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## COVID-19 and the Caregiving Crisis: The Rights of our Nation's Social Safety Net and a Doorway to Reform

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# COVID-19 and the Caregiving Crisis: The Rights of our Nation's Social Safety Net and a Doorway to Reform

## Abstract

In March 2020, the United States declared a pandemic due to the global Covid-19 virus. Across the nation and within a matter of days, workplaces, schools, childcare, and eldercare facilities shuttered. People retreated to their homes to shelter-in-place and slow the spread of the virus for what would become a much longer time than most initially anticipated. Now, more than a year into the pandemic, many professional and personal lives have been upended and become inextricably intertwined. Work is now home, and home is now work. Work is completed at all times of day and well into the night. Children and pets make daily appearances in our virtual meetings. In many ways, the Covid-19 pandemic has been a leveling experience. Everyone has struggled during the pandemic in some way—even the most privileged. And, yet, in many ways the pandemic has also been incredibly stratifying. The United States is now in an “unequal recession.” One of the most crucial inequalities is the impact on those who hold caregiving roles in our society.

Working caregivers and women absorbed most of the unanticipated work throughout the Covid-19 pandemic—childcare, remote teaching, and care for aging parents and family members with special needs. Additionally, those same working caregivers—primarily women—are quitting their jobs in record numbers in order to manage the workload. Loss of employment is not the only impact.

Working caregivers quickly became society’s fallback plan in the United States. The Covid-19 pandemic shone a bright light on the value that the United States assigns to the work of caregiving and the inequities that exist in American culture and workplaces toward the individuals who perform those roles. The ripple effects of the Covid-19 pandemic on women will be felt for years to come—by the women, their families, and our workplaces which have lost and are losing daily the important and diverse perspectives those women bring to their work.

This article explores the role of caregivers during the Covid-19 pandemic, both the immediate and long-term impacts on those in caregiving roles, including the disproportionate impact of caregiving responsibilities on women, and the need for long-term reform to better support and value caregivers in the United States.

## Keywords

COVID-19, Caregiving, Caregivers, Women

## Disciplines

Labor and Employment Law | Social Welfare Law

# COVID-19 and the Caregiving Crisis: *The Rights of our Nation's Social Safety Net and a Doorway to Reform*

Leanne Fuith\*

Susan Trombley\*

*In March 2020, the United States declared a pandemic due to the global Covid-19 virus. Across the nation and within a matter of days, workplaces, schools, childcare, and eldercare facilities shuttered. People retreated to their homes to shelter-in-place and slow the spread of the virus for what would become a much longer time than most initially anticipated. Now, more than a year into the pandemic, many professional and personal lives have been upended and become inextricably intertwined. Work is now home, and home is now work. Work is completed at all times of day and well into the night. Children and pets make daily appearances in our virtual meetings. In many ways, the Covid-19 pandemic has been a leveling experience. Everyone has struggled during the pandemic in some way—even the most privileged. And, yet, in many ways the pandemic has also been incredibly stratifying. The United States is now in an “unequal recession.”<sup>1</sup> One of the most*

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<sup>1</sup> Greg Iacurci, *The Legacy of 2020: Riches for the Wealthy and White, Financial Pain For Others*, CNBC (Jan. 1, 2021), <https://www.cnbc.com/2021/01/01/the-covid-recession-brought-extreme-inequality-in-2020.html>. (White, wealthy college-educated Americans

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had a quick financial recovery while racial minorities, low earners, those without a college education, service workers, and women are more likely to be unemployed and falling into poverty)

<sup>2</sup> Kevin Dolan, Vivian Hunt, Sara Price, & Sandra Sancier-Sultan, *Diversity Still Matters*, MCKINSEY QUARTERLY (May 19, 2020), <https://www.mckinsey.com/featured-insights/diversity-and-inclusion/diversity-wins-how-inclusion-matters>. (According to a 2020 McKinsey and Company study, the greater the gender representation in a company, the higher the likelihood of outperformance. Companies with more than 30% female executives surpassed those with 10-30% female executives. Even those with fewer female executives surpassed those with no females at all. The results are similar for cultural and ethnic diversity. In fact, performance rates increase even more for cultural and ethnic diversity over gender diversity)

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## I. CAREGIVING IS UNIVERSAL

A caregiver is a person who tends to the needs or concerns of a person who cannot care for themselves.<sup>3</sup> This may include care of children; adults; older children with short- or long-term limitations due to illness, injury, or disability; and care of the elderly.<sup>4</sup> Caregivers provide care for individuals within their own family of origin, but they may also care for those outside their family of origin (their family of choice).<sup>5</sup> Former First Lady of the United States Rosalynn Carter, who founded The Rosalynn Carter Institute for Caregivers (“RCI”) in 1987, famously said, “[t]here are only four kinds of people in this world: those who have been caregivers, those who are currently caregivers, those who will be caregivers and those who will need caregivers. Caregiving is universal.”<sup>6</sup>

More than one in five Americans are caregivers. In May 2020, American Association of Retired Persons (AARP) reported that fifty-three million or 21% of American adults were providing uncompensated care to an adult or child.<sup>7</sup> Approximately 5.7% or 14.1 million American adults are caring for children under the age of 18 with special needs.<sup>8</sup> Approximately, one in five adults in the United States (including Puerto Rico) reported that they had provided care for a relative or friend during 2015–2017, suggesting that informal, unpaid caregiving is a widely occurring part of family life in the United States.<sup>9</sup>

These caregivers play an important role in our child, elder, and healthcare systems. Yet sixty-one percent of them also work paying jobs during their time as caregivers.<sup>10</sup> Caregiving affects individuals of all

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<sup>3</sup> DIV. OF POPULATION HEALTH, NAT’L CTR. FOR CHRONIC DISEASE PREVENTION AND HEALTH PROMOTION, *Caregiving*, CENTER FOR DISEASE CONTROL AND PREVENTION (Nov. 25, 2019), <https://www.cdc.gov/aging/caregiving/index.htm>.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> Rosalyn Carter, *About Us*, ROSALYN CARTER INSTITUTE FOR CAREGIVERS (2020) <https://www.rosalyncarter.org/about-us/>.

<sup>7</sup> AARP and National Alliance for Caregiving, *Caregiving in the United States 2020*. WASHINGTON, DC: AARP, 9 (May 2020), <https://www.aarp.org/content/dam/aarp/ppi/2020/05/full-report-caregiving-in-the-united-states.doi.10.26419-2Fppi.00103.001.pdf>. (This estimate is up substantially from 16.6% in 2015)

<sup>8</sup> *Id.*

<sup>9</sup> Valerie Edwards et al., *Characteristics and Health Status of Informal Unpaid Caregivers — 44 States, District of Columbia, and Puerto Rico, 2015–2017*. MMWR MORB MORTAL WKLY REP, 183-188 (2020), [HTTPS://WWW.CDC.GOV/MMWR/VOLUMES/69/WR/MM6907A2.HTM#SUGGESTEDCITATION](https://www.cdc.gov/mmwr/volumes/69/wr/mm6907a2.htm#SUGGESTEDCITATION).

<sup>10</sup> Lynn Friss Feinberg & Laura Skufca, *Managing a Paid Job and Family Caregiving is a Growing Reality: Nearly 30 Million Family Caregivers of Adults Are in the Labor Force*, AARP PUBLIC POLICY INSTITUTE, 1 (December 2020),

genders, race, class, and ethnicity, but the impact on certain segments of the population is greater than on others.

Men make up about 42% of adult caregivers, while women account for 58% of that unpaid labor force.<sup>11</sup> Interestingly, while men actually anticipate needing to take time off of work to give care at the same level as women, men ultimately do not take that time off because workplace policies and cultures often do not support their choice. So while the disproportionate impact of the caregiving crisis is on women, men also experience caregiving norms and expectations that prevent them from choosing to take on caregiving roles. These same norms and expectations simultaneously increase the burden experienced by women.

