Family responsibilities discrimination: Why we need legislation to replace a patchwork of incomplete protections

By Ramit Mizrahi and Mariko Yoshihara

INTRODUCTION

If an employer refuses to hire a woman because she has young children or decides not to promote a man because he is caring for his elderly mother, do these workers have any recourse? Not necessarily. Our existing laws may provide some patchwork of protections, but too often this kind of blatant discrimination, stemming from gendered biases that disproportionately affect women, falls through the cracks. When mothers and other caregivers are fired or suffer negative consequences at work because of their caregiving responsibilities, it can often lead to family instability, negative health outcomes, food insecurity, and other plagues of poverty.

At least 200 state and local jurisdictions have already enacted laws outlawing employment discrimination against parents and other caregivers, covering nearly 35% of the American workforce.[1] Sadly however, here in California, workers still lack clear anti-discrimination protections for family caregiver bias that is arguably more prevalent and economically destructive than ever.

Below, we explore the damaging impact of family responsibilities discrimination ("FRD"). We then review the patchwork of laws California workers with family responsibilities currently rely on for protection, and their shortfalls. Finally, we discuss the efforts to add family responsibilities as a protected characteristic covered by the Fair Employment and Housing Act ("FEHA").[2]

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FRD LEADS TO GENDER INEQUALITY

According to the Department of Labor, roughly 60 percent of two-parent households with children under the age of 18 have both parents working.[3] Nearly 1 in 3 workers has a child under the age of 14.[4] More than 1 in 6 workers report assisting with the care of an elderly or disabled family member, relative, or friend.[5] A record-breaking number of families today – nearly one in five Americans – live in multigenerational households, and over 1 in 12 employed adults care for both children *and* elderly or disabled adults.[6]

The reality is that most employees will have caregiving responsibilities at some point in their professional lives. Yet, workplace policies that address caregiver bias have not kept pace with this reality. Caregiver bias generally stems from gendered assumptions about how caregivers will or should prioritize their family responsibilities with work. Often, employers assume that caregivers are not as valuable because they will not be committed to their jobs. When this bias affects personnel decisions, such as who gets furloughed, terminated, hired, or promoted, the impact can be devastating – to the worker in particular and to society as a whole.

Working mothers and pregnant workers are most likely to experience FRD, with low-paid workers and people of color disproportionately impacted.[7] For women under the age of 35, the wage gap between mothers and nonmothers, sometimes called the "motherhood penalty,"

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is wider than the one between men and women in general.[8] In fact, according to some research, the majority of the gender wage gap can be attributed to a penalty on motherhood.[9]

One study found that mothers were 6 times less likely to be recommended for hire, and offered an average of $12,000 less in salary for the same position as similarly qualified women without children.[10] Childless women were 8.2 times more likely to be recommended for a promotion than mothers.[11] This motherhood penalty is even more pronounced for women of color. In one recent study, more than half of Latinas and nearly half of Black women reported that their caregiving responsibilities would cause them to lose pay.[12]

During the pandemic, we saw the disproportionate impact that caregiving had on women and their economic security. Two-thirds of parents who needed child care to work reported having difficulty finding it in the early months of the pandemic.[13] As a result, women lost 5.4 million jobs during the pandemic compared with 4.4 million jobs lost by men, with caregiving responsibilities being one of the main forces pushing them out of the labor market.[14] Women were twice as likely as men to say that they left work for caregiving responsibilities due to childcare provider or school closures.[15] Black and brown women, in particular, have been disproportionately impacted.[16]

Given this reality, we have an urgent obligation to provide ways for people to continue to care for their families without suffering adverse consequences at work. Supporting caregivers and establishing discrimination protections is, simply put, an issue of equity.

THE EXISTING, INCOMPLETE PATCHWORK USED TO ADDRESS FRD

Most claims for family responsibilities discrimination are being filed under a patchwork of federal and state anti-discrimination and leave laws. However, they each have their limitations and ultimately leave far too many workers without protection.

