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## Caregiver Discrimination in the Wake of the COVID-19 Pandemic

Alaina Harwood

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# Caregiver Discrimination in the Wake of the COVID-19 Pandemic

Alaina Harwood\*

## ABSTRACT

Discrimination against workers that are caregivers to family members has risen dramatically in the United States due to the COVID-19 pandemic. The horde of novel issues that were brought on by the pandemic—such as school closures—have had a severely negative impact on workers with caregiving responsibilities, resulting in many of them losing their jobs during a major recession. Because of COVID-19, workers have experienced various types of discrimination relating to their caregiver status, including harassment and retaliation for requesting accommodations and leave during a global pandemic, as well as humiliation from their employers. This paper discusses the trends in caregiver discrimination lawsuits that were filed during the COVID-19 pandemic and analyzes the common issues plaintiffs experienced at the hands of their employers. While legislation that was passed during the pandemic offered some temporary protections to workers with caregiving responsibilities, this paper also discusses how the lack of permanent and comprehensive protection at the federal level left many workers vulnerable to caregiver discrimination.

**Keywords:** COVID-19, pandemic, caregivers, caregiver discrimination, family responsibilities discrimination, childcare, workplace discrimination, job loss, family or medical leave, immunocompromised, accommodations, wrongful termination

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## I. INTRODUCTION

### A. BACKGROUND ON CAREGIVER DISCRIMINATION

Caregiver discrimination is a serious and far-reaching issue for American workers that has been recognized only in recent decades.<sup>1</sup> Caregiver discrimination, also known as Family Responsibilities Discrimination (FRD), occurs when an employer discriminates against its workers because they have family caregiving responsibilities at home.<sup>2</sup> It typically occurs when an employer acts on unexamined biases about how employees with caregiving responsibilities will or should act.<sup>3</sup> For example, an employer may assume that a new mother will not be as committed to her job after having a child, or that a man should not request paternity leave since women are typically the primary caregivers. These are just a few of the numerous examples of stereotypes that fuel caregiver discrimination.

Women often face the brunt of caregiver discrimination, because in most families, women are the primary caregivers.<sup>4</sup> They spend considerably more time than men performing care work at home,<sup>5</sup> and they are more likely than men to sacrifice their job for caregiving responsibilities.<sup>6</sup> Not only are women primarily responsible for childcare within their immediate families, but they are also the primary caregivers for the elderly, which includes caring for parents, in-laws, and spouses.<sup>7</sup> Not surprisingly, the responsibilities of caring for ill and disabled family

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1. Elizabeth Roush, Note, *(Re)Entering the Workforce: An Historical Perspective on Families Responsibilities Discrimination and the Shortcomings of Law to Remedy It*, 31 WASH. U. J. L. & POL'Y 221, 221 (2009).

2. *What is FRD?*, CTR. FOR WORKLIFE L., <https://worklifelaw.org/get-help/what-is-frd/> (last visited Apr. 25, 2021).

3. STEPHANIE BORNSTEIN, CENTER FOR WORKLIFE LAW & JULIE WEBER, SLOAN WORK AND FAMILY RESEARCH NETWORK, ADDRESSING FAMILY RESPONSIBILITIES DISCRIMINATION (2008).

4. Rita Zeidner, *How to Recognize—and Avoid—Caregiver Discrimination*, SHRM (Aug. 23, 2018), <https://www.shrm.org/hr-today/news/hr-magazine/0918/Pages/recognizing-caregiver-discrimination.aspx>.

5. CYNTHIA HESS ET AL., INSTITUTE FOR WOMEN'S POL'Y RSCH., PROVIDING UNPAID HOUSEHOLD AND CARE WORK IN THE UNITED STATES: UNCOVERING INEQUALITY, (2020) (noting that women perform more unpaid care work at home even when taking employment status into account).

6. PEW RSCH. CTR., ON PAY GAP, MILLENNIAL WOMEN NEAR PARITY—FOR NOW (2013); see also Claire C. Miller, *When Schools Closed, Americans Turned to Their Usual Backup Plan: Mothers*, N.Y. TIMES (Nov. 17, 2020), <https://www.nytimes.com/2020/11/17/upshot/schools-closing-mothers-leaving-jobs.html>.

7. U.S. EQUAL EMP. OPPORTUNITY COMM'N, NOTICE OF ENFORCEMENT GUIDANCE: UNLAWFUL DISPARATE TREATMENT OF WORKERS WITH CAREGIVING RESPONSIBILITIES (2007); Cathy D. Martin, *More Than the Work: Race and Gender Differences in Caregiving Burden*, 21 J. FAM. ISSUES 986, 989-90 (2000). See also Peggie R. Smith, *Elder Care, Gender, and Work: The Work-Family Issue of the 21st Century*, 25 BERKELEY J. EMP. & LAB. L. 351, 360 (2004).

members also fall primarily on women.<sup>8</sup> Although caregiving responsibilities disproportionately impact working women as a whole, some women feel the effects more than others—women of color and immigrants, in particular, are more likely than their white counterparts to devote time to caring for elderly family members.<sup>9</sup>

In recent years, men in the U.S. have taken on more caregiving responsibilities.<sup>10</sup> Between 1965 and 2003, the amount of time that men spent on childcare nearly tripled,<sup>11</sup> and in 2015, 40% of family caregivers were male, up from the 1990's when less than 20% of family caregivers were men.<sup>12</sup> Although this changing trend is worthy of celebration, women are still disproportionately assuming the majority of caregiving responsibilities at home, and thus are more vulnerable to caregiver discrimination in the workplace.<sup>13</sup>

There is currently no federal law offering protection to workers from discrimination based solely on caregiving status.<sup>14</sup> To remedy this, workers have relied on different statutes and theories to prove that they have suffered from caregiver discrimination, for example, by showing they were discriminated against based on a protected characteristic or status.<sup>15</sup> As of 2008, the Center for WorkLife Law had identified seventeen legal theories under state and federal law that workers with caregiving responsibilities

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8. Nidhi Sharma et al., *Gender Differences in Caregiving Among Family – Caregivers of People with Mental Illnesses*, 6 WORLD J. PSYCHIATRY 7, 8 (2016).

9. NAT'L P'SHIP FOR WOMEN & FAMILIES, THE FEMALE FACE OF CAREGIVING 1 (2018) (noting that families of color are more likely to have elder care responsibilities because they are more likely to have multiple generations living with them). See also U.S. EQUAL EMP. OPPORTUNITY COMM'N, *supra* note 7; cf. Rebecca Glauber, *Trends in the Motherhood Wage Penalty and Fatherhood Wage Premium for Low, Middle, and High Earners*, 55 DEMOGRAPHY 1663, 1668 (2018) (finding that the motherhood wage penalty was essentially eliminated for high-earning women, while low-income women's wages continued to be negatively impacted because of their actual or perceived caregiving responsibilities).

