

# State Regulations Update

## ***Caregivers in the Workplace: Prohibitions Against Family-Responsibility Discrimination***

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Family-responsibility discrimination cases are increasing as an increasing number of workers struggle to care for both children and aging parents. Family-responsibility discrimination (FRD) refers generally to the concept of discriminating against an employee because of his or her caregiving responsibilities. Examples of FRD include rejecting job applicants or denying employees promotions based on negative assumptions concerning the worth of employees with caregiving responsibilities. Subjecting employees—male and female—to harassment for their use of parental leave benefits is also a form of FRD.

### **FEDERAL LAWS THAT PROTECT AGAINST FRD**

Although FRD is not expressly forbidden by federal law, certain statutes do provide protections for employees who must tend to personal and family-related matters. These laws include Title VII of the Civil Rights Act of 1964 (Title VII), the Pregnancy Discrimination Act (PDA), the Family and Medical Leave Act (FMLA), and the Americans with Disabilities Act (ADA). The Family Medical Leave Act provides eligible employees leave from work in connection with the birth or adoption of a child or to take care of a family member with a serious health condition.<sup>1</sup> Employers may not "interfere" with an eligible employee's right to FMLA leave, nor may they retaliate against an employee who has exercised his or her FMLA rights. An FRD claim may arise under the FMLA when, for example, an employee is harassed or discriminated against for taking FMLA leave. Title VII of the Civil Rights Act of 1964 forbids discrimination on the basis of sex.<sup>2</sup>

Under Title VII, a female employee with children who is treated differently from a man with children may state a claim for FRD. Also, under the Pregnancy Discrimination Act,<sup>3</sup> women cannot be subjected to discrimination simply because they are pregnant, plan to become pregnant, or because of childbirth. For instance, an employer may not have a rule that prohibits an employee from returning to work for a predetermined length of time after childbirth.

An additional federal law that has been called on to initiate FRD lawsuits is the Americans with Disabilities Act, which protects employees with a known association or relationship with an individual with a disability from discrimination.<sup>4</sup>

Concerned with the proliferation of FRD, the U.S. Equal Employment Opportunity Commission (EEOC) recently published guidance on how federal laws apply to workers with caregiving responsibilities.<sup>5</sup> The new EEOC guidance highlights how changing workplace demographics, such as the increase of women in the workplace and the aging baby boomer population, have created more opportunity for discrimination against working parents and those with elder-care responsibilities.<sup>6</sup> The guidance features various scenarios involving FRD. The scenarios illustrate gender-based assumptions about future caregiving responsibilities, assumptions about the work performance of female caregivers, unlawful stereotyping based on participation in flexible work arrangements, denials of promotions based on stereotypes of how mothers should act, unlawful denials of benefits to male workers because of gender-based stereotypes, unlawful stereotyping based on pregnancy, and hostile work environments based on caregiver status, including association with an individual with a disability.

## **STATE LAWS ON FRD**

States may enact their own laws regarding employees' working conditions, including laws that afford workers more extensive rights than those provided under federal law. Consistent with the rise in FRD claims, specific protections based on "familial status" and "parenthood" are finding their way into state legislation. Certain states, including Alaska and Connecticut, now have laws on the books expressly protecting employees from FRD.<sup>7</sup> Additionally, California, New York, and Pennsylvania have legislation pending that would expressly prohibit FRD.

### **Alaska**

In Alaska, it is unlawful for an employer to refuse employment to a person, or to bar a person from employment, or to discriminate against a person in

compensation or in a term, condition, or privilege of employment because of the person's "parenthood" when the reasonable demands of the position do not require distinction on the basis of parenthood.<sup>8</sup> The definition of "employer" in Alaska is broad, as it includes any person, including the state and a political subdivision of the state, who has one or more employees in the state.<sup>9</sup>

## Connecticut

Connecticut law prohibits employers from requesting or requiring information relating to "familial responsibilities" from an applicant or employee.<sup>10</sup> Specifically, an employer may not request or require information from an employee or person seeking employment about the individual's child-bearing age or plans, pregnancy, function of the individual's reproductive system, use of birth-control methods, or familial responsibilities.<sup>11</sup> These inquiries are only lawful if the information is directly related to a bona fide occupational qualification or need. The legislation covers private employers with three or more employees, state and local governments (including all departments, agencies, and instrumentalities), and employment agencies and labor organizations.

## California

The California Assembly and Senate have passed a bill that prohibits discrimination against workers who have family caregiving responsibilities.<sup>12</sup> The bill would expand California's Fair Employment and Housing Act to include a prohibition against discrimination based on familial status and its consequent responsibilities, including (1) providing supervision or transportation; (2) providing psychological or emotional comfort and support; (3) addressing medical, educational, nutritional, hygienic, or safety needs; or (4) attending to an illness, injury, or mental or physical disability of a family member. Under the bill, *family member* includes a child, parent, sibling, spouse, domestic partner, parent of a spouse or domestic partner, grandparent, and grandchild. The bill would affect employers who regularly employ five or more persons, or any person acting as an agent of an employer, the state, or any political or civil subdivision of the state, and cities.