A. Framing FRD as "Sex Plus" Discrimination

Over forty years ago, in *Phillips v. Martin Marietta Corporation*, the United States Supreme Court considered the following scenario: an employer refused job applications from women with preschool-aged children; it employed men with preschool-aged children; 70-75% of applicants for the position were women; and 75-80% of those hired for the position were women, negating the possibility of a general bias against women.[17] The Supreme Court held that, under these facts, the trial court erred in granting summary judgment on the plaintiff's claim for sex discrimination in violation of Title VII of the Civil Rights Act of 1964.[18]

The concept of "sex plus" discrimination was thus born. Discrimination based on sex plus another characteristic is deemed discrimination based on sex. As the Supreme Court explained in *Bostock v. Clayton County* nearly forty years later: "[I]f changing the employee's sex would have yielded a different choice by the employer—a statutory violation has occurred."[19] Thus, under both the FEHA and Title VII, employers are prohibited from holding men and women to different standards, such as hiring fathers but not mothers.[20]

Limitations: If an employer discriminates equally against mothers and fathers, or male and female caregivers, then the protections of FEHA and Title VII do not apply.

B. Framing FRD as Associational Disability Discrimination

When an employer refuses to hire or promote an employee because that person has a family member with a disability, FRD may be covered by associational disability discrimination protections. The FEHA prohibition on employment discrimination based on a protected characteristic[21] extends to protect any employee who is "associated with a person who has, or is perceived to have, any of those characteristics."[22] Similarly, the Americans with Disabilities Act of 1990 ("ADA") prohibits an employer from discriminating "against a qualified individual on the basis of disability," and includes within the definition of such discrimination "excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified

individual is known to have a relationship or association."[23] These associational protections may require employers to engage in an interactive process with, and provide reasonable accommodations to, employees who are associated with a person who has a disability.[24]

Limitations: If the person being cared for does not have a disability (or is not perceived by the employer as having one), then the protections of the FEHA and ADA against associational disability discrimination do not apply.

C. Framing FRD as Retaliation for Taking Pregnancy Disability Leave

FRD can sometimes occur when a worker announces she is pregnant and will be taking pregnancy leave. The Pregnancy Disability Leave Law (PDLL) requires that an employer provide an employee disabled by pregnancy, childbirth, or a related condition up to four months of job-protected leave.[25] It has no eligibility requirements, such as minimum hours worked or length of service.[26] Pregnancy disability leave covers the post-partum recovery period, which generally lasts six weeks after delivery for a birth without medical complications, eight weeks after delivery for a birth by cesarean section, and potentially longer if there are other complications (such as post-partum depression).[27] Thus, new mothers can often rely on PDLL to be able to take time off during the first weeks with a new baby. If the new mother returns to work and finds that her job is no longer there or that she is demoted, she may have a claim under the PDLL.

***Limitations*:** Family responsibilities discrimination often exists well past the pregnancy and post-partum period, when PDLL's protections no longer apply.

D. Framing FRD as Retaliation for Taking Family Leave

If an employee is denied a job opportunity or otherwise subject to adverse actions for taking time off to bond with a new child[28] or to care for a family member with a serious health condition, the employee may pursue an FRD claim under the California Family Rights Act ("CFRA"). The CFRA provides covered employees with up to 12 weeks of unpaid, job-protected leave for any of the following reasons:

(1) For an employee's own serious health condition (pregnancy, birth, and related conditions are excluded, as the Pregnancy Disability Leave Law (PDLL) already applies);
(2) To bond with the employee's newly-born child (within the first year of life) or in connection with the adoption or foster care of a child; and
(3) To care for a parent, child, spouse, grandparent, grandchild, siblings, domestic partner, or child of domestic partner, or parent-in-law who has a serious health condition.[29]

Upon returning to work, the employee is entitled to be reinstated to the same or a comparable position.[30] The CFRA also prohibits retaliation against an employee for exercising their leave rights.[31]

Limitations: The CFRA and the Family and Medical Leave Act ("FMLA") have eligibility criteria that must be met (e.g., under CFRA, working for an employer with five or more employees, with at least 12 months of service with the employer, and at least 1,250 hours worked during the past 12 months).[32] If the employee was not eligible for or did not require family leave (for example, the employee is a parent of a young child or the caretaker of an elderly parent, but does not need a leave to provide care), then the protections of CFRA and the FMLA do not apply. Nor is there protection against the general bias that parents and family caretakers are less dedicated employees.