10. See generally SUZANNE BIANCHI ET AL., CHANGING RHYTHMS OF AMERICAN FAMILY LIFE (2006); see also U.S. EQUAL EMP. OPPORTUNITY COMM'N., *supra* note 7.

11. Donna St. George, *Fathers Are No Longer Glued to Their Recliners*, WASH. POST, Mar. 20, 2007, at A11.

12. NAT'L ALLIANCE FOR GIVING & AARP PUBLIC POL'Y INST., EXECUTIVE SUMMARY: CAREGIVING IN THE U.S. 9 (2015); see also David Lawrence, *Male Caregivers: The Numbers are Growing*, FAM. RES. HOME CARE (June 8, 2010) <https://www.familyresourcehomecare.com/male-caregivers-the-numbers-are-growing/>.

13. See JOAN WILLIAMS ET AL., WORKLIFE LAW, ENDING DISCRIMINATION AGAINST FAMILY CAREGIVERS 6 (2003); see also Erin Mulvaney, *'Motherhood Penalty' May Fuel Workplace Lawsuits in Pandemic*, BLOOMBERG L. (Apr. 29, 2020, 1:41 PM), [https://www.bloomberglaw.com/bloomberglawnews/daily-labor-report/X5PTG0K0000000?bna\\_news\\_filter=daily-labor-report#jcite](https://www.bloomberglaw.com/bloomberglawnews/daily-labor-report/X5PTG0K0000000?bna_news_filter=daily-labor-report#jcite).

14. U.S. EQUAL EMP. OPPORTUNITY COMM'N., *supra* note 7; JOAN FARRELL, ¶ 135 WORKERS WITH CAREGIVING RESPONSIBILITIES (Supp. 2020), Westlaw.

15. Roush, *supra* note 1 at 224-25; see also FARRELL, *supra* note 14.

have used in litigating caregiver discrimination.<sup>16</sup> Although there are numerous legal theories plaintiffs can use to show that they have suffered from family responsibilities discrimination, this paper will limit its discussion to a handful of them, as they relate to the cases discussed in Part II.<sup>17</sup>

One statute that plaintiffs have relied on when litigating FRD is Title VII.<sup>18</sup> In *Chadwick v. Wellpoint*, a worker successfully alleged that her employer violated Title VII's prohibition on sex discrimination when she was denied a promotion, because her employer's decision was based in part on the sex-based stereotype that women who are mothers, particularly of young children, neglect their jobs in favor of their childcare responsibilities.<sup>19</sup> Workers also have a valid cause of action under the Americans with Disabilities Act ("ADA") if their employer discriminates against them based on their association with an individual with a disability.<sup>20</sup> Additionally, violations of the Family Medical Leave Act ("FMLA") may support claims of FRD.<sup>21</sup> Although courts are more receptive to recognizing valid claims for caregiver discrimination under these statutes, these laws are still limited in their ability to protect workers from FRD, particularly at the federal level.<sup>22</sup>

Fortunately, some state and local laws provide broader protections for caregivers.<sup>23</sup> While some states have better protections for caregivers, including laws creating caregiver protections, they are few and far between, leaving many people vulnerable to suffer from caregiver discrimination at the hands of their employer.<sup>24</sup> The issue of caregiver discrimination has become even more apparent in recent years, with the Center for WorkLife Law reporting in 2016 that FRD cases have risen 269% over the last

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16. Joan C. Williams & Stephanie Bornstein, *Evolution of "FRD": Family Responsibilities Discrimination and Developments in the Law of Stereotyping and Implicit Bias*, 59 HASTINGS L.J. 1311, 1344 (2008).

17. See discussion *infra* Part II.

18. Williams & Bornstein, *supra* note 16, at 1344.

19. *Chadwick v. Wellpoint*, 561 F.3d 38, 46-47 (1st Cir. 2009) (holding that summary judgment in favor of the employer was improper because a jury could have reasonably determined that a sex-based stereotype was behind the decision-maker's explanation).

20. See Americans with Disabilities Act (ADA) of 1990, 42 U.S.C. § 12112 (2009); see also FARRELL, *supra* note 14.

21. Roush, *supra* note 1, at 224-25; see also Family and Medical Leave Act (FMLA) of 1993, 29 U.S.C. §§ 2601-2654 (2008).

22. Roush, *supra* note 1, at 243.

23. FARRELL, *supra* note 14; see also CYNTHIA T. CALVERT & JESSICA LEE, THE CENTER FOR WORKLIFE LAW, CARING LOCALLY FOR CAREGIVERS: HOW STATE AND LOCAL LAWS PROTECT FAMILY CAREGIVERS FROM DISCRIMINATION AT WORK 2 (2021).

24. CALVERT & LEE, *supra* note 23, at 2 (highlighting the fact that only one state has a law that explicitly prohibits discrimination against employees that care for adult family members while three other states have laws that could be expanded to include protection for family caregivers).

decade.<sup>25</sup> FRD is an increasingly pervasive issue among American workers, and the current legislation has left many employees open to attacks from their employers because of caregiver status.

#### B. ONSET OF THE COVID-19 PANDEMIC

In December 2019, an unidentified virus emerged which resulted in a worldwide pandemic.<sup>26</sup> This novel coronavirus, now known as COVID-19, was officially declared a pandemic by the World Health Organization in March 2020,<sup>27</sup> and on March 13, 2020, the White House declared a national emergency in the U.S.<sup>28</sup> This resulted in the majority of states issuing shelter-in-place and lock-down orders, with 43 governors between March and April 2020 issuing orders directing residents to stay at home and for nonessential businesses to close.<sup>29</sup> Schools and daycares all over the country suddenly closed, leaving workers everywhere without childcare.<sup>30</sup>

The immediate impact of the COVID-19 pandemic was tremendous. By April 2020, 60% of licensed childcare providers were fully closed,<sup>31</sup> 30 million Americans filed unemployment claims,<sup>32</sup> and the number of active business owners in the U.S. fell by 22%.<sup>33</sup> As of June 2020, it was estimated that 50 million workers had childcare obligations affected by school and daycare closures.<sup>34</sup> Due to the closures, there were 1.6 million fewer mothers in the labor force in the fall of 2020 than would generally be

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25. CYNTHIA T. CALVERT, CAREGIVERS IN THE WORKPLACE: FAMILIES RESPONSIBILITIES DISCRIMINATION LITIGATION UPDATE 2016 4 (2016).

26. Yi-Chi Wu et al., *The Outbreak of COVID-19: An Overview*, 83 J. CHINESE MED. ASS'N 217, 217 (2020).

27. Tedros Adhanom Ghebreyesus, Director, World Health Org., Declaration of COVID-19 as a Pandemic (Mar. 11, 2020).

28. Proclamation No. 9994, 85 Fed. Reg. 15337 (Mar. 18, 2020).

29. *States That Issued Lockdown and Stay-at-Home Orders in Response to the Coronavirus (COVID-19) Pandemic, 2020*, BALLOTPEDIA (Jan. 5, 2021), [https://ballotpedia.org/States\\_that\\_issued\\_lockdown\\_and\\_stay-at-home\\_orders\\_in\\_response\\_to\\_the\\_coronavirus\\_\(COVID-19\)\\_pandemic,\\_2020](https://ballotpedia.org/States_that_issued_lockdown_and_stay-at-home_orders_in_response_to_the_coronavirus_(COVID-19)_pandemic,_2020).