In 2020, over half of caregivers were part of the “sandwich generation” – those trying to simultaneously care for children, and the elderly, while also trying to develop their careers.<sup>13</sup> In fact, 74% of Generation X caregivers (those born between 1965 and 1980) care for adult relatives while also working outside for pay.<sup>14</sup> The rate of Generation Z and Millennial caregivers (those born after 1981) working outside the home is 72%.<sup>15</sup> And despite the significant nature of their caregiving obligations, caregivers under the age of thirty-five reported reduced access to telecommuting options, and paid family leave than those older than thirty-five.<sup>16</sup>

LGBTQ+ caregivers report feeling more discriminated against in the workplace because of their caregiving responsibilities.<sup>17</sup> Approximately, 8% of caregivers self-identify as lesbian, gay, bisexual, or transgender.<sup>18</sup> Also, because members of the LGBTQ+ community often depend on chosen family rather than the traditional family structure, the need for an expansive definition of family is critical for this population.<sup>19</sup>

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<https://www.aarp.org/content/dam/aarp/ppi/2020/12/managing-a-paid-job-and-family-caregiving.doi.10.26419-2Fppi.00103.024.pdf>.

<sup>11</sup> *Id.*

<sup>12</sup> Terry Gross, *Pandemic Makes Evident ‘Grotesque’ Gender Inequality in Household Work*, NPR (May 21, 2020), <https://www.npr.org/2020/05/21/860091230/pandemic-makes-evident-grotesque-gender-inequality-in-household-work>.

<sup>13</sup> AARP and National Alliance for Caregiving, *supra* note 7, at 11. (Millennial caregivers, those born between 1981 and 1996 are 23% of caregivers while Generation X, born between 1965 and 1980, are 29% of caregivers.)

<sup>14</sup> *See* Feinberg & Skufca, *supra* note 10.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> AARP and National Alliance for Caregiving, *supra* note 7, at 70. (For caregivers in general, 6% reported feeling discriminated against due to their caregiving responsibility while 17% of caregivers identifying as LGBTQ answered that way)

<sup>18</sup> *Id.* at 5.

<sup>19</sup> Cynthia Thomas Calvert, *Protecting Parents During Covid-19: State and Local FRD Laws Prohibit Discrimination at Work*, THE CENTER FOR WORK LIFE LAW, 12 (Nov. 2020),

African American caregivers are the most likely to also be in the labor force (64%) followed by White caregivers (62%), Hispanic caregivers (60%), and Asian caregivers (59%).<sup>20</sup>

Single mothers are the “head of the home” in one of eight American households.<sup>21</sup> As an aggregate, unmarried workers are the least likely to have young children at home, but for those that do, those with the lowest household income are two times as likely to have at least one child at home compared to the highest income bracket.<sup>22</sup> These families are also more likely to be employed in positions that require on-site work.<sup>23</sup> According to the St. Louis Federal Reserve, between 24% and 26% of workers also have a spouse who works full time.<sup>24</sup> While workers in this category may face similar stresses to single parents, they also have the potential to rely on their partner’s income or to share caregiving duties with their partner.<sup>25</sup>

Nationally, about 60% of caregivers have some college education or more.<sup>26</sup> About 26% of caregivers have a high school education and 6% have less than a high school education.<sup>27</sup> Although a two-income family may have the economic cushion of a second income, there is a larger economic cost because this group constitutes 10% of all full-time workers compared to the 2% of workers with young children and no spouse.<sup>28</sup> The majority of family members caring for adult relatives (61%) also worked at outside employment for pay during their caregiving experience.<sup>29</sup>

Higher-income caregivers (those making more than \$50,000 a year) are the most likely to have access to paid family leave benefits.<sup>30</sup> Salaried workers also report more access to paid sick days, and greater access to

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<https://worklifelaw.org/wp-content/uploads/2020/11/Protecting-Parents-During-Covid-19-State-and-Local-FRD-Laws.pdf>.

<sup>20</sup> Feinberg & Skufca, *supra* note 10, at 2.

<sup>21</sup> *Mothers & Families*, WOMEN’S BUREAU, U.S. DEP’T OF LABOR, MOTHERS & FAMILIES, <https://www.dol.gov/agencies/wb/data/mothers-and-families> (last visited June 15, 2020).

<sup>22</sup> Charles Gascon, *COVID-19, School Closings and Labor Market Impacts*, ON THE ECONOMY BLOG (April 30, 2020) <https://www.stlouisfed.org/on-the-economy/2020/april/covid-19-school-closings-labor-market-impacts>.

<sup>23</sup> Charles Gascon, *How Many Employees Are Prepared to Work From Home?*, ON THE ECONOMY BLOG (Mar. 23, 2020), <https://www.stlouisfed.org/on-the-economy/2020/march/employees-work-home>.

<sup>24</sup> Gascon, *supra* note 22.

<sup>25</sup> *Id.*

<sup>26</sup> Edwards et al., *supra* note 9.

<sup>27</sup> AARP and National Alliance for Caregiving, *supra* note 7, at 95.

<sup>28</sup> Gascon,

<sup>29</sup> Feinberg & Skufca, *supra* note 10, at 1.

<sup>30</sup> *Id.* at 4.

telecommuting opportunities.<sup>31</sup> African American and Hispanic caregivers more often work in hourly positions.<sup>32</sup>

## II. COVID-19 CAREGIVING: DISPROPORTIONATE IMPACT ON WOMEN AND WOMEN OF COLOR

Women have made great strides in the fight for equality including obtaining the right to vote and making inroads toward equal opportunity in education and in the workplace. Despite this progress, women still face discrimination and institutional barriers to equal participation in society including in the areas of employment and caregiving, and have been disproportionately impacted by the demands of caregiving during Covid-19.

The beginning of 2020 looked bright for women's employment. For only the second time in United States history, there were more women in the workplace than men.<sup>33</sup> Unfortunately, this did not last. After the Covid-19 pandemic was declared in March 2020, women began to leave the workforce in record numbers. In September 2020 alone, more than 865,000 women left the workforce.<sup>34</sup> According to more recent data from the Bureau of Labor Statistics, the United States economy lost net 140,000 jobs in December 2020—and all of them belonged to women.<sup>35</sup> There were 2.1 million fewer women working in December 2020 than there were in February 2020, right before the Covid-19 pandemic.<sup>36</sup>

The year 2020 marked the 100th anniversary of the passage of the 19th Amendment, guaranteeing women's constitutional right to vote.<sup>37</sup> But instead of the optimism that should have accompanied such this centennial anniversary, the year 2020 brought with it “America's first female recession” as jobs held by women disappeared faster than those held by

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<sup>31</sup> *Id.* at 4–5. (For salaried workers, 81% have paid sick leave as opposed to 43% for hourly workers. While 40% of salaried workers can telecommute, only 13% of hourly employees have that option)

<sup>32</sup> AARP and National Alliance for Caregiving, *supra* note 7, at 64. (According to AARP, 55% of African American and Hispanic caregivers work in hourly positions)

<sup>33</sup> Steve Horsley, *Women Now Outnumber Men on U.S. Payrolls*, NPR (Jan. 10, 2020), <https://www.npr.org/2020/01/10/795293539/women-now-outnumber-men-on-u-s-payrolls>.

<sup>34</sup> BUREAU OF LABOR STATISTICS, THE EMPLOYMENT SITUATION—SEPTEMBER 2020 (Oct. 2, 2020), [https://www.bls.gov/news.release/archives/empsit\\_10022020.htm](https://www.bls.gov/news.release/archives/empsit_10022020.htm).

<sup>35</sup> Yelena Dzhanova, *The US Lost 140,000 Jobs in December, All of Those Jobs Were Held By Women*, INSIDER (Jan. 9, 2021) <https://www.businessinsider.com/women-lost-140000-jobs-in-december-2021-1>.

<sup>36</sup> *Id.*

<sup>37</sup> U.S. CONST. amend. XIX

men.<sup>38</sup> Women's employment was more likely to be affected by social distancing regulations and the business shutdowns and closures brought on by the Covid-19 pandemic. Additionally, the loss of childcare and in-person schooling also forced hundreds of thousands of women to leave the workforce to care for children.<sup>39</sup> The Covid-19 pandemic pushed women's participation rate in the labor force to levels not seen since 1988.<sup>40</sup>

#### A. *Women and Women of Color Are Essential Workers Affected by the Covid-19 Pandemic*

In addition to taking on most of the caregiving responsibilities, women and people of color are also serving in many of the front-line worker roles throughout the pandemic from healthcare to retail to government services. Women are the bulk of essential workers in health care (76%) and government and community-based services (73%), while men make up most of the essential workers in the energy sector (96%), water and wastewater management (91%), and critical manufacturing (88%).<sup>41</sup> The Covid-19 pandemic has exacerbated the existing demands of women's roles as both caregivers and essential workers to historic levels not previously seen. That pressure, combined with the often-low wages paid to individuals in these roles, has forced many women and women of color to rethink their place in the workforce.