E. Framing FRD as Retaliation for Taking Leave to Participate in School Activities

An employee may experience FRD if they are disciplined or treated adversely for requesting time off because of a child's school-related activities. Labor Code § 230.8 allows parents who work for employers with 25 or more employees to take up to 40 hours off each year: (1) "To find, enroll, or reenroll his or her child in a school or with a licensed child care provider, or to participate in activities of the school or licensed child care provider of his or her child," and (2) "To address a child care provider or school emergency, if the employee gives notice to the employer."[33] If an employee requests time off under this section and is retaliated against for making that request or taking the requested time off, the employee may pursue a claim under this section with the Labor Commissioner's Office.[34]

Limitations: This does not address biases against caregivers that exist unrelated to specific child care emergencies or activities. This section also does not have a private right of action, so a claim must be filed with the Labor Commissioner's Office.

THE SOLUTION: MAKING "FAMILY RESPONSIBILITIES" A PROTECTED CHARACTERISTIC UNDER THE FEHA

This year, the California Legislature considered, for at least the fifth time, legislation to prohibit discrimination against family caregivers.[35] Assembly Bill 2182, by Assembly Member Wicks, sought to add "family responsibilities" to the list of protected characteristics covered by the employment provisions of the FEHA.[36] This addition would prohibit the disparate

treatment of employees because of their family responsibilities. In other words, it would prohibit employers from treating workers adversely based on assumptions or stereotypes associated with their family responsibilities. In May, the bill was held in the Assembly Appropriations Committee, extinguishing the prospect that it will be passed into law this year.[37]

However, hope should not be lost: employee rights advocates have succeeded in passing other important bills after multiple unsuccessful attempts. For example, it took over 20 years and more than ten failed attempts before the CFRA was expanded to cover a broader set of familial relationships.[38]

CONCLUSION

The efforts to add "family responsibilities" to the FEHA must continue. Enshrining protections against family caregivers in our discrimination laws would help support equity in the workplace and would provide greater economic security for women and working families. ■

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[1] Center for WorkLife Law, *State and Local FRD Laws Prohibiting Employment Discrimination against Parents and Other Caregivers* (April, 2022), available at https://worklifelaw.org/wp-content/uploads/2021/10/State-and-Local-FRD-Law-Table.pdf.

[2] Cal. Gov. Code § 12940, et seq.

[3] Bureau of Labor Statistics, The Department of Labor, *Employment in Families with Children in 2016* (Apr. 27, 2017), available at https://www.bls.gov/opub/ted/2017/employment-in-families-with-children-in-2016.htm.

[4] Alicia Sasser Modestino, *Coronavirus child-care crisis will set women back a generation*, Wash. Post (July 29, 2020), https://www.washingtonpost.com/us-policy/2020/07/29/childcare-remote-learning-women-employment/.

[5] Bureau of Labor Statistics, The Department of Labor, *Unpaid Eldercare in the United States—2017-2018 Summary* (Nov. 22, 2019), available at https://www.bls.gov/news.release/elcare.nr0.htm.

[6] Gretchen Livingston, *More than one-in-ten U.S. parents are also caring for an adult*, Pew Research Ctr. (Nov. 29, 2018), available at https://www.pewresearch.org/fact-tank/2018/11/29/more-than-one-in-ten-u-s-parents-are-also-caring-for-an-adult/.

[7] U.S. Equal Employment Opportunity Commission, *Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities* (May 23, 2007), available at https://www.eeoc.gov/laws/guidance/enforcement-guidance-unlawful-disparate-treatment-workers-caregiving-responsibilities.

[8] Shelley J Correll, Stephen Benard, and In Paik, *Getting a Job: Is There a Motherhood Penalty?*, Am. J. Soc. 112.5 (2007): 1297-1339.

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] Time's Up Foundation, *Time's Up, Measure Up, Foundations for a Just and Inclusive Recovery* (2021), https://timesupfoundation.org/work/times-up-impact-lab/times-up-measure-up/foundations-for-a-just-and-inclusive-recovery/.

[13] Modestino, *supra*, at n.4.

[14] Diana Boesch and Shilpa Phadke, *When Women Lose All the Jobs: Essential Actions for a Gender-Equitable Recovery*, Center for Am. Progress (Feb. 1, 2021), available at https://www.americanprogress.org/issues/women/reports/2021/02/01/495209/women-lose-jobs-essential-actions-gender-equitable-recovery/.

