a dependent relationship."⁸⁹ In *Simpson v. District of Columbia Office of Human Rights*, the plaintiff used her employer's flex-time policy to change her work hours to 9:30–6:30—an hour later than her original workday—to enable her to care

⁷⁹ *Robinson v. T-Mobile, USA, Inc.*, 663 F. Supp. 2d 604, 605 (E.D. Tenn. 2009).

⁸⁰ *Id.* at 606.

⁸¹ *Id.* at 607.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.* at 607–09.

⁸⁶ *Id.* at 616.

⁸⁷ Joint Stipulation of Dismissal with Prejudice, *Robinson*, 663 F. Supp. 2d 604 (No. 1:08-CV-143).

⁸⁸ D.C. CODE § 2-1401.01 (2016).

⁸⁹ *Id.* § 2-1401.02(12).

for her father in the morning before going to work.⁹⁰ Four months later, her manager informed her that she would have to begin work at 8:00.⁹¹ When the plaintiff explained that she could not satisfy the new requirement, the employer terminated her, and she filed a claim under the District of Columbia's law.⁹²

The court was reluctant to find that the term “family responsibilities” obligated the employer to grant the employee's request for a flexible schedule, noting that:

The statute does not reveal whether the family responsibilities must rise to the level of a legal duty (*e.g.*, to pay child support) or whether a moral obligation to care for an ill parent is sufficient. It contains no explicit requirement that an employer accommodate an employee's working schedule so that the employee can discharge his or her “family responsibilities.”⁹³

The court declined to decide the issue, preferring instead “to await the input of [the Office of Human Rights] and, if the case reaches it, of the Human Rights Commission.”⁹⁴ Thus, even with language prohibiting discrimination for “family responsibilities,” a statute may still prove inadequate to shield working caregivers from FRD.

C. Local FRD Ordinances

In the absence of federal and state laws that effectively protect caregivers' employment, local ordinances are the primary sources of FRD protection.⁹⁵ These laws are significant because two-thirds of them cover businesses too small to be covered by federal statutes.⁹⁶ One survey found that most local FRD laws cover businesses with fewer than fifteen employees.⁹⁷

While local ordinances offer caregivers more protection from discrimination, they can cause confusion for employers who operate in states with multiple ordinances.⁹⁸ Florida, with nine local FRD ordinances, is an

⁹⁰ 597 A.2d 392, 395 (D.C. 1991). Ms. Simpson was responsible for caring for her 76-year-old father living with her. He required her help for feeding, dressing, and caring for himself due to his partial paralysis from a stroke, blindness, and diabetes. *Id.* at 394.

⁹¹ *Id.* at 395.

⁹² *Id.* at 395–96.

⁹³ *Id.* at 404–05 (footnotes omitted).

⁹⁴ *Id.* at 406 (footnote omitted).

⁹⁵ WILLIAMS ET AL., *supra* note 3, at 11–12. As of 2012, “[a]t least 67 localities in 22 different states have laws that prohibit discrimination against employees with certain family caregiving responsibilities.” *Id.*

⁹⁶ *Id.*

⁹⁷ BORNSTEIN & RATHMELL, *supra* note 14, at 11–12, 12 tbl.2 (finding that of the forty-seven local FRD laws surveyed, all had minimum employee thresholds of fifteen or lower, forty-one had thresholds of ten or lower, and eighteen had a minimum of only one employee).

⁹⁸ *See id.* at 16.

example.⁹⁹ “Employer” is defined differently in each ordinance, with minimum requirements ranging from five or more employees working four weeks per year, to at least fifteen or more employees working twenty weeks per year.¹⁰⁰ Some of the ordinances provide a private right of action in court, while others provide only for administrative agency review.¹⁰¹ Remedies also vary, with some including injunctive relief, actual and punitive damages, and attorney’s fees and costs; others limit the monetary recovery available.¹⁰² Thus, a business with locations throughout a state may find it onerous to comply with a bewildering array of requirements, and its own employees may receive different protections.