In addition to the pressures women have felt as both caregivers and front-line workers, women and Black, Indigenous, and People of Color (BIPOC) have experienced historic job losses. Unlike the 2008 recession, in which workers across all sectors were more evenly impacted, job losses from the Covid-19 pandemic have overwhelmingly affected low-wage and minority workers the most.<sup>42</sup>

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<sup>38</sup> Dzhanova, *supra* note 35.

<sup>39</sup> *Id.*

<sup>40</sup> Pallavi Gogoi, *Stuck at Home Moms: The Pandemic's Devastating Toll on Women*, NPR (Oct. 28, 2020), <https://www.npr.org/2020/10/28/928253674/stuck-at-home-moms-the-pandemics-devastating-toll-on-women>.

<sup>41</sup> Celine McNicholas & Margaret Poydock, *Who Are Essential Workers? A Comprehensive Look at Their Wage, Demographics, and Unionization Rates*, WORKING ECONOMICS BLOG (May 19, 2020; 11:25 A.M.), <https://www.epi.org/blog/who-are-essential-workers-a-comprehensive-look-at-their-wages-demographics-and-unionization-rates/>.

<sup>42</sup> Rakesh Kochhar, *Hispanic Women, Immigrants, Young Adults, and Those With Less Education Hit Hardest by COVID-19 Job Losses*, PEW RESEARCH CENTER: THINK TANK (June 9, 2020), <https://www.pewresearch.org/fact-tank/2020/06/09/hispanic-women-immigrants-young-adults-those-with-less-education-hit-hardest-by-covid-19-job-losses/>.

### B. *An Unequal Recession*

The Covid-19 pandemic has thrust us into an “unequal recession” with disparate employment, financial, and wellness impacts on BIPOC workers and women workers—populations who are already disadvantaged in the employment and professional arenas.<sup>43</sup>

In the early days of the Covid-19 pandemic, unemployment swelled from 6.2 million in February 2020 to 20.5 million in May 2020.<sup>44</sup> These unemployment levels make the Covid-19 recession comparable to the estimated 25% unemployment of the Great Depression.<sup>45</sup> By late August, there was optimistic talk of “economic recovery” as White Americans had regained more than half of the jobs they had lost.<sup>46</sup> But for BIPOC and women workers, the story was much different.<sup>47</sup> A year into the pandemic, Black women, Black men, and mothers of school-age children have taken the longest time to regain their employment.<sup>48</sup> As much of the caregiving responsibility and employment instability associated with the Covid-19 pandemic falls to women and women of color, the impact on these populations is significant and long-term. The impact is professional and financial, but it goes far beyond those two facets of women’s identity. It also impacts their health, families, and relationships. And it is far worse for women of color.

### C. *Covid-19 Impact: Time Out of the Workforce*

The rate of women leaving the workforce is high.<sup>49</sup> And the effects are devastating both now and in the long-term.<sup>50</sup> In addition to the immediate loss of income, women who leave the workforce may also experience long-term loss of income, loss of retirement, and decreased social security payments as they approach retirement.

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<sup>43</sup> Iacurci, *supra* note 1.

<sup>44</sup> Rakesh Kochhar, *Unemployment Rose Higher in Three Months of COVID-19 Than It Did in Two Years of the Great Recession*, PEW RESEARCH CENTER: THINK TANK (June 11, 2020), <https://www.pewresearch.org/fact-tank/2020/06/11/unemployment-rose-higher-in-three-months-of-covid-19-than-it-did-in-two-years-of-the-great-recession/>.

<sup>45</sup> *Id.*

<sup>46</sup> Iacurci, *supra* note 1.

<sup>47</sup> *Id.*

<sup>48</sup> BUREAU OF LABOR STATISTICS, LABOR FORCE STATISTICS FROM THE CURRENT POPULATION SURVEY (Oct. 5, 2020).

<sup>49</sup> Kweilin Ellingrud & Liz Hilton Segel, *COVID-19 Has Driven Millions of Women out of the Workforce. Here’s How to Help Them Come Back*, FORTUNE (Feb. 13, 2021), <https://fortune.com/2021/02/13/covid-19-women-workforce-unemployment-gender-gap-recovery/> (noting that female participation in the workforce has plummeted 57%. Economic projections estimate that women may not regain pre-pandemic levels of employment until 2024 compared 2022 for men).

<sup>50</sup> *Id.*

Mike Madowitz of the Center for American Progress created a calculator to show the cost of one parent's drop out of the labor force to provide care.<sup>51</sup>

A woman earning the median salary for younger full-time, full-year workers — \$30,253 annually in 2014 — who takes five years off at age 26 for caregiving would lose \$467,000 over her working career, reducing her lifetime earnings by 19 percent. A man in the same scenario — but earning the median wage for young male workers of \$33,278 annually in 2014 — would lose \$596,000 over the course of his career and would see a 22 percent reduction in lifetime earnings.<sup>52</sup>

A recent study done by McKinsey and Company and the “Lean In” organization found that mothers were more likely than fathers to consider leaving the workforce or scaling back.<sup>53</sup> As a result of the caregiving crisis brought on by the Covid-19 pandemic, that same study showed that more than one in four women has contemplated downshifting their careers or leaving the workforce completely.<sup>54</sup> Not only are women *thinking* about leaving the workforce, they are doing it.

In 2019, nearly 10 million women made up more than half of the labor force—for only the *second* time in United States history.<sup>55</sup> Contrast that the nearly 865,000 women who had dropped out of the work force as of September 2020 due to the Covid-19 pandemic.<sup>56</sup> That is four times the number of men. Challenges in managing work and family responsibilities have forced women to drop out of the workforce.<sup>57</sup> This will have an

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<sup>51</sup> Kirsten Doerer, *How Much Does It Cost to Leave the Workforce to Care for a Child? A Lot More Than You Think*, PBS NEWSHOUR (June 21, 2016), <https://www.pbs.org/newshour/economy/how-much-does-it-cost-to-leave-the-workforce-to-care-for-a-child-a-lot-more-than-you-think>.

<sup>52</sup> Michael Madowitz, Alex Rowell & Katie Hamm, *Calculating the Hidden Cost of Interrupting a Career for Child Care*, CENTER FOR AMERICAN PROGRESS (June 21, 2016), <https://www.americanprogress.org/issues/early-childhood/reports/2016/06/21/139731/calculating-the-hidden-cost-of-interrupting-a-career-for-child-care/>.

<sup>53</sup> Rachel Thomas et al., *Women in the Workplace*, MCKINSEY & CO. (2020), [https://wiw-report.s3.amazonaws.com/Women\\_in\\_the\\_Workplace\\_2020.pdf](https://wiw-report.s3.amazonaws.com/Women_in_the_Workplace_2020.pdf).

<sup>54</sup> *Id.*

<sup>55</sup> Julie Kashen, Sarah Jane Glynn & Amanda Novello, *How COVID-19 Sent Women's Workforce Progress Backward*, CENTER FOR AMERICAN PROGRESS (Oct. 30, 2020), <https://www.americanprogress.org/issues/women/reports/2020/10/30/492582/covid-19-sent-womens-workforce-progress-backward/>.