30. Marguerite Ward, *The Pandemic is Set to Shutter 40% of U.S. Childcare Centers—and it Could Prove Catastrophic for the Careers of American Women*, INSIDER (July 30, 2020, 7:54 AM), <https://www.businessinsider.com/pandemic-child-care-closures-could-be-terrible-for-womens-careers-2020-5>.

31. *Nationwide Survey: Child Care in the Time of Coronavirus*, BIPARTISAN POL'Y CTR. (Apr. 10, 2020), <https://bipartisanpolicy.org/blog/nationwide-survey-child-care-in-the-time-of-coronavirus/>.

32. Anneken Tappe, *30 Million Americans Have Filed Initial Unemployment Claims Since Mid-March*, CNN BUS. (Apr. 30, 2020, 10:20 AM), <https://www.cnn.com/2020/04/30/economy/unemployment-benefits-coronavirus/index.html>.

33. ROBERT W. FAIRLIE, THE IMPACT OF COVID-19 ON SMALL BUSINESS OWNERS: EVIDENCE OF EARLY-STAGE LOSSES FROM THE APRIL 2020 CURRENT POPULATION SURVEY 1 (2020) (noting that the drop in active business owners was the largest on record).

34. Lisa Levenstein, *With Schools and Daycare Closed, the Coronavirus is Worsening Women's Inequality*, WASH. POST (June 26, 2020, 3:00 AM), <https://www.washingtonpost.com/outlook/2020/06/26/with-schools-daycare-closed-covid-19-is-worsening-womens-inequality/>.

expected.<sup>35</sup> Because school and daycare closures left workers without childcare, many women were forced to choose between their job and their families, resulting in large numbers of women quitting their jobs.<sup>36</sup> Although there are men who have had to quit their jobs or cut their hours to care for their children during the pandemic, the COVID-19 crisis has highlighted the fact that women disproportionately bear the brunt of caregiving responsibilities when unexpected things occur—this has been called the “gendered fallback plan.”<sup>37</sup> The pandemic not only exacerbated existing gender disparities, but it also led to an uptick in caregiver discrimination against workers with caregiving responsibilities.<sup>38</sup>

## II. CAREGIVER DISCRIMINATION SUITS FILED DUE TO COVID-19

### A. PARAMETERS OF SEARCH

From the start of the pandemic in March 2020 until February 28, 2021, there were 43 lawsuits filed by workers that alleged caregiver discrimination from their employers due to the conditions created by the pandemic. This section discusses the parameters of the search for the cases that are examined in this paper.

The search included cases that were filed in the U.S. and U.S. territories between March 1, 2020 and February 28, 2021 in both federal and state courts. The criterion for cases was that a worker suffered a form of caregiver discrimination in part due to the circumstances that the COVID-19 pandemic created. While there were numerous cases filed during the pandemic that alleged caregiver discrimination, only 43 cases were found to have alleged caregiver discrimination due to conditions that the pandemic created. There was no limitation on the statutes or causes of actions that plaintiffs could rely on, and instead the criterion was that the discrimination the worker suffered from involved circumstances stemming from the pandemic. Many plaintiffs had never experienced discrimination before the COVID-19 crisis; for many others, workers had already been facing some sort of discrimination from their employers before March 2020, with the pandemic intensifying the harassment or discrimination they

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35. Julie Fink & Rachel Tuchman, *Implementing Lasting Changes for Gender Equity in the Workplace*, BLOOMBERG L. (Dec. 17, 2020, 1:01 AM), [https://www.bloomberglaw.com/product/labor/bloomberglawnews/daily-labor-report/X3NBL3HK000000?bna\\_news\\_filter=daily-labor-report](https://www.bloomberglaw.com/product/labor/bloomberglawnews/daily-labor-report/X3NBL3HK000000?bna_news_filter=daily-labor-report); *see also* Miller, *supra* note 6.

36. *See* Miller, *supra* note 6.

37. *Id.*

38. David Yaffe-Bellany, *Parents Say Employers are Illegally Firing Them During Pandemic*, BLOOMBERG L. (Nov. 11, 2020, 8:04 AM), [https://www.bloomberglaw.com/product/labor/bloomberglawnews/coronavirus/XBLE12T000000?bna\\_news\\_filter=coronavirus](https://www.bloomberglaw.com/product/labor/bloomberglawnews/coronavirus/XBLE12T000000?bna_news_filter=coronavirus).

were already experiencing. Status updates on selected cases were tracked only until March 28, 2021.<sup>39</sup>

#### B. OVERVIEW OF CAUSES OF ACTIONS FOUND

Across the cases filed, there were various causes of action. The majority of cases were filed in federal courts, primarily under the Families First Coronavirus Response Act (“FFCRA”), which was passed by Congress in March 2020 and became effective on April 1, 2020.<sup>40</sup> The FFCRA was enacted for the express purpose of providing workers with expanded family and sick leave for issues related to COVID-19, including for workers who needed to stay home to watch their children due to school and daycare closings.<sup>41</sup> Although the protections under FFCRA were temporary, many workers filed suits against their employers for violating their rights under the act.<sup>42</sup>

More than one cause of action was often found in the cases filed. Table 1 organizes the cases into three categories: 1) cases that listed FFCRA as one of the claims, 2) cases under federal jurisdiction that did not have a FFCRA claim, and 3) cases under state law jurisdiction that did not have a FFCRA claim.<sup>43</sup> There were 27 cases total where FFCRA was listed as one of the claims, and 10 cases brought under other federal statutes, such as FMLA and Title VII claims, many of which also included claims for state law violations.<sup>44</sup> There were six cases that were brought under state law claims only, with four of these cases filed in California.<sup>45</sup>

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39. See *infra* Appendix, at Table 8.

40. See Families First Coronavirus Response Act (FFCRA), Pub. L. No. 116-127, 134 Stat. 178 (2020); see also *infra* Appendix, at Table 1.

41. Joan C. Williams, *Real Life Horror Stories from the World of Pandemic Motherhood*, N.Y. TIMES (Aug. 6, 2020), <https://www.nytimes.com/2020/08/06/opinion/mothers-discrimination-coronavirus.html>; see also *Families First Coronavirus Response Act: Employer Paid Leave Requirements*, Wage and Hour Division, U.S. DEP’T OF LAB., <https://www.dol.gov/agencies/whd/pandemic/ffcra-employer-paid-leave> (last visited Nov. 20, 2020) (one of the two key provisions within FFCRA, which provides that certain employers provide up to 10 weeks of paid, and 2 weeks unpaid, emergency family and medical leave to eligible employees if the employee is caring for their child whose school or case place of care is closed or whose child care provider is unavailable for reasons related to COVID-19).