## New York

The New York State Assembly has introduced a bill that would prohibit discrimination based on "family responsibilities."<sup>13</sup> The bill defines "family responsibilities" as the legal responsibility to care for a child.

## **Pennsylvania**

House Bill 280 and Senate Bill 280 would amend the Pennsylvania Human Relations Act<sup>14</sup> and prohibit discrimination in employment based on "familial status." The amendment would affect employers of four or more persons. Religious, fraternal, charitable, and sectarian corporations and associations employing four or more persons within the state are also covered by the Act's antidiscrimination provisions.<sup>15</sup>

## **CITIES AND LOCALITIES FORBIDDING FRD**

Also worthy of mention is the rise in the number of cities and counties that clearly protect workers from FRD. These include Atlanta, Georgia; Chicago, Illinois; Milwaukee, Wisconsin; Tacoma, Washington; Cook County, Illinois; and Dade County, Florida. New York City is considering such legislation, as well.

### **Cook County, Illinois**

Cook County's antidiscrimination ordinance prohibits discriminating against any county employee or applicant for county employment because of "parental status."<sup>16</sup>

### **Miami-Dade County, Florida**

The Code of Miami-Dade County makes it unlawful for an employer to discriminate against any individual on account of "familial status."<sup>17</sup>

### **Atlanta, Georgia**

Atlanta's code of city ordinances protects individuals from employment discrimination on the basis of both "parental status" and "familial status."<sup>18</sup>

### **Chicago, Illinois**

The Chicago Human Rights Ordinance prohibits discrimination against any individual in hiring, classification, grading, discharge, discipline, compensation, or other term or condition of employment because of the individual's parental status.<sup>19</sup> An employer is also prohibited from inquiring about the parental status of an applicant for employment.<sup>20</sup>

### **Milwaukee, Wisconsin**

The city of Milwaukee forbids discrimination against individuals with respect to employment on the basis of "familial status."<sup>21</sup>

## Tacoma, Washington

The Tacoma Municipal Code protects employees from discrimination based on "familial status."<sup>22</sup>

## New York, New York

The New York City Council has introduced a law to amend the city's administrative code to prohibit employment discrimination based on an individual's "actual or perceived status as a caregiver."<sup>23</sup>

## CONCLUSION

Most workers have some kind of family-care responsibilities, whether for a child, partner, or elderly relative. Employers must be mindful when making employment decisions that they are not tainted by assumptions that these workers are less dedicated to their jobs or less dependable at work. The safest way to avoid FRD lawsuits is to train supervisors and managers regarding FRD and provide examples of scenarios where FRD might arise. Rest assured, parents and other caregivers need not receive more favorable treatment. Simply put, they need to be treated the same as other employees, without consideration of their caregiving responsibilities. One measure employers can take to curtail FRD is to revise antidiscrimination and anti-harassment policies to include protections against FRD. Another is to implement a complaint and response procedure to handle FRD-related complaints. Ultimately, employers need to ensure that their operations comply with federal law, as well as emerging state and local laws.

## Notes

1. 29 U.S.C. §§ 2601, et seq.
2. 42 U.S.C. §§ 2000(e), et seq.
3. The Pregnancy Discrimination Act is an amendment to Title VII of the Civil Rights Act of 1964. See *Id.*
4. 42 U.S.C. §§ 12101, et seq.
5. Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities, Number 915.002 (May 23, 2007).
6. *Id.*
7. The District of Columbia's Human Rights Act also includes protections for employees with "family responsibilities." See D.C. Code Ann. §§ 2-1401.01-.02, 1-2502(12).
8. Alaska Stat. § 18.80.220.
9. Alaska Stat. § 18.80.300. The definition of employer does not include a club that is exclusively social, or a fraternal, charitable, educational, or religious association or corporation, if the club, association, or corporation is not organized for private profit. *Id.*

10. Conn. Gen. Stat. § 46a-60(a)(9) (2004).
11. Id.
12. S.B. 836, 2007 Leg., Reg. Sess. (Cal. 2007).
13. A3214, 2007-2008 State Assemb., Reg. Sess. (N.Y. 2007).
14. 43 Pa. Cons. Stat. §§ 951, et. seq.
15. 43 Pa. Cons. Stat. § 954(b).
16. Cook County, Ill., Code of Ordinances ch. 42, art. II, § 42-31.
17. Miami-Dade County, Fla., Code § 11A-26.
18. Atlanta, Ga., Code of City Ordinances § 94-112.
19. Chi., Ill., Mun. Code 2-160-030.
20. Chi., Ill., Comm'n on Human Relations Reg. 320.100.
21. Milwaukee, Wis., Code of Ordinances 109-9.
22. Tacoma, Wash. Mun. Code 1.29.050.
23. Int. 0565-2007, N.Y. City Council (N.Y. 2007).

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