<sup>56</sup> *Id.*

<sup>57</sup> Titan Alon et al., *The Impact of COVID-19 on Gender Equality* (March 2020), [https://www.nber.org/system/files/working\\_papers/w26947/w26947.pdf](https://www.nber.org/system/files/working_papers/w26947/w26947.pdf)

impact on their financial well-being. According to the Institute for Women's Policy Research, just a year's gap in employment leads to a 39% decrease in annual earnings that compounds over time.<sup>58</sup> For those women who had the ability to work remotely during the Covid-19 pandemic, having young children at home all day every day decreased productivity.<sup>59</sup> These women are less productive than married men with similar family lives.<sup>60</sup> Lack of productivity creates roadblocks not only for career progression but also future earning potential.<sup>61</sup>

Women's departure from the employment market is an emergency for our workplaces. Workplaces that have struggled to welcome women and people of color, now risk losing women and women of color in our organizations and leadership of those organizations.<sup>62</sup> The Covid-19 pandemic has unwound years of painstaking progress toward gender diversity in the workplace. Some estimates say it will set women's progress back as much as twenty-five to fifty years as a country<sup>63</sup> and globally.<sup>64</sup>

#### D. Covid-19 Impact: Perceived Negatively at Work

In addition to loss of employment or choosing to leave the workforce, women caregivers have also been perceived more negatively at work during the Covid-19 pandemic. This is harder to quantify, but because of their caregiving responsibilities (or perceived role as caregivers) women in the workplace are now experiencing lost opportunities for promotions and advancements,<sup>65</sup> retaliation resulting in hostile work environment or termination,<sup>66</sup> and strained relationships with colleagues who may feel they have assumed additional burden in the workplace because of a

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<sup>58</sup> Stephen J. Rose & Heidi I. Hartmann, *Still a Man's Labor Market*, INST. FOR WOMEN'S POLICY RESEARCH, 1, 10 (2018) [https://iwpr.org/wp-content/uploads/2020/08/C474\\_IWPR-Still-a-Mans-Labor-Market-update-2018-2.pdf](https://iwpr.org/wp-content/uploads/2020/08/C474_IWPR-Still-a-Mans-Labor-Market-update-2018-2.pdf).

<sup>59</sup> Gascon, *supra* note 22.

<sup>60</sup> Alon et al., *supra* note 57; *see also* Colleen Flaherty, *No Room of One's Own*, INSIDE HIGHER ED (Apr. 21, 2020), <https://www.insidehighered.com/news/2020/04/21/early-journal-submission-data-suggest-covid-19-tanking-womens-research-productivity> (discussing how early journal submissions show women in academia are struggling with productivity and the threat it poses to their career advancement).

<sup>61</sup> *Id.*

<sup>62</sup> Kashen, *supra* note 55.

<sup>63</sup> *Id.*

<sup>64</sup> Alexandra Topping, *Covid-19 Crisis Could Set Women Back Decades, Experts Fear*, THE GUARDIAN (May 29, 2020), <https://www.theguardian.com/world/2020/may/29/covid-19-crisis-could-set-women-back-decades-experts-fear>.

<sup>65</sup> Thomas et al., *supra* note 53, at 8. (Only one in five C-suite leaders is a woman, and fewer than one in 30 are women of color)

<sup>66</sup> Thomas Calvert, *supra* note 19, at 14.

woman's caregiving responsibilities or who may feel like women with caregiving responsibilities should not be working professionals.<sup>67</sup>

Interestingly, in a 2015 study done by the Pew Research Center, 51% of Americans reported that they thought an ideal situation for young children was to have a parent who worked part-time or not at all.<sup>68</sup> Of those studied, 43% thought it was most ideal for the *mothers* of young children to work part-time or not at all.<sup>69</sup> And only 6% thought that it would be most ideal for the *fathers* of young children to stay home.<sup>70</sup>

Negative perceptions of women in the workplace pre-dates the Covid-19 pandemic and is often referred to as the “motherhood penalty.” Those negative perceptions, though, have been amplified as more women have taken on caregiving responsibilities at home during Covid-19 and their colleagues have greater visibility into their roles as caregivers through two-inch boxes on Zoom or increased needs for schedule flexibility and time away from work.

### E. Covid-19 Impact: Women's Health

According to the National Institute of Health, anxiety affects 19.1% percent of Americans annually.<sup>71</sup> However, anxiety disproportionately affects women with 23.4% of women experiencing anxiety compared to 14.3% of men.<sup>72</sup> Compared to similarly-situated men, women with children, partners and a full-time job experience more symptoms of stress and burnout.<sup>73</sup> According to a coalition of women's health organizations, all women and girls should be screened for anxiety.<sup>74</sup> Women with

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<sup>67</sup> Nikki Graf, *Most Americans Say Children Are Better Off With a Parent at Home*, PEW RESEARCH CENTER: THINK TANK (Oct. 10, 2016), <https://www.pewresearch.org/fact-tank/2016/10/10/most-americans-say-children-are-better-off-with-a-parent-at-home/>. (A 2015 study shows that most Americans say that children with two parents are better off when one of them stays home to tend to the family and, among certain segments of those studied, the belief is that the parent who stays home should be the mother.)

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> NAT'L INST. OF MENTAL HEALTH, ANY ANXIETY DISORDER (Nov. 2017), <https://www.nimh.nih.gov/health/statistics/any-anxiety-disorder.shtml>.

<sup>72</sup> *Id.*

<sup>73</sup> *Women are Maxing Out—and Burning Out—During Covid -19*, LEAN-IN.ORG AND SURVEY MONKEY, 3 (May 7, 2020), [https://media.sgff.io/sgff\\_rlCHetbDYb/2020-05-07/1588873077242/women-are-maxing-out-during-covid-19\\_1.pdf](https://media.sgff.io/sgff_rlCHetbDYb/2020-05-07/1588873077242/women-are-maxing-out-during-covid-19_1.pdf) [hereinafter *Maxing Out*].

<sup>74</sup> Sarah McCammon, *All Women Should Be Screened for Anxiety Disorders Health Group Says*, NPR (June 11, 2020), [https://www.npr.org/sections/health-shots/2020/06/11/874343044/all-women-should-be-screened-for-anxiety-disorders-health-group-says?fbclid=IwAR3bhBXN8EaxishCtew-DztVAcPMY59Ze3KEzF7MICuK4ISXi\\_8BZfS6hRM](https://www.npr.org/sections/health-shots/2020/06/11/874343044/all-women-should-be-screened-for-anxiety-disorders-health-group-says?fbclid=IwAR3bhBXN8EaxishCtew-DztVAcPMY59Ze3KEzF7MICuK4ISXi_8BZfS6hRM).

children, partners and a full-time job were also more than twice as probable than men to have severe anxiety with physical manifestations.<sup>75</sup> Anxiety screening is now covered as a preventative service under the Affordable Care Act.<sup>76</sup> While screening and treatment of anxiety is receiving more recognition, there is a fear that “widespread mental health issues of all kinds may become the ‘next wave’ of the pandemic.”<sup>77</sup> Those most vulnerable to the mental health effects of the Covid-19 pandemic include members of the Black and Hispanic communities and paid and unpaid care providers.<sup>78</sup> According to an August 2020 Centers for Disease Control (CDC) report, 31% of adults with unpaid caregiving responsibilities, like those living in multigenerational homes, reported suicidal thoughts.<sup>79</sup> During Covid-19, women have reported feeling more likely to be judged for their caregiving role.<sup>80</sup> For employed caregivers, 38% report that caregiving is highly stressful while 27% report that it is moderately stressful.<sup>81</sup>

In the early days of the Covid-19 pandemic, Lean-In and SurveyMonkey conducted a poll showing more than half of the women surveyed (52%) reported sleep issues compared to only a third of men (32%).<sup>82</sup> Besides sleep deprivation, caregiving takes other tolls on the caregiver’s physical health. For 25% of caregivers with ages ranging from eighteen to sixty-four, their caregiving responsibilities make it difficult for them to take care of their own health.<sup>83</sup> The physical demands of caregiving also take a toll, with 18% of caregivers reporting a high level of physical strain with another 29% reporting a moderate level of strain.<sup>84</sup> Finally, while the Covid-19 pandemic has isolated everyone, 49% of

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<sup>75</sup> *Maxing Out*, *supra* note 73. (Stating that 22% of women reported anxiety symptoms compared with only 10% of men)

<sup>76</sup> McCammon, *supra* note 74. (Noting that depression screening has been available as a preventative service under the Affordable Care Act since 2016)

<sup>77</sup> Joe Carlson, *As Pandemic Year Winds Down, Mental Health Concerns Rising in Minnesota*, STAR TRIBUNE (Dec. 28, 2020), <https://www.startribune.com/as-pandemic-year-winds-down-mental-health-concerns-rising-in-minnesota/573488092/>.