42. Patricio Chile, *Covid-19 Leave Suits Trickle in with Surge Expected this Fall*, BLOOMBERG L. (Sept. 3, 2020, 3:55 AM), [https://www.bloomberglaw.com/product/labor/bloomberglawnews/daily-labor-report/X1FMH00000000?bna\\_news\\_filter=daily-labor-report](https://www.bloomberglaw.com/product/labor/bloomberglawnews/daily-labor-report/X1FMH00000000?bna_news_filter=daily-labor-report).

43. See *infra* Appendix, at Table 1.

44. *Id.*

45. See *infra* Appendix, at Table 2.

### C. ISSUES WORKERS FACED

There were several different issues that the workers in these cases faced, but three issues were most common among the cases: access to leave, workplace flexibility and accommodations, and outright discrimination.<sup>46</sup>

#### 1. Access to Leave

The first and most pervasive issue among the cases was access to leave, with 37 out of 43 cases filed involving some issue of leave.<sup>47</sup> In most cases, workers requested leave because their children's schools and daycares had closed. Some workers relied on family members or nannies to watch their children, but others requested leave because their normal caregivers were unavailable—either because of COVID-19 or for other reasons, leaving them without childcare.<sup>48</sup> In a few cases, workers requested leave because they were the caregiver for their immunocompromised children or other family members and did not want to risk getting sick by going to work.<sup>49</sup>

The workers that requested leave did so under the FFCRA, the FMLA, or a leave statute under state law, whereas the employers in these cases may have been covered under these statutes, based off the complaints.<sup>50</sup> Many workers either asked for leave and were denied, approved for leave but were terminated while out on leave, or suffered retaliation and harassment for taking or requesting leave.<sup>51</sup> In *Delaney v. Advantage Sales Ltd.*, the plaintiff was threatened by her employer that if she took “FFCRA leave, then she would be demoted when she returned.”<sup>52</sup> The plaintiff requested leave because her 9-year-old son's elementary school was closed and she had no one to watch him.<sup>53</sup> After she requested FFCRA leave, she was subjected to intense scrutiny and unfair criticism from her supervisor.<sup>54</sup> When she complained to her supervisor about the unfair treatment she had been receiving, he issued the plaintiff discipline for decreased productivity,

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46. See *infra* Appendix, at Table 3.

47. *Id.*

48. See Complaint at 5, *Mack v. Carousel Preschool, LLC*, No. 3:20-CV-877 (D. Conn. June 25, 2020); see also Plaintiff's Complaint for Damages and Equitable Relief and Request for Trial by Jury at 2, *Stivers v. Ind. Limestone Acquisition, LLC*, No. 4:20-CV-124 (S.D. Ind. June 5, 2020).

49. See Complaint, *Gregg v. Liberty Lutheran Hous. Dev. Corp.*, No. 4:21-CV-00165 (M.D. Pa. Jan. 28, 2021); see also Verified Complaint, *Foster v. Monticello Motor Club Sales & Mgmt.*, No. 1:21-CV-01400 (S.D.N.Y. Feb. 17, 2021).

50. See *infra* Appendix, at Table 1.

51. See Complaint, *Perez v. Ceco Concrete Constr. LLC*, 2020CA010211 (Fla. Cir. Ct. 2020) (employee requested leave to take care of his family that tested positive for COVID-19, which was denied); see also Complaint, *Fretz v. Allan Meyers, Inc.*, No. 5:20-CV-04758 (E.D. Pa. Sep. 28, 2020) (plaintiff was terminated while out on FMLA leave); Complaint at 5, *Delaney v. Advantage Sales Ltd.*, No. 4:20-CV-01644 (M.D. Pa. Sept. 11, 2020) (employee suffered retaliation for requesting leave).

52. Complaint at 5, *Delaney v. Advantage Sales Ltd.*, No. 4:20-CV-01644.

53. *Id.* at 4-5.

54. *Id.* at 6.

and, ignoring the 5-step progressive discipline policy that was in place, proceeded to demote her effective immediately from a Processing Manager to a Processing Crew Member.<sup>55</sup> The plaintiff subsequently filed a lawsuit against her employer for violating FFCRA by interfering with her right to leave and retaliating against her for requesting leave she was entitled to under the Act.<sup>56</sup>

Another plaintiff was impacted by the pandemic when he returned to work after taking protected leave under FFCRA to care for his children only to find that his position was no longer available.<sup>57</sup> Under FFCRA, an employee generally has a right to be restored to the same or equivalent position upon returning from leave.<sup>58</sup> The plaintiff, who worked as a driver, was offered another position driving a route that required a two-hour round trip, which was significantly more than the 10-minute round trip he had before taking leave.<sup>59</sup> He was unable to take the new driving position because he needed to be close to his son with special needs in case of emergency, and, as a result, lost his job as there were no other available positions for him.<sup>60</sup>

Although most workers who requested leave did so because they lacked childcare for their children, there were several cases filed where the plaintiff sought leave in order to care for an elder, such as a parent or in-law.<sup>61</sup> There was only one case where a worker requested leave for their spouse.<sup>62</sup> In that case, the plaintiff first requested leave from work because her doctor told her she was at high risk of complications from COVID-19.<sup>63</sup> After her employer denied her leave and ordered her to come into the office for work, the plaintiff requested FMLA leave to take care of her husband who had several upcoming medical appointments and tests due to his serious heart and mental conditions.<sup>64</sup> Under FMLA, a covered worker is entitled to leave to care for a family member, such as their spouse, if they have a serious health condition.<sup>65</sup> The plaintiff planned on attending these appointments with her husband in order to understand his medication needs and ensure his compliance with them.<sup>66</sup> However, the employer accused the

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55. *Id.* at 6-7.

56. *Id.* at 8-10.

57. *See* Complaint at 4-5, *Pacitti v. Ricciardi Brothers Old City, Inc.*, No. 2:20-CV-03734 (E.D. Pa. July 31, 2020).

58. *See* Families First Coronavirus Response Act (FFCRA), Pub. L. No. 116-127, 134 Stat. 178 (2020).

59. Complaint at 5-6, *Pacitti v. Ricciardi Brothers Old City, Inc.*, No. 2:20-CV-03734.

60. *Id.* at 6-7.

61. *See infra* Appendix, at Table 7.

62. *Id.*

63. Complaint at 2, *Newman v. HARC, Inc.*, No. 3:20-CV-01257 (D. Conn. Aug. 27, 2020).

64. *Id.* at 3.

65. Family and Medical Leave Act (FMLA) of 1993, 29 U.S.C. §§ 2601-2654 (2008).

66. Complaint at 2, *Newman v. HARC, Inc.*, *supra* note 63.

plaintiff of submitting a fraudulent FMLA request and denied her leave to help care for her husband.<sup>67</sup> Soon after, the plaintiff was forced to resign.<sup>68</sup> These cases highlight the various retaliatory actions employers took against plaintiff workers when they tried to exercise their right to leave.

