

## Publications

### Figuring Out Family Responsibilities Discrimination

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**AUTHORED ARTICLE** | April 2015

*Law360*

Monica Oathout, a partner in the Vorys Houston office and a member of the labor and employment group, and Jim Barnish, an associate in the Houston office and a member of the litigation group, co-authored an article for *Law360* titled “Figuring Out Family Responsibilities Discrimination.” The full text of the article is included below.

### Figuring Out Family Responsibilities Discrimination

Birth rates in the U.S. are holding steady while life expectancy rose to 78.8 years, a record high. More parents are moving in with their children and the trend is expected to continue as people live longer and require more care as they age. At the same time, the number of families with two working parents has increased by nearly 20 percent in the past few decades.

As a result, both families and employers are struggling with the effect family responsibilities have on the workplace. These struggles relate to real issues, such as rearranging work schedules, decreasing hours worked (and wages or salaries), or taking unpaid leaves of absence in order to manage commitments to both work and family. Additionally, there are implied issues, such as fighting against gender bias and stereotypes that compromise career paths. Due to the challenges these issues present, more employers find themselves defending against claims, by men and women, alleging family responsibilities discrimination.

FRD generally occurs when employees are discriminated against based on their responsibilities to their families, such as providing care to children, aging parents or people with disabilities. The discrimination can occur in a variety of circumstances and it affects both genders. Examples include: a young married woman who is denied employment due to a fear of her soon becoming pregnant; a parent of a young child who is denied a promotion due to concerns over time off needed to raise the child and an employee who is terminated after requesting flexible work hours to care for a sick parent.

## Why Should Employers Be Concerned?

While not directly prohibited by federal law, employers may face liability because:

- The number of claims has significantly increased. Currently, the Center for WorkLife Law, a center for research and advocacy out of the University of California Hastings College of Law, tracks more than 4,000 cases involving FRD claims in its database.
- Liability exists in different forms. While FRD is not expressly prohibited under any federal law, employees have different ways they can bring a suit. Potential avenues include: Title VII of the Civil Rights Act, the Americans with Disabilities Act, the Family Medical Leave Act and a variety of other local, state and federal laws. The most common claim is through Title VII or the ADA.
- More men are asserting claims. Although FRD claims may be founded on discriminatory bias or stereotypes about women, men are increasingly bringing claims. In fact, Professor Joan Williams, founding director of WLL, found 25 percent of the calls the center receives on FRD claims come from men. These claims are for violations of the FMLA and, increasingly, gender discrimination. For example, there are still widely held views that men limit their careers when they take paternity leave, even when it is offered by an employer. Professor Williams says studies have shown men are more likely to be punished when they request time off for family care responsibilities or request a flexible schedule. This “flexibility stigma” can affect working men more than working women.
- Claims are not limited to child care. Discrimination based on caring for an incapacitated relative can also lead to liability. According to the Family Caregiver Alliance, 52 million informal and family caregivers provide care to someone age 20 or over who is ill or disabled. Examples include: a spouse who suffered a stroke, a mother-in-law with cancer, a sibling with a traumatic brain injury from a car accident and a child with muscular dystrophy. Employers must be on the lookout to prevent discrimination when an employee takes care of any relative.
- Elder care is increasing. A significant portion of the workforce is also providing elder care to family members. The FCA estimates that 25 to 35 percent of all workers report they are currently providing or have provided care to someone over 65. And most of those caregivers are employed.
- The U.S. [Equal Employment Opportunity Commission](#) is actively investigating. The EEOC has issued guidance on what types of actions it considers to be a violation of Title VII or the ADA. These include treating female caregivers differently than male caregivers; making stereotypical assumptions about a pregnant woman’s ability to perform certain tasks; denying men leave for child care purposes while granting the same leave to females; and taking adverse actions against an employee who has complained about stereotyping of employees.
- Plaintiffs have been successful. According to the WLL, plaintiffs have a higher success rate, and recover much larger awards, with FRD claims than with other discrimination claims.

## What Can Employers Do to Minimize Risk?

Most children and incapacitated adults depend exclusively on family and friends for their care. Given that balancing work and family commitments is not a dilemma that will be solved soon, it is likely FRD claims will continue to increase in the coming years. An employer’s awareness of the issue and implementation of these tips may lessen any potential exposure:

***Review Policies***

Employers should review their handbooks and policies to ensure all caregivers and noncaregivers are treated consistently. For example, all leave and scheduling policies should be drafted so caregivers of both genders are treated the same. Similarly, all hiring, promotion and pay policies should be reviewed to make sure caregivers are given equal treatment. Further, adoption of an anti-discrimination policy that specifically identifies family responsibilities should be considered. Such a policy demonstrates the company's commitment to equality and would be useful in defending against punitive damages, should a lawsuit arise.

***Train People Well***

Employers should provide their employees with FRD training as part of its discrimination training. Most cases arise from an atmosphere created by managers and supervisors who have outdated assumptions or stereotypes about how family responsibilities affect an employee. Employers should train their employees on common biases, what conduct is prohibited and the avoidance of decisions based on stereotypes. The key is to train all employees "to leave their personal opinions on the 'ideal family' at home," says Professor Williams. Further, any training should stress that personnel actions have to be based on legitimate business needs and individual performance, not stereotypes and biases.

***Monitor Policies in Practice***

In addition to implementing proper policies and training, employers should ensure their policies are actually followed. For example, there are numerous cases where an employer offers family leave in its policies. However, in practice, employees are discouraged from using it by other employees. This could potentially lead to FRD claims.

***Handle Change Carefully***

One common complaint in a large number of FRD claims is a difference in treatment after a change in management. Often this is because new managers or supervisors may alter an employee's schedule or work responsibilities. An issue arises when an employee feels she is being targeted due to her family responsibilities or her new supervisor's stereotypes about employees with family responsibilities. When implementing any personnel changes, employers should be sure that managers and supervisors are instructed to treat all employees equally and to make decisions based on actual circumstances, not stereotypes, to avoid liability.

***Provide Flexibility***

Employers may also want to consider introducing scheduling flexibility in the form of telecommuting and reduced or adjusted schedules. These types of scheduling tweaks can both reduce the stress of family responsibilities on the workplace and increase productivity. Without flexible scheduling, many employees are forced to miss work all together due to family commitments. A flexible schedule allows an employee to address their responsibilities and complete their work. Additionally, many employers may also find it reduces their operating costs.

### ***Treat Claims Seriously***

Employers should set a procedure to receive and investigate claims involving FRD. Each claim should be investigated timely.

### ***Know Your Jurisdiction***

Some municipalities and states have stepped in to fill the gaps in federal law. Five states and more than 60 municipalities have enacted some type of law that concerns family responsibility issues. These statutes vary in who is protected and what acts are prohibited. Additionally, federal law in this area continues to evolve. These local, state and federal laws can create a complicated legal environment for employers. As such, it is important both employers and attorneys remain proactive and review any changes in the law carefully.