<sup>78</sup> *Id.*

<sup>78</sup> Feinberg & Skufca, *supra* note 10, at 3. (The rate of rate of Asian Americans reporting stress was 42%, while 41% of Whites, 32% of Hispanics, and 27% of African Americans reported experiencing stress)

<sup>79</sup> Mark E. Czeisler et al., *Mental Health, Substance Use, and Suicidal Ideation During the COVID-19 Pandemic — United States, June 24–30, 2020*, MMWR MORBIDITY AND MORTALITY WEEKLY REPORT (Aug. 14, 2020), <https://www.cdc.gov/mmwr/volumes/69/wr/mm6932a1.htm#contribAff>.

<sup>80</sup> Thomas et al., *supra* note 53, at 20.

<sup>81</sup> Feinberg & Skufca, *supra* note 10, at 3.

<sup>82</sup> *Maxing Out*, *supra* note 73, at 2.

<sup>83</sup> AARP and National Alliance for Caregiving, *supra* note 7, at 51.

<sup>84</sup> *Id.* at 52.

mothers report feeling lonely and isolated several times a week as compared to only 36% of fathers.<sup>85</sup>

#### F. *Covid-19 Impact: Family Relationships*

The Covid-19 pandemic has taken a toll on relationships as well. One in five people have reported fighting more than normal with their partner or spouse.<sup>86</sup> While few Americans have reported wanting to split from their partner because of Covid-19, more than 25% report knowing a couple who will probably end their relationship when the pandemic ends.<sup>87</sup>

#### G. *Disproportionate Impact on Women of Color and Racial Trauma*

The impact of the Covid-19 pandemic on the economic and professional well-being of the BIPOC population has been significant, but the impact on women of color has been even more devastating.<sup>88</sup> Women of color make up most of the front-line and service sector workers who experienced lower employment recovery during Covid-19.<sup>89</sup> Nearly, 30% of Black women work in the service industry.<sup>90</sup> These women, if they are working at all, may be working for even lower wages during the pandemic than they did previously.<sup>91</sup> Hispanic women have also experienced an especially steep rise in their unemployment rate, which jumped from 5.5% to 20.5% between February and April 2020.<sup>92</sup> Women of color already

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<sup>85</sup> Samuel J. Abrams, *The Parents Are Not All Right: The Experience of Parenting During a Pandemic*, AMERICAN ENTERPRISE INSTITUTE (July 9, 2020), <https://www.aei.org/research-products/report/the-parents-are-not-all-right-the-experiences-of-parenting-during-a-pandemic/>. (The rates of depression and isolation are even more significant for single parents with 54% of single parents reporting loneliness and isolation and 57% reporting depression)

<sup>86</sup> Mallory Newall, *As Pandemic Drags on Relationships Are Getting More Serious*, IPSOS (Aug. 4, 2020), <https://www.ipsos.com/en-us/news-polls/relationships-covid19>.

<sup>87</sup> *Id.* Only about 10% of respondents admitted to wanting to split from their partner because of the pandemic.

<sup>88</sup> Jocelyn Frye, *On the Frontlines at Work and at Home: The Disproportionate Economic Effects of the Coronavirus Pandemic on Women of Color*, CENTER FOR AMERICAN PROGRESS (April 23, 2020), <https://www.americanprogress.org/issues/women/reports/2020/04/23/483846/frontlines-work-home/>.

<sup>89</sup> *Id.*

<sup>90</sup> Nina Banks, *Black Women's Labor Market History Reveals Deep-Seated Race and Gender Discrimination*, WORKING ECONOMICS BLOG (Feb. 19, 2019), <https://www.epi.org/blog/black-womens-labor-market-history-reveals-deep-seated-race-and-gender-discrimination/>.

<sup>91</sup> Frye, *supra* note 88.

<sup>92</sup> *Hispanic Unemployment Rate Has Spiked During COVID-19, With Women Seeing a Bigger Increase Than Men*, PEW RESEARCH CENTER (Aug. 3, 2020),

face more barriers to advancement than most other employees. The impact of Covid-19 on women of color and their families is magnified by existing wage gaps, the higher number of women of color working in more severely impacted jobs and industries, and varying gender norms along cultural lines.<sup>93</sup>

In addition to increased caregiving responsibilities and employment instability, Black, Indigenous, and women of color are also coping with the unequal health impact of Covid-19 on communities of color as well as the emotional toll and trauma of repeated instances of racial violence and race-based rhetoric including the violence surrounding the death of George Floyd<sup>94</sup> and many of the anti-Asian sentiments related to the spread of Covid-19.<sup>95</sup>

This race-based stress and trauma brings with it serious consequences for the mental, physical, and emotional well-being of Black, Indigenous and women of color during an already exacting time. The consequences of this trauma are like post-traumatic stress disorder and includes feelings of vigilance and intrusion, depression, anger, symptoms of avoidance, loss of appetite, emotional numbing, and apathy.<sup>96</sup>

### III. CAREGIVERS EXPERIENCE DISCRIMINATION IN THE WORKPLACE; LAWS OFFER LIMITED PROTECTIONS TO WOMEN CAREGIVERS DURING COVID-19

From their work in front-line industries, to their need to leave the workforce to fulfill caregiving responsibilities, to their mental, emotional, and physical health and wellness, women have been disproportionately impacted by the Covid-19 crisis. They may also experience discrimination and retaliation because of their status as caregivers. The law has provided some protection to these women, but the protections are limited and do not fully compensate women for their unprecedented losses.

Family Responsibility Discrimination (FRD) is a form of workplace sex discrimination in which employees are treated unfairly because of their

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[https://www.pewresearch.org/hispanic/2020/08/04/coronavirus-economic-downturn-has-hit-latinos-especially-hard/ph\\_08-02-40\\_latino\\_economy-00-11/](https://www.pewresearch.org/hispanic/2020/08/04/coronavirus-economic-downturn-has-hit-latinos-especially-hard/ph_08-02-40_latino_economy-00-11/).

<sup>93</sup> Frye, *supra* note 88.

<sup>94</sup> Greg Johnson, *Police Killings and Black Mental Health*, PENN TODAY (June 23, 2020), <https://penntoday.upenn.edu/news/police-killings-and-black-mental-health>.

<sup>95</sup> Robert Polner, *Pandemic Era Sparks Both Anxiety and Activism for Asian Americans*, NYU NEWS (Feb. 26, 2021), <https://www.nyu.edu/about/news-publications/news/2021/february/AsianAmericanDiscriminationStudy.html>.

<sup>96</sup> Bradley University, *Counseling Minority Groups in a Time of Racial Unrest* (2020), <https://onlinedegrees.bradley.edu/blog/counseling-minority-groups-in-a-time-of-racial-unrest/>.

caregiving responsibilities for children, disabled relatives, or elderly parents, in-laws, or spouses.<sup>97</sup> The negative employment actions associated with FRD are the result of gender stereotypes against caregivers, including assumptions about how a caregiver will or should act in the workplace.<sup>98</sup> Common examples of gender stereotyping include making the assumption that a woman cannot be both a good mother and a good employee or expecting a man to be the breadwinner without caregiving responsibilities that will conflict with his work.<sup>99</sup> FRD affects all workers, but as the primary caregivers in our society, women are disproportionately disadvantaged.

FRD cases encompass a wide range of claims from Title VII gender discrimination to denial of leave benefits under the Family and Medical Leave Act.<sup>100</sup> FRD takes on a variety of different forms in the workplace including discrimination against workers with young children by questioning job applicants about plans to have children and using that information in hiring decisions; treating workers who are pregnant or have young children less favorably than those who do not or assigning them to jobs with lower pay and fewer advancement opportunities; and terminating workers who become pregnant or upon learning that workers are mothers of school-aged children.<sup>101</sup> FRD also affects workers who have caregiving responsibilities for disabled or elderly relatives, including parents and spouses.<sup>102</sup> Discrimination against these workers may manifest itself in a refusal to hire or reinstate workers who are parents of children with disabilities; interference with workers' rights to take family or medical leave; and retaliation against workers who exercise their right to take legally protected family and medical leave.<sup>103</sup>

Employees have been claiming discrimination based on their caregiving responsibilities for decades, but as more women with children have entered the workforce and more men have assumed non-traditional roles at home and in parenting, FRD has gained notoriety and has sparked an increase in FRD-related litigation.<sup>104</sup> Employees are also increasingly

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<sup>97</sup> The Center for Work Life Law, *What is FRD?* (2021), <https://worklifelaw.org/get-help/what-is-frd/> [hereinafter *What is FRD?*].