## 2. Workplace Flexibility and Accommodations

Many plaintiffs also had difficulty with requesting and obtaining workplace flexibility and accommodations.<sup>69</sup> Of the 43 total cases filed, this issue arose in 20 cases.<sup>70</sup> In many of these cases, the worker requested workplace flexibility or accommodations first, and then requested leave as a final resort when their accommodation requests were denied. Accommodations requested included fewer hours, ability to work from home, change in hours or schedule, and being able to leave work early.<sup>71</sup>

The most common reason workers sought workplace flexibility or accommodations was due to a lack of childcare. In one case, a worker requested to temporarily work from a construction site closer to his home to watch his daughter.<sup>72</sup> He was responsible for watching his daughter because his entire family tested positive for COVID-19, except for him and his 5-year-old daughter.<sup>73</sup> The plaintiff wanted to keep his daughter separate from the family to prevent the spread of COVID, so he watched over her while his family quarantined and he had no other childcare for her during that time.<sup>74</sup> The worker reasoned that if he was transferred to a closer job site, he would have more time to care for his 5-year-old daughter as well as care for his sick family members.<sup>75</sup> The plaintiff, who had worked for the defendant for 16 years, was fired after his initial request to work at a different job site and his alternative requests to take leave under FFCRA were both denied.<sup>76</sup>

Other workers requested accommodations to care for immunocompromised family members and prevent them from getting

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67. *Id.* at 3-4.

68. *Id.* at 4.

69. *See infra* Appendix, at Table 3.

70. *Id.*

71. *See* Complaint, Delaney v. Advantage Sales Ltd., No. 4:20-CV-01644 (M.D. Pa. Sept. 11, 2020) (employee requested to work different hours); *see also* Complaint, Hawthorne v. James River Petroleum, Inc., No. 3:20-CV-00584 (E.D. Va. July 30, 2020) (plaintiff's request to work from home was denied); Complaint, Mack v. Carousel Preschool, LLC, No. 3:20-CV-877 (D. Conn. June 25, 2020) (plaintiff requested a reduced schedule due to her children's school closing); Complaint, Tse v. Capital One Fin. Corp., No. 1:20-CV-09347 (S.D.N.Y. Nov. 07, 2020) (employee requested to leave work at 5:15 pm in order to care for her two children).

72. Complaint at 5, Perez v. Ceco Concrete Constr. LLC, 2020CA010211 (Fla. Cir. Ct. 2020).

73. *Id.* at 4.

74. *Id.* at 5.

75. *Id.*

76. *Id.* at 3, 5.

infected from COVID-19, and some women requested accommodations because they had recently given birth.<sup>77</sup> The plaintiff worker in *Ashmon v. D&B Building Solutions LLC* sued her employer over violations of her state's leave and employee protection statutes, after being subjected to constant interrogation, contempt, and disdain from her supervisors when she requested to work remotely to care for her elderly, immunocompromised mother.<sup>78</sup> After working remotely for one month, the defendant employer terminated the worker.<sup>79</sup> In another case, the worker's employer refused to let her work remotely on a full-time basis because they believed she could not work while caring for an infant at home.<sup>80</sup> The plaintiff in that case alleged that her employer discriminated against her on the basis of sex, her pregnancy status, and her caregiver status by refusing to let her work remote with a newborn while other coworkers were not subjected to the same treatment.<sup>81</sup>

Oftentimes, workers had multiple reasons for requesting accommodations or workplace flexibility because of the conditions the pandemic created. The plaintiff in *Wilder v. Advocare Ear, Nose & Throat Specialists of Morristown* was eventually fired after requesting accommodations because of a lack of childcare and because her son was at high-risk for COVID-19 complications due to his severe asthma.<sup>82</sup> There, the plaintiff had been working remotely since the start of the pandemic—although with a reduction in hours—because her children's schools were closed.<sup>83</sup> She returned to work in person in August 2020, but requested the option to work remotely again for a two week period because she lacked childcare and made a separate request to work from home a few days out of the week moving forward since her children's schools would be operating on a hybrid-remote basis.<sup>84</sup> Her first request was denied, and she was told she would need to take leave for those two weeks.<sup>85</sup> Several days later, the plaintiff told her employer she would not be able to work in person after she learned that her coworker tested positive for COVID-19 because she feared for her son's safety due to his severe asthma and did not want to risk getting him sick.<sup>86</sup> The plaintiff was instructed to apply for a leave of

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77. See Complaint, *Ashmon v. D&B Bldg. Sols. LLC*, No. L-000494-21 (N.J. Super. Ct. Law Div. Jan. 20, 2021); see also Complaint, *Tse v. Capital One Fin. Corp.*, No. 1:20-CV-09347.

78. Complaint at 3, *Ashmon v. D&B Bldg. Sols. LLC*, No. L-000494-21.

79. *Id.* at 4.

80. Complaint at 4, *Leis v. Flag Comme'n US, LTD*, No. 1:21-CV-00350 (S.D.N.Y. Jan. 14, 2021).

81. *Id.* at 5-8.

82. Complaint at 7, *Wilder v. Advocare Ear, Nose, & Throat Specialists of Morristown*, No. 2:21-CV-00848 (D.N.J. Jan. 18, 2021).

83. *Id.* at 3-4.

84. *Id.* at 5.

85. *Id.*

86. *Id.*

absence, and, while in the process of submitting an application for leave under FFCRA, she learned she was locked out of her company's computer system and email.<sup>87</sup> After submitting her application for leave, the plaintiff saw her position posted on indeed.com, was notified that her application had been rejected, and, ultimately, she lost her job.<sup>88</sup> The plaintiff sued her employer for FFCRA interference and retaliation, and violations of her state's sick and leave laws.<sup>89</sup>

It is evident from looking at these cases that many employers do not believe workers can successfully work with accommodations while having caregiving responsibilities. The circumstances the COVID-19 crisis created forced many workers to request accommodations to fulfill their roles as both workers and caregivers, leaving many of them without a job as a result.

### 3. Discrimination

Outright discrimination was the least common issue among the plaintiffs that filed cases.<sup>90</sup> Cases alleging discrimination either concerned workplace flexibility, access to leave, or both. Table 4 lists the number of cases where the plaintiff experienced some sort of discrimination related to their status as a caregiver.<sup>91</sup> While there were many other claims for discrimination among the complaints, such as racial discrimination and disability discrimination, the cases in the table are limited to those where the discrimination was related to the plaintiff's caregiver status.

There were nine cases where the plaintiff claimed their employer discriminated against them because of their sex, and all nine of these cases were filed by women.<sup>92</sup> For example, one woman was furloughed from her job the day after she requested to work from home because daycares were closed and she had no one to watch her baby.<sup>93</sup> In *Leis v. Flag Communications US LTD*, the plaintiff was on maternity leave after giving birth to her newborn in January 2020, and was planning to return to work when she was furloughed.<sup>94</sup> Prior to the pandemic and before going on maternity leave, the plaintiff primarily worked from home and, for a short period of time, would go into a work-share office only once a week.<sup>95</sup> In 2019 when she requested an accommodation in her workload and schedule due to her fear of having another miscarriage, her supervisor dismissed her

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87. *Id.* at 6.