III

PREVENTING FRD BY ADDING “FAMILY CAREGIVERS” AS A PROTECTED CLASS TO STATE ANTIDISCRIMINATION STATUTES

Although expanded or additional federal laws might serve to better protect family caregivers, the legislative complexities of a politically divided Congress could make this a challenging approach. As recommended by AARP and others, modifying state laws may be the best means of “filling gaps in legal protections” left by federal and local family employment discrimination laws.¹⁰³ All states have statutes prohibiting private employers from discrimination against employees based on categories such as race, religion, sex, disability, and national origin; amending these statutes by adding “family caregivers” as a protected class would require state legislatures to make only minor changes to existing laws.¹⁰⁴ To be effective, state antidiscrimination laws should “provide an inclusive definition of ‘family’ that extends beyond children and spouses and covers any individual for whom the . . . employee has primary caretaking responsibilities.”¹⁰⁵

A few states have recently begun to consider such amendments. Nebraska initiated an amendment in 2017 to its Fair Employment Practice Act that would add “family care responsibilities” as an impermissible ground for employment discrimination, and would create a right of action against employers who so discriminate.¹⁰⁶ The amendment would have defined

⁹⁹ *Id.* The authors surveyed nine local FRD ordinances across the state: the cities of Cutler Bay, Jupiter, Key West, Miami Beach, Tampa, and West Palm Beach, and the counties of Miami-Dade, Monroe, and Palm Beach. *Id.* at 7 tbl.1, 16.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ See WILLIAMS ET AL., *supra* note 3, at 12 (proposing adding “family caregivers” as a protected class under state antidiscrimination statutes).

¹⁰⁴ *Id.*

¹⁰⁵ *Employer Best Practices for Workers with Caregiving Responsibilities*, *supra* note 48 (citation omitted).

¹⁰⁶ Legis. B. 372, 105th Leg., 1st Sess. (Neb. 2017).

“family care responsibility” as “providing direct and ongoing care for a person’s spouse, child, parent, sibling, grandchild, or grandparent or a child or parent of such person’s spouse.”¹⁰⁷

Legislators in Oklahoma proposed similar language by adding “family responsibilities” to its employment antidiscrimination statute as an impermissible basis for discrimination, further defining family responsibilities as “the state of, or the potential to be, caring for a child, parent, spouse, domestic partner or any other individual related by blood or affinity.”¹⁰⁸

West Virginia used the same definition of family responsibilities in its proposed Family Protection Act, whereby it would be illegal to “[f]ail or refuse to hire, discharge or otherwise discriminate against any individual with respect to compensation, terms, conditions or privileges of employment because of that individual’s family responsibilities.”¹⁰⁹

Finally, Arizona House Bill No. 2467 would protect an employee’s right to request a work schedule to accommodate “the employee’s caregiving responsibilities for a family member,” where “family member” expressly includes “the biological, adoptive or foster parent,” the grandparent, or the parent-in-law of the employee, in addition to spouses, children, grandchildren, and others.¹¹⁰ Although none of these amendments has yet been enacted, such proposals are encouraging signs that legislators are becoming aware of the need to protect working family caregivers and entice businesses to develop flexible policies.

CONCLUSION

The growing conflict created by the combination of a rapidly-aging population and women’s increasing participation in the labor force will magnify the potential for FRD. Although FRD may affect any working family caregiver, working middle-aged women especially risk the financial insecurity that caregiving can cause. At the same time, businesses incur higher costs when caregivers leave the workplace to fulfill their family obligations. The states are in a position to resolve this tension. By adding family caregivers as a protected class to existing state antidiscrimination laws, states can efficiently and effectively improve FRD law for both working family caregivers and their employers.

¹⁰⁷ *Id.*

¹⁰⁸ S.B. 1552, 56th Leg., 2d Sess. (Okla. 2018).

¹⁰⁹ H.B. 3012, 2018 Leg., Reg. Sess. (W. Va. 2017).

¹¹⁰ H.B. 2467, 53d Leg., 2d Reg. Sess. (Ariz. 2018).