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> The Center for Work Life Law, *FRD Frequently Asked Questions?* (2021), <https://worklifelaw.org/get-help/what-is-frd/> [hereinafter *FRD Frequently Asked Questions?*].

<sup>101</sup> *What is FRD?*, *supra* note 97.

<sup>102</sup> *FRD Frequently Asked Questions?*, *supra* note 100.

<sup>103</sup> *Id.*

<sup>104</sup> Cynthia Thomas Calvert, *Family Responsibility Litigation Update 2016*, THE CENTER FOR WORK LIFE LAW, 9-10 (2016), <https://worklifelaw.org/publications/Caregivers-in-the-Workplace-FRD-update-2016.pdf>.

aware of what their legal rights are at work and what employer obligations are to help employees balance work and family.<sup>105</sup> As a result, employees expect to be able to successfully balance work and caregiving responsibilities. When they do not receive the support, they believe they deserve in the workplace, they look to litigation or other legal remedies to rectify the situation.<sup>106</sup> This may be particularly true for women who were successful, accomplished, and well-respected professionals in their twenties and thirties, but had their competence and commitment questioned when later in life they chose to have children or were confronted with the need to care for an aging parent or family member. After being revered for their earlier professional contributions and achievements, these women are less likely to tolerate the disrespect and bias that accompanies caregiver discrimination.<sup>107</sup>

Employees have also had significant success in bringing FRD claims.<sup>108</sup> The number of FRD cases decided in the last decade (2006–2015, 3223 cases) is more than three times the number of FRD cases decided in the prior decade (1996–2005, 873 cases), representing a 269% increase.<sup>109</sup> From 1998 to 2012, FRD filings increased 590% while over the same period employment discrimination cases in federal court decreased 13%.<sup>110</sup> Plaintiffs have a success rate of greater than 50% in these federal FRD cases with an average recovery of \$346,639.<sup>111</sup> Caregiver discrimination is more widely reported by caregivers under the age of fifty than those over the age of fifty.<sup>112</sup>

#### IV. LAWS PROTECTING CAREGIVERS

In the United States, caregivers are protected from family responsibility discrimination and other related claims by a complex, and often imperfect, web of federal and state laws and regulations. Some of these protections have been implemented as recently as April 2020 and were designed to protect caregivers specifically during the Covid-19 pandemic.

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<sup>105</sup> *Id.* at 9.

<sup>106</sup> *Id.* at 11.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 24. (Approximately 67% of FRD plaintiffs who take their case to trial win)

<sup>109</sup> *Id.* at 13.

<sup>110</sup> *Id.* at 4. (FRD related to aging relatives is growing even faster, up 650% from the previous decade.) *Id.* at 14.

<sup>111</sup> *Id.* at 26. (Federal cases represent 76% of FRD filings. State cases represent 16% of FRD cases and employees are successful 49% of the time)

<sup>112</sup> Feinberg & Skufca, *supra* note 10, at 7.

*A. Title VII of the Civil Rights Act of 1964 & The Pregnancy Discrimination Act*

For caregivers, Title VII and the Pregnancy Discrimination Act are two avenues for defending themselves against workplace discrimination based on sex. Title VII of the Civil Rights Act of 1964 prohibits discrimination and declares it unlawful to discriminate in hiring, firing, compensation, classification, promotion, and other conditions of employment based on race, sex, color, religion, or national origin.<sup>113</sup> Title VII also prohibits limiting, segregating, or classifying employees in any way that would deprive them of employment opportunities or otherwise adversely affect their employment.<sup>114</sup>

Title VII's prohibition of sex discrimination is the most relevant to caregivers. It provides that employment decisions that discriminate against workers with caregiving responsibilities are prohibited if they are based on sex or another protected characteristic, regardless of whether the employer discriminates more broadly against all members of the protected class.<sup>115</sup> The key types of workplace sex discrimination against caregivers will be discussed in more detail below, with particular emphasis on those types of discrimination that affect women and the kinds of evidence relied on to prove discrimination.

Title VII also prohibits employers from retaliating against workers who oppose or complain about unlawful discrimination, including discrimination against caregivers.<sup>116</sup> This includes retaliation against employees who file a charge of discrimination with the Equal Employment Opportunity Commission (EEOC) or who testify on behalf of another employee who has filed a charge.<sup>117</sup> If workers with caregiving responsibilities are subjected to offensive comments or other harassment because of any protected characteristic under Title VII, including sex, employers may be liable.<sup>118</sup> The offensive comments or harassment must be "sufficiently severe or pervasive" to create a hostile work environment.<sup>119</sup>

In 1978 the Pregnancy Discrimination Act was passed to amend Title VII and states that discrimination based on pregnancy, childbirth, or

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<sup>113</sup> 42 U.S.C. § 2000e-2(a).

<sup>114</sup> *Id.*

<sup>115</sup> U.S. Equal Opportunity Employment Commission, *Enforcement Guidance Unlawful Disparate Treatment of Workers With Caregiving Responsibilities* (May 23, 2007), <https://www.eeoc.gov/laws/guidance/enforcement-guidance-unlawful-disparate-treatment-workers-caregiving-responsibilities>.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

related medical conditions constitutes unlawful sex discrimination under Title VII.<sup>120</sup> This may include discrimination in hiring, pregnancy, and maternity leave and in providing health benefits and other fringe benefits.<sup>121</sup>

### B. *The Americans with Disabilities Act of 1990 (ADA)*

The Americans with Disabilities Act of 1990 (ADA) states that “[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.”<sup>122</sup>

To constitute a “disability,” a condition must substantially limit a major life activity.<sup>123</sup> Major life activities include caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.<sup>124</sup> The term “qualified individual with a disability” is a legal term of art meaning “an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.”<sup>125</sup> The ADA extends its protection to these caregivers by defining discrimination to include the denial of 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.”<sup>126</sup> The definition of a “major life activity” was expanded in 2009 and made protection under the ADA available to more caregivers whose children, aging parents or other individuals needing care did not previously qualify.<sup>127</sup>

### C. *The Family Medical Leave Act (FMLA)*

In 1993, Congress enacted, and the President signed the Family and Medical Leave Act (FMLA).<sup>128</sup> The FMLA is another source of federal

<sup>120</sup> U.S. Equal Opportunity Employment Commission, *Facts About Pregnancy Discrimination* (2008), <http://www.eeoc.gov/facts/fs-preg.html>.

<sup>121</sup> *Id.*

<sup>122</sup> 42 U.S.C. § 12112(a).

<sup>123</sup> Americans with Disabilities Act, *ADA Title III Technical Assistance Manual Covering Public Accommodations and Commercial Facilities*, <http://www.ada.gov/taman3.html#III-2.4000>.

<sup>124</sup> *Id.*

<sup>125</sup> 42 U.S.C. § 12111(8) (2018).

<sup>126</sup> 42 U.S.C. § 12112(b)(4).

<sup>127</sup> 42 U.S.C. § 12102(2)(A).

<sup>128</sup> Family and Medical Leave Act, Pub. L. No. 103-3, 107 Stat. 6 (1993).

protection for caregivers that entitles eligible employees, of all public agencies and most private-sector employers, to take up to twelve weeks of unpaid leave during a twelve-month period for specified family and medical reasons.<sup>129</sup> Employees are eligible to take FMLA leave for one or more of the following reasons:

- Birth and care of employee's newborn child.
- Placement with employee of son or daughter through adoption or foster care.
- Care for an immediate family member (spouse, child, parent) with a serious health condition.
- When the employee is unable to work because of a serious health condition.<sup>130</sup>

A "serious health condition" is defined as an illness, injury, impairment, or physical or mental condition that involves either any period of incapacity or treatment that involves inpatient care or continuing treatment by a healthcare provider, which includes an inability to work, attend school, or perform other daily activities due to:

- (1) a health condition lasting more than three consecutive days and any subsequent treatment relating to the condition;
- (2) pregnancy or pre-natal care;
- (3) a chronic serious health condition which continues over an extended period of time (e.g., asthma, diabetes);
- (4) a permanent or long-term condition for which treatment may not be effective (e.g., Alzheimer's, a severe stroke, terminal cancer); or
- (5) any absences to receive multiple treatments for restorative surgery or for a condition which would likely result in a period of incapacity of more than three days if

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<sup>129</sup> U.S. Department of Labor, Employment Standards Administration, *Fact Sheet #28: The Family and Medical Leave Act of 1993* (2012), <https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/whdfs28.pdf>.