[15] Bipartisan Policy Center, *New Survey: Facing Caregiving Challenges, Women Leaving the Workforce at Unprecedented Rates*, October 28, 2020, available at https://bipartisanpolicy.org/blog/facing-caregiving-challenges/.

[16] *Id.*

[17] *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 543 (1971).

[18] *Id.*

[19] *Bostock v. Clayton County, Georgia*, 140 S.Ct. 1731, 1741 (2020).

[20] Cf. *Mayes v. WinCo Holdings, Inc.*, 846 F.3d 1274, 1280 (9th Cir. 2017) (identifying as direct evidence of discriminatory animus manager's alleged criticism of the female plaintiff, but not her male counterpart, for leaving work early to care for her children).

[21] Cal. Gov. Code § 12940(a).

[22] Cal. Gov. Code § 12926(o).

[23] 42 U.S.C. § 12112(b)(4).

[24] See *Castro-Ramirez v. Dependable Highway Express, Inc.*, 2 Cal.App.5th 1028 (2016) (discussing associational disability discrimination claim under the FEHA, and stating in dicta that Gov. Code § 12940(m) "may reasonably be interpreted to require accommodation based on the employee's association with a physically disabled person"); *Rope v. Auto-Chlor System of Washington, Inc.*, 220 Cal.App.4th 635, 656-58 (2013), superseded by statute on another ground (discussing associational disability claims under the FEHA).

[25] Cal. Gov. Code § 12945(a).

[26] 2 C.C.R. § 11037.

[27] 2 C.C.R. § 11035(f) (defining "disabled by pregnancy" without specifying dates); Employment Development Department, Disability Insurance – Pregnancy FAQs, available at https://edd.ca.gov/en/Disability/FAQ_DI_Pregnancy/ (providing for disability benefits up to six weeks after delivery for birth without medical complications, eight weeks for birth by cesarean section, and longer if there are medical complications or if unable to perform normal job duties).

[28] Research shows that fathers who take longer leaves to bond with their babies tend to be more involved in child care after returning to work. See Lauren Weber, *Why Dads Don't Take Paternity Leave*, Wall Street Journal (Jun. 12, 2013), https://www.wsj.com/articles/SB10001424127887324049504578541633708283670.

[29] *Id.*

[30] *Id.*, at subd. (a).

[31] Cal. Gov. Code § 12945.2(k).

[32] Cal. Gov. Code § 12945.2(a). The FMLA offers substantially similar protections, although it requires that the employer work for an employer with at least 50 employees within a 75-mile radius, and covers the care of fewer types of family members. 29 U.S.C. § 2601, *et seq*.

[33] Cal. Lab. Code § 230.8(a). The term "parent" is broadly defined to include a "guardian, stepparent, foster parent, or grandparent of, or a person who stands in loco parentis to, a child." Cal. Lab. Code. § 238(e)(1).

[34] Cal. Lab. Code § 230.8(d).

[35] Assembly Bill 2182 (2021-2022), Assembly Bill 1119 (2021-2022), Senate Bill 404 (2013-2014), Assembly Bill 1001 (2008-2009), Senate Bill 836 (Kuehl, 2007-2008). In addition, Assembly Bill 1938 (2017-2018) sought to prohibit employers from making inquiries into an employee or applicant's familial status, specifically including during job interviews.

[36] Assembly Bill 2182 (2021-2022). This bill is substantially similar to the enrolled version of SB 836 (Kuehl, 2007), which had been vetoed by Governor Schwarzenegger.

[37] See AB 2182 Bill Status, available at https://leginfo.legislature.ca.gov/faces/billStatusClient.xhtml?bill_id=202120220AB2182.

[38] See SB 1383 Bill Analysis, Assembly Committee on Labor and Employment (Jul. 29, 2020) (listing out prior and related legislation). Success came with 2020's Senate Bill 1383. As far back as 1999, Senate Bill 1149 (1999-2000) sought to amend the CFRA to allow care for an adult child, grandparent, sibling, or domestic partner. It was vetoed by Governor Davis. Governor Schwarzenegger vetoed a similar bill in 2007 (Assembly Bill 537), as did Governor Brown in 2015 (Senate Bill 406).