88. *Id.* at 6-7.

89. *Id.* at 7-10; *cf.* 29 C.F.R. § 826.50 (2020) (the Department of Labor clarified that employees needing to take FFCRA leave in full-day increments to care for their children whose schools are operating on an alternate day or hybrid basis were not required to get employer consent before taking such leave).

90. *See infra* Appendix, at Table 3.

91. *See infra* Appendix, at Table 4.

92. *Id.*

93. Complaint at 4, *Leis v. Flag Commc'n US, LTD*, No. 1:21-CV-00350.

94. *Id.* at 3-4.

95. *Id.* at 2.

concerns and refused her requests, even though the supervisor was aware of the plaintiff's previous miscarriage.<sup>96</sup> The plaintiff learned that she was the only employee furloughed, even though other employees were working remotely due to the COVID-19 pandemic.<sup>97</sup> While on furlough, she was told by a colleague that the plaintiff's supervisor had "asked the colleague to find out if [the plaintiff] had childcare" because the supervisor's decision on whether they would release the plaintiff from furlough was going to be based on her childcare arrangements.<sup>98</sup> Later on, the supervisor notified the plaintiff that she could only return on a part-time basis and that the plaintiff would need to secure childcare as they would not allow her to "work at home with a baby."<sup>99</sup> The worker subsequently filed a lawsuit against her employer, alleging that by only furloughing her and refusing to let her work remotely with an infant at home, she was discriminated against because of her sex and caregiver status.<sup>100</sup>

In a similar case, the plaintiff worker sued her employer for sex, pregnancy, and caregiver discrimination when she faced hostility and harassment from her employer after disclosing her pregnancy to her employer.<sup>101</sup> The plaintiff, who worked as the Senior Vice President of Sales for an investment firm, began to experience discriminatory treatment her employer during her first pregnancy in 2019, and was again met with hostility from her supervisor when she announced she was pregnant in September of 2020.<sup>102</sup> During her first pregnancy, she requested to work from home as an accommodation for her high-risk pregnancy, which her employer rescinded after she worked remotely for two months.<sup>103</sup> When the plaintiff announced her second pregnancy, everyone on her team was working remotely due to the pandemic.<sup>104</sup> In preparation for a return to in-person work, the defendant asked the plaintiff whether she had childcare.<sup>105</sup> The plaintiff notified her supervisor that her second pregnancy would also be high risk and that she would need to continue working remotely as an accommodation, and she was fired a few weeks later as a part of a reduction in force.<sup>106</sup> The day before the plaintiff was fired, the defendant hired a man who did not have the necessary licenses to perform the job onto her team.<sup>107</sup>

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96. *Id.* at 2-3.

97. *Id.* at 4.

98. *Id.*

99. *Id.*

100. *Id.* at 5-8.

101. *See* Complaint, *McKenna v. Santander Inv. Sec., Inc.*, No. 1:21-CV-00941 (S.D.N.Y. Feb. 03, 2021).

102. *Id.* at 7, 9.

103. *Id.* at 6.

104. *Id.* at 8-9.

105. *Id.* at 9.

106. *Id.*

107. *Id.* at 10.

Another common claim among the discrimination cases was associational disability discrimination, which occurs when a person is discriminated against because of their association with another person with a disability.<sup>108</sup> One plaintiff in California alleged her employer discriminated against her because she was the guardian of her granddaughter, who suffered from viral pneumonia and other disabilities, among other reasons.<sup>109</sup> The plaintiff requested leave at the start of the pandemic as an accommodation for her granddaughter's disabilities, she was subjected to discrimination and retaliation, and her request was denied.<sup>110</sup> After reporting the discrimination and harassment she had endured, the plaintiff was ultimately terminated by her employer.<sup>111</sup>

In another case, a plaintiff who had been at his job for over 30 years, claimed that his employer fired him because he went to Cambodia at the start of the pandemic to care for his father who suffered from a brain bleed.<sup>112</sup> The plaintiff continued to work while in Cambodia to avoid work conflicts, and upon returning to the U.S. in March 2020, was forced by his employer to quarantine for eight days before they would allow him to return to work.<sup>113</sup> Several days later, he was asked to work remotely indefinitely, even though none of the other employees with the same job title as him were forced to work from home.<sup>114</sup> Two months later the employee was fired, and in his complaint he alleged he was fired in part because he took care of his disabled father in Cambodia, and was thus discriminated against for his association with his sick father.<sup>115</sup>

The complaints from these cases indicate that the COVID-19 pandemic led many workers to experience discrimination from their employers due to their caregiver status. Whether they experienced caregiver discrimination for the first time because of the pandemic, or the pandemic exacerbated the discrimination and harassment they had already been facing at work, the COVID-19 crisis created opportunities for employers to punish workers for their caregiver status.

#### D. OTHER TRENDS

There were several other notable trends within the cases filed that were worthy of discussion. Out of the 43 cases filed, there were 26 cases where

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108. See *infra* Appendix, at Table 4; see also CAL. GOV'T CODE § 12926(o) (effective Jan. 1, 2021)

109. See Complaint at 6-7, *Hibbler v. Spenser4hire Sec. Guards*, No. 20STCV46090 (Cal. Super. Ct. Dec. 2, 2020).

110. *Id.* at 7.

111. *Id.* at 7-8.

112. Complaint for Damages at 3-4, *Sokhom v. Pac. Asian Consortium in Emp.*, No. 20STCV45048 (Cal. Super. Ct. Nov. 24, 2020).

113. *Id.* at 4.

114. *Id.*

115. *Id.*

the plaintiff was a woman.<sup>116</sup> With 60% of the cases filed by women, this follows the trend of women experiencing caregiver discrimination at higher rates than men.<sup>117</sup> As mentioned earlier, the majority of workers faced caregiver discrimination because they were caregivers to their children, with 36 of the 43 plaintiffs having caregiver responsibilities for children.<sup>118</sup>

With regard to plaintiffs' employment status at the time the lawsuit was filed, about three-fourths of the plaintiffs were terminated by their employer, three plaintiffs were constructively discharged, five of the workers' employment statuses were unclear based off of the complaints, and there were three cases where there was a dispute about whether the employee resigned or whether they were terminated by their employer.<sup>119</sup> For the cases where there was a dispute regarding how the employment relationship was ended, the employers denied the plaintiffs' request either for leave or for an accommodation; although the plaintiffs communicated they wanted to keep their jobs, they were unable to work due to their employers' denial of their requests, which the employers interpreted as a sign that the workers resigned.<sup>120</sup>

As of March 28, 2021, 35 cases were still pending, six cases had settled, one case was submitted to arbitration, and one case had been dismissed.<sup>121</sup> The sole case with a final disposition was dismissed because the plaintiff failed to prosecute the case.<sup>122</sup> In some of the pending cases, motions to dismiss were filed, but there was only one case where the court ruled on the motion.<sup>123</sup> In that case, the issue was whether the employer was considered an emergency responder under FFCRA to determine if it was exempt from having to provide leave to the plaintiff under FFCRA.<sup>124</sup> The court required more information, and thus ruled in favor of the plaintiff by denying the motion.<sup>125</sup>

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116. See *infra* Appendix, at Table 5.