<sup>130</sup> *Id.*

not treated (e.g., chemotherapy or radiation treatments for cancer).<sup>131</sup>

After an employee returns from FMLA leave, the employer must restore the employee to her original position or to an equivalent position with equivalent pay, benefits, and other employment terms.<sup>132</sup> If the employer can demonstrate that restoring the employee to her original position or an equivalent position will cause “substantial and grievous economic injury,” the employer may refuse to reinstate certain highly-paid, key employees, as long as the employer gives the employee notice that she is a “key” employee who may not be reinstated when the employee indicates her intent to take FMLA leave.<sup>133</sup> A key employee is defined as a salaried, eligible employee who is among the highest paid ten percent of employees within seventy-five miles of the work site.<sup>134</sup>

To be eligible for FMLA leave, employees must have worked for their covered employer for at least twelve months and must have worked a minimum of 1,250 hours in the last twelve months.<sup>135</sup> In order to be a covered employer, the employer must employ at least fifty employees within a seventy-five mile radius.<sup>136</sup> An eligible employee may take FMLA leave in small blocks of time or by reducing her normal weekly or daily work schedule, as long as she takes all of her leave within the prescribed twelve month period.<sup>137</sup> An employee’s use of FMLA leave cannot be held against her under attendance policies and cannot result in the loss of an employment benefit.<sup>138</sup> For caregivers who qualify, FMLA provides the time they need away from work to care for their families and the assurance that they will have a job to which to return.

Elder care issues are on the rise as more people take on an elder care role.<sup>139</sup> However, there is less statutory recourse for elder care issues than other forms of FRD.<sup>140</sup> Generally, most elder care issues arise in the FMLA context or their state equivalent.<sup>141</sup>

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<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> BUREAU OF LABOR STATISTICS, UNPAID ELDER CARE IN THE UNITED STATES—2017-2018 SUMMARY (Nov. 22, 2019), <https://www.bls.gov/news.release/elcare.nr0.htm>. (According to this study of the 40.4 million elder caregivers, 58% were women. Additionally, 8.2 million caregivers had children under age 17 at home)

<sup>140</sup> Thomas Calvert, *supra* note 104, at 24.

<sup>141</sup> *Id.*

*D. Families First Coronavirus Response Act (FFCRA)*

In late March 2020, Congress passed and President Trump signed into law the Families First Coronavirus Response Act (FFCRA) which went into effect on April 2, 2020.<sup>142</sup> The FFCRA effectively amends the FMLA and attempts to provide employees with paid leave to care for a minor child, if the child’s regular place of care is closed due to a federal, state or locally declared “public health emergency” related to Covid-19.<sup>143</sup> The FFCRA, however, is subject to many exemptions which leave thousands of workers with caregiving responsibilities at risk for workplace discrimination.

The wide array of exemptions written into the law and subsequent regulations the Department of Labor issued have left few options for thousands of workers who have called the department, lawyers, or advocacy groups for help, according to interviews with a dozen government employees, worker advocates, and private attorneys. Up to 80% of the workforce may not be eligible, according to an analysis by the left-leaning think tank Center for American Progress.<sup>144</sup>

The FFCRA provides that employers with fewer than 500 employees must provide paid sick leave or expanded family/medical leave for reasons related to Covid-19.<sup>145</sup> These reasons include if employees are:

- Subject to a federal, state, or local quarantine order or are caring for an individual subject to one,
- Advised by a health care provider to self-quarantine or are caring for an individual who has been so advised,
- Experiencing Covid-19 symptoms and seeking medical diagnosis, or
- Caring for a child whose school or childcare is closed or unavailable due to Covid-19.<sup>146</sup>

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<sup>142</sup> Families First Coronavirus Response Act, PUB. L. NO. 116-127, 134 Stat. 178 (2020) [hereinafter *FFCRA*].

<sup>143</sup> *Id.* at § 3102.

<sup>144</sup> Ben Penn, *Paid Leave Promise Turns ‘Mirage’ for Most Workers in Pandemic*, BLOOMBERG LAW (May 27, 2020).

<sup>145</sup> *FFCRA*, *supra* note 142, at § 189.

<sup>146</sup> *Id.* at §§ 195-196.

The FFCRA allows employees to take a limited amount of paid leave for caregiving responsibilities and prohibits employers from discharging, disciplining, or discriminating against employees who do so. Under the FFCRA, full-time employees are entitled to up to eighty hours of paid leave at their regular rate of pay for quarantine orders, self-quarantine or medical diagnosis and an additional ten weeks of partially paid leave if they are caring for a child whose school or childcare is closed.<sup>147</sup> Notably, leave for those ten weeks of caregiving are only paid at two-thirds the employee's regular rate of pay.<sup>148</sup>

There are other legal protections available to caregivers under federal and state employment discrimination and retaliation laws such as the Family Medical Leave Act,<sup>149</sup> the Pregnancy Discrimination Act,<sup>150</sup> and the Americans with Disabilities Act,<sup>151</sup> but most of those are time limited in some way (they did not contemplate a more than year-long global pandemic) or they may preserve a job but may not provide for paid leave from it. The FFCRA<sup>152</sup> also provided additional flexibility and funding. Additionally, the CARES Act<sup>153</sup> (both the FFCRA and CARES Act passed in March 2020) expands states' ability to provide unemployment insurance including to workers who are not ordinarily eligible for unemployment benefits, but again, the benefits are limited. In fact, twenty-six million people are receiving unemployment benefits and those benefits have gradually lessened over the duration of the pandemic.

In the early days of the Covid-19 pandemic, some employers were able to offer a great deal of flexibility to working caregivers. Other employers, especially those in the service or retail industry could not. As the Covid-19 pandemic has dragged on, all employers have had to evaluate whether they can continue to offer that same flexibility against the changing needs of their businesses. Laws like the FFCRA have attempted to provide working caregivers with some protections but they are far from perfect.

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<sup>147</sup> WAGE AND HOUR DIVISION, U.S. DEP'T OF LABOR, FAMILIES FIRST CORONAVIRUS RESPONSE ACT: EMPLOYER PAID LEAVE REQUIREMENTS, <https://www.dol.gov/agencies/whd/pandemic/ffcr-employer-paid-leave>.

<sup>148</sup> *Id.* It is worth noting that covered employers qualify for *dollar-for-dollar* reimbursement through tax credits for all qualifying wages paid under the FFCRA (emphasis added). Applicable tax credits also extend to amounts paid or incurred to maintain health insurance coverage.

<sup>149</sup> Family and Medical Leave Act of 1993, PUB. L. NO. 103-3, 107 Stat. 6 (1993) [hereinafter *FMLA*].

<sup>150</sup> Pregnancy Discrimination Act, PUB. L. NO. 95-555, 92 Stat. 2076 (1978) [hereinafter *Pregnancy Discrimination*].

<sup>151</sup> Americans With Disabilities Act, 42 U.S.C. §12101 et set. (2018) [hereinafter *ADA*].

<sup>152</sup> *FFCRA*, *supra* note 142, at §§ 195-196.

<sup>153</sup> Coronavirus Aid, Relief, and Economic Security Act, PUB. L. NO. 116-136 (2020) [hereinafter *CARES*].