117. WILLIAMS, *supra* note 13.

118. See *supra* note 61 and accompanying text; see also *infra* Appendix, at Table 7.

119. See *infra* Appendix, at Table 6.

120. See Complaint, Pacitti v. Ricciardi Brothers Old City, Inc., No. 2:20-CV-03734 (E.D. Pa. July 31, 2020); see also Complaint, Mack v. Carousel Preschool, LLC, No. 3:20-CV-877 (D. Conn. June 25, 2020); Complaint, Wilder v. Advocare Ear, Nose, & Throat Specialists of Morristown, No. 2:21-CV-00848 (D.N.J. Jan. 18, 2021).

121. See *infra* Appendix, at Table 8.

122. See Pacitti v. Ricciardi Brothers Old City, Inc., No. 2:20-CV-03734 2020 WL 4386293 (E.D. Pa. Mar. 16, 2021) (dismissed without prejudice for failing to prosecute after the plaintiff failed to advise the court on whether he intended to proceed with the matter without counsel).

123. See Sanchez v. Treemsmiths, Inc., No. 3:20-CV-858, 2021 WL 1015841 (M.D. Pa. Mar. 1, 2021).

124. *Id.* at \*2.

125. *Id.* at \*5.

### III. POLICY CONSIDERATIONS IN THE WAKE OF COVID-19

#### A. LIMITATIONS OF CURRENT LAWS

Although aggrieved workers relied on numerous statutes to allege they suffered from caregiver discrimination, there are limitations from current laws that have prevented workers all over the country from being able to assert a viable cause of action for caregiver discrimination during the COVID-19 pandemic.<sup>126</sup> For starters, the FFCRA, which was relied on by the majority of plaintiffs in the cases filed, was only effective from April 1, 2020 to December 31, 2020.<sup>127</sup> This means that workers who would have otherwise been eligible for leave under FFCRA were not covered if they needed leave from work for a COVID-19 related reason outside the law's window of applicability.<sup>128</sup>

Another limitation under FFCRA is that it allowed employers of health care providers or emergency responders, as well as employers with over 500 employees, to exclude employees from the Act's requirements.<sup>129</sup> These employer exclusions left up to 106 million private sector workers unable to access the paid leave provisions under FFCRA during a global pandemic.<sup>130</sup> Furthermore, employers have tried arguing that they are exempt under the Act by reasoning that they satisfied the requirements for one of the employer exclusions.<sup>131</sup> In one of the cases filed during the pandemic and discussed earlier, the defendant employer argued that it was considered an emergency responder under the FFCRA.<sup>132</sup> It relied on the Department of Labor's Guidance on FFCRA, which included public works personnel under the definition of emergency responder, and reasoned that because it was an arborist employed exclusively for public utility customers, it met the definition for a public works personnel employer.<sup>133</sup> Although the motion to dismiss was denied, the court held that the issue of whether the defendant was exempt from the FFCRA's paid leave provisions

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126. See Williams, *supra* note 41.

127. Families First Coronavirus Response Act (FFCRA), Pub. L. No. 116-127, Division C, § 3102, 134 Stat. 178 (2020); 29 U.S.C. § 2620 (2020); see also *infra* Appendix, at Table 1.

128. See FFCRA § 3102.

129. *Id.* §§ 3102, 3105.

130. Sarah J. Glynn, *Coronavirus Paid Leave Exemptions Exclude Millions of Workers from Coverage*, CTR. FOR AM. PROGRESS (Apr. 17, 2020, 5:00 AM), <https://www.americanprogress.org/issues/economy/news/2020/04/17/483287/coronavirus-paid-leave-exemptions-exclude-millions-workers-coverage/>; see also Williams, *supra* note 41.

131. See *Sanchez v. Treesmiths, Inc.*, No. 3:20-CV-858, 2021 WL 1015841 (M.D. Pa. Mar. 1, 2021); see also *Sanchez v. Treesmiths, Inc.*, No. 3:20-CV-858, 2021 WL 1015841 at \*2, \*5 and accompanying text (M.D. Pa. Mar. 1, 2021).

132. *Sanchez*, 2021 WL 1015841, at \*5.

133. *Id.* at \*5-6; see also *Families First Coronavirus Response Act: Questions and Answers, Wage and Hour Division*, U.S. DEP'T OF LAB. (last visited Nov. 21, 2021), <https://www.dol.gov/agencies/whd/pandemic/ffcra-questions#57>.

was yet to be determined.<sup>134</sup> This case highlights a potential issue for plaintiffs who claim they were entitled to leave and protections under the FFCRA—as more cases for FFCRA violations are filed, the more likely employers will argue that they are excluded from the Act’s requirements. Thus, FFCRA’s already limited protection to workers may be further narrowed as the statute’s provisions get challenged by employers in current and future litigation.

FMLA, another statute numerous plaintiffs relied on in these caregiver discrimination suits, is also quite limited in scope.<sup>135</sup> In order to qualify for FMLA leave, an employee needs to work for a covered employer with 50 or more employees, have worked for their employer for at least a year, and worked a minimum of 1,250 hours.<sup>136</sup> A Department of Labor survey from 2012 found that only 59% of employees were covered and eligible to take FMLA leave, which meant that over 40% of workers in the U.S. were not able to access the job-protected leave of FMLA.<sup>137</sup> In addition to the limited reach of FMLA, many workers who are eligible to take FMLA leave are unable to exercise their rights to leave because they cannot afford to take unpaid time off from work.<sup>138</sup> Thus, millions of workers do not have access to job-protected leave at the federal level, which is an especially pressing issue given the fact that employees now, more than ever, need access to leave because of the horde of issues the COVID-19 pandemic created.<sup>139</sup>

The ADA is another federal statute that is limited in its ability to protect workers who are associated with or related to a person with a disability. Although the ADA prohibits associational disability discrimination, it does not require that employers provide a reasonable accommodation to employees who are associated with someone with a disability.<sup>140</sup> The EEOC also makes clear that employees were not entitled to accommodations at work under the ADA to avoid exposing family members at higher risk of severe illness from COVID-19 due to underlying

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134. *Sanchez*, 2021 WL 1015841, at \*6.

135. Jennifer Ludden, *FMLA Not Really Working for Many Employees*, NPR (Feb. 5, 2013, 3:24 AM), <https://www.npr.org/2013/02/05/171078451/fmla-not-really-working-for-many-employees>; see also Debra L. Ness, *Why the FMLA Isn't Enough*, NAT'L P'SHIP FOR WOMEN & FAMS. (May 2, 2013), <https://www.nationalpartnership.org/our-impact/blog/general/why-the-fmla-isnt-enough.html>.

136. Family and Medical Leave Act (FMLA) of 1993, 29 U.S.C. § 2611 (2008).

137. NAT'L P'SHIP FOR WOMEN & FAMS., A LOOK AT THE U.S. DEPARTMENT OF LABOR'S 2012 FAMILY AND MEDICAL LEAVE ACT EMPLOYEE AND WORKSITE SURVEYS 1 (2013).

138. *Id.* at 2.

139. *Id.* at 1-2; see also Seth Stern, *Coronavirus Creates Novel Employee Leave Considerations*, BLOOMBERG L. (May 15, 2020, 2:39 PM), [https://www.bloomberglaw.com/product/labor/bloomberglawnews/coronavirus/XEK0I08S000000?bna\\_news\\_filter=coronavirus](https://www.bloomberglaw.com/product/labor/bloomberglawnews/coronavirus/XEK0I08S000000?bna_news_filter=coronavirus).

140. US EEOC, *Questions & Answers: Association Provision of the ADA* (Oct. 17, 2005), <https://www.eeoc.gov/laws/guidance/questions-answers-association-provision-ada>.

medical conditions.<sup>141</sup> This was an issue for many workers in the cases filed during the pandemic—many requested accommodations to work remotely or go on leave to protect their immunocompromised or disabled family members from getting exposed to COVID-19, which resulted in many of them suffering adverse action from their employers.<sup>142</sup> The limits on the ADA's Association Provision have already negatively impacted workers that are caregivers to immunocompromised family members during the COVID-19 crisis.

#### B. POTENTIAL POLICIES TO COMBAT CAREGIVER DISCRIMINATION

The COVID-19 pandemic has made it abundantly clear that caregiver discrimination is a significant issue for workers across the country and that we need better protection for workers with caregiving responsibilities. Luckily, there are several policy initiatives designed to combat caregiver discrimination within the U.S. One policy proposal is to make caregiver status a protected characteristic at the federal level, similar to Title VII's protections against discrimination on the basis of sex or race.<sup>143</sup> Another proposal is to allow reasonable accommodations to workers that live with disabled or immunocompromised individuals.<sup>144</sup> Other policy proposals focus on improving access to leave, such as increasing the reach of FMLA to guarantee job-protected leave to more workers or expanding upon the reasons for when employees can take FMLA leave.<sup>145</sup> Finally, a widely supported proposal is to implement a paid leave policy.<sup>146</sup>

### IV. CONCLUSION

Although caregiver discrimination in the U.S. is not a new issue, the COVID-19 Pandemic exposed the severity of the problem and brought to

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141. US EEOC, *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws* (June 11, 2020), <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>.

142. *See* Complaint, *Ashmon v. D&B Bldg. Sols. LLC*, No. L-000494-21 (N.J. Super. Ct. Law Div. Jan. 20, 2021); *see also* Complaint, *Wilder v. Advocare Ear, Nose, & Throat Specialists of Morristown*, No. 2:21-CV-00848 (D.N.J. Jan. 18, 2021).

143. *See* Protecting Family Caregivers from Discrimination Act, S. 3878, 116th Cong. (2020); Roush, *supra* note 1, at 230.

144. Maddie Butler, *Immunocompromised Workers Need Expanded Protections During COVID-19*, INDIANA DAILY STUDENT (Oct. 7, 2020, 6:33PM), <https://www.idsnews.com/article/2020/10/opinion-immunocompromised-workers-need-expanded-protections-during-covid-19>.

145. Roush, *supra* note 1, at 232; *see also* NAT'L P'SHIP FOR WOMEN & FAMS., *supra* note 137, at 3; GERALD MAYER, CONG. RSCH. SERV., R43214, THE FAMILY AND MEDICAL LEAVE ACT (FMLA): POLICY ISSUES 19 (2013).

146. Akayla Gardner, *Pandemic Drives Business Support for Paid Leave, Study Finds*, BLOOMBERG L. (Jan. 26, 2021, 3:00 AM), [https://www.bloomberglaw.com/product/labor/bloomberglawnews/daily-labor-report/XFLF6G3400000?bna\\_news\\_filter=daily-labor-report](https://www.bloomberglaw.com/product/labor/bloomberglawnews/daily-labor-report/XFLF6G3400000?bna_news_filter=daily-labor-report).

light the few protections, if any, workers have from being discriminated against based on their caregiver status. The plaintiffs from the lawsuits discussed in this paper are only a small number of the workers that were impacted by the circumstances the COVID-19 crisis created, as many more workers were denied coverage under the few statutes currently in place.<sup>147</sup> The COVID-19 pandemic highlighted the drastic need for change in how we protect and treat caregivers in the workplace, and the suggested policy proposals are a step in the right direction for trying to prevent workers from experiencing caregiver discrimination.

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147. See discussion *supra* Part III.A.

## V. APPENDIX

TABLE 1 – TYPES OF CLAIMS FILED

<b>Type of Claim</b>	<b>Number of Cases</b>
FFCRA	27
Other Federal and State Law Claims (no FFCRA)	10
State Law Claims Only (no FFCRA)	6

TABLE 2 – CASES FILED IN STATE COURT WITH STATE LAW CLAIMS

<b>State</b>	<b>Number of Cases</b>
CA	4
NY	1
NJ	1

TABLE 3 – COMMON ISSUES AMONG THE CASES FILED

<b>Type of Issue</b>	<b>Number of Cases</b>
Access to Leave	37
Workplace Flexibility and Accommodations	20
Discrimination	11

TABLE 4 – TYPES OF DISCRIMINATION CLAIMS

<b>Type of Discrimination</b>	<b>Number of Cases</b>
Sex Discrimination	9
Associational Disability Discrimination	5
Caregiver Discrimination	5
Pregnancy Discrimination	4

TABLE 5 – PLAINTIFF GENDER

<b>Plaintiff Gender</b>	<b>Number of Cases</b>
Male	17
Female	26

TABLE 6 – PLAINTIFFS' EMPLOYMENT STATUS AT THE TIME THE CASE WAS FILED

<b>Plaintiff Status</b>	<b>Number of Cases</b>
Terminated	32
Unknown	5
In dispute	3
Constructive Discharge	3

TABLE 7 – RELATIONSHIP TO PERSON THAT PLAINTIFF WAS  
CAREGIVER FOR

<b>Caregiver to Whom</b>	<b>Number of Cases</b>
Children	36
Spouse	1
Parent/In-law	6
Grandchildren	1

TABLE 8 – CASE STATUS AS OF MARCH 28, 2021

<b>Disposition of Case</b>	<b>Number of Cases</b>
Pending	36
Settled	6
Submitted to Arbitration	1
Dismissed	1

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