## V. GAPS IN THE LAWS PROTECTING CAREGIVERS IN THE UNITED STATES

Not surprisingly, the laws protecting working caregivers during the Covid-19 pandemic are insufficient—they do not cover all caregivers and they are limited in the protections they do provide. The laws that were in place prior to the Covid-19 pandemic (Title VII,<sup>154</sup> ADA,<sup>155</sup> and FMLA<sup>156</sup>) were not designed to support long-term and widespread caregiving needs during a global health crisis and the lawmakers who drafted the FFCRA legislation did not contemplate a global public health crisis that has dragged on for more than a year and still is not over. The FFCRA covers only employees working for certain public employers and private employers with fewer than 500 employees.<sup>157</sup> It does not provide coverage to caregivers working for larger organizations. It also only provides ten additional weeks for childcare—less than halfway into the Covid-19 pandemic that time had already run out for most working caregivers.<sup>158</sup> The FFCRA also only compensates a working caregiver who must take time off for caregiving at two-thirds of their regular income.<sup>159</sup> Additionally, grandparents and other non-parental caregivers are not covered by the FFCRA. Notably, in the United States approximately 1.3 million grandparents in the labor force are also responsible for caring for their grandchildren.<sup>160</sup>

Unemployment benefits are also not the answer. Even with the extended protections provided under the CARES Act, unemployment benefits do not replace a worker's full salary.<sup>161</sup> The emergency acts put in place related to the Covid-19 pandemic offer some flexibility on this, but depending on the state, unemployment benefits may also require some showing of continued efforts to find work. This is inconsistent with both the duration and unanticipated nature of caregiving needs during the Covid-19 pandemic. Finally, without further legislation, the regulations put in place to offer extended emergency unemployment benefits during the pandemic are only in effect through September 2021.<sup>162</sup>

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<sup>154</sup> *Pregnancy Discrimination*, *supra* note 150.

<sup>155</sup> *ADA*, *supra* note 151.

<sup>156</sup> *FMLA*, *supra* note 149.

<sup>157</sup> *FFCRA*, *supra* note 142.

<sup>158</sup> *Id.*

<sup>159</sup> WAGE AND HOUR DIVISION, *supra* note 147. Applicable tax credits also extend to amounts paid or incurred to maintain health insurance coverage.

<sup>160</sup> NAT'L FAMILY CAREGIVERS MONTH: NOVEMBER 2019, U.S. CENSUS BUREAU, <https://www.census.gov/newsroom/stories/2019/family-caregivers.html> (last visited Aug. 1, 2020).

<sup>161</sup> *CARES*, *supra* note 153.

<sup>162</sup> *FFCRA*, *supra* note 142, at § 5109. See also Jennifer Liu, *The \$1.9 trillion stimulus bill is headed to Biden's desk—here's what it includes for unemployment* (Mar. 10, 2021),

Working caregivers in the United States have no other safety nets under the law or otherwise. The United States lacks the infrastructure designed to protect our working caregivers and to value the act of caregiving—particularly, as compared to other countries.

## VI. THE COVID-19 CAREGIVING CRISIS: A RECKONING AND A DOORWAY TO REFORM

Other countries have social safety nets. The United States has women. Women in the United States have long done a disproportionate share of the unpaid service work in institutions and at home. Women run the school fundraisers and lead the church outreach programs. They also check in on sick coworkers remember birthdays, and help their colleagues feel like part of a team. Women do all of that unpaid service for the institutions in their lives, and then they go home and do even more. Women serve as the social safety net because norms (norms that serve historically capitalistic, patriarchal, and white interests) in the U.S. tell them that is their role. And because breaking those norms leaves [women] open to judgments (or worse) from others and judgments from themselves.<sup>163</sup>

Women in the United States have long served as the nation's fallback plan in times of crisis. The Covid-19 pandemic has underscored that fact as women have been forced to navigate both their professional responsibilities and increased, enduring caregiving needs in their homes, workplaces, and communities. This emotional labor takes time away from the high-value work necessary for women to advance, or even just maintain, their status professionally and financially. It also impacts their health and wellness as well as the well-being of their families. Yet, when women do not live up to society's norms and expectations that they serve as caretakers in their homes, workplaces, and communities, they are

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<https://www.cnn.com/2021/03/10/unemployment-benefit-updates-in-the-american-rescue-plan-stimulus.html>. (In December 2020, Congress passed a pandemic relief package extending emergency unemployment benefits, albeit at reduced levels, to mid-March 2021. On March 10, 2021 and at the time this article went to press, Congress had passed the American Rescue Plan which extends until Sept. 6, 2021 the unemployment benefits previously set to expire in mid-March)

<sup>163</sup> Anne Helen Petersen, *Other Countries Have Social Safety Nets: The U.S. Has Women*, CULTURE STUDY (Nov. 11, 2020), <https://annehelen.substack.com/p/other-countries-have-social-safety>.

labeled uncaring or abrupt.<sup>164</sup> A reckoning is needed on how the United States values the role of caregivers in our society and now is the time. As we emerge from the Covid-19 pandemic and acknowledge the consequences of the past year and the disproportionate impact of our nation's caregiving crisis on women, we must also walk through the doorway to reform.

During World War II, the United States made its first foray into publicly funded childcare. Under a law meant to fortify war production, childcare facilities opened in communities contributing to war time production.<sup>165</sup> When the Department of Defense had to start competing for employees with the end of the draft in the 1970s, family-oriented benefits, like Child Development Centers, were one component of the benefits package used to attract and retain service members.<sup>166</sup> Fast forward more than fifty years and the United States is now the only nation out of forty-one Western nations that provides no paid leave for new parents.<sup>167</sup> Nearly 200 state and local governments in the United States have laws prohibiting familial discrimination that cover more than fifty million people, but those laws provide only limited protections for caregivers—the disproportionate share of whom are women—and those discrimination laws do not fully compensate them for their losses.<sup>168</sup>

The United States has never adequately valued and supported women's paid work and unpaid caregiving, though both are essential contributions to the nation's economy and families' well-being. Even with issues as critical as administering the Covid-19 vaccine, the United States

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<sup>164</sup> Gwen Moran, *This Is the Cost of Women's Workplace Emotional Labor*, FAST COMPANY (Oct. 3, 2018), <https://www.fastcompany.com/90241506/women-do-more-emotional-labor-than-men-at-work>.

<sup>165</sup> Lanham Public War Housing Act, 54 Stat. 1125; *See also* Rhaina Cohen, *Who Took Care of Rosie the Riveter's Kids*, THE ATLANTIC (Nov. 18, 2015), <https://www.theatlantic.com/business/archive/2015/11/daycare-world-war-rosie-riveter/415650/>.

<sup>166</sup> *See generally*, Kristy Kamarack, CONGRESSIONAL RESEARCH SERVICE, MILITARY CHILD DEVELOPMENT PROGRAM: BACKGROUND AND ISSUES (Mar. 19, 2020), <https://fas.org/sfp/crs/natsec/R45288.pdf>; *See also* Andrea Hsu, *The American Government Once Offered Widely Affordable Child Care . . . 77 Years Ago*, NPR (Oct. 31, 2020), <https://www.npr.org/2020/10/31/927267330/the-american-government-once-offered-widely-affordable-child-care-77-years-ago>.

<sup>167</sup> Gretchen Livingston & Deja Thomas, *Among 41 Countries, Only U.S. Lacks Paid Parental Leave*, PEW RESEARCH Center (Dec. 16, 2019), <https://www.pewresearch.org/fact-tank/2019/12/16/u-s-lacks-mandated-paid-parental-leave/>. (Some nations only provide leave for women, but some countries also provided a small mandatory leave period for men as well. In the United States, there is no federally mandated paid parental leave, but selected states have a parental leave requirement including California, New Jersey, New York, Rhode Island, Washington, and the District of Columbia.)

<sup>168</sup> Thomas Calvert, *supra* note 19, at 3.

continues to fail in prioritizing caregivers.<sup>169</sup> As a country, we lack the structural policies to support women's work and caregiving. Women need access to work-family supports and childcare to participate in the labor force, but these programs have consistently been unsupported by legislators and policymakers.

The United States must prioritize structural policy changes to recognize the value of women's work and unpaid caregiving and improve gender equality. Specifically, policies are needed that ensure employees can request workplace flexibility without discrimination or retaliation, increase funding for childcare and resources for childcare providers, expand and make permanent paid sick leave and paid family and medical leave, prohibit caregiver and pregnancy discrimination, and raise wages and ensure equal pay. The 2019 Childcare for Working Families Act<sup>170</sup> and the subsequent 2020 Childcare is Essential Act<sup>171</sup> are examples of a type of reform that would, at least partially, address the caregiving crisis in our country. Yet, lawmakers have consistently struggled to pass this type of legislation in the United States calling into question whether most Americans think mothers should work in the first place.<sup>172</sup> The United States must reconcile its idealism around the notion of women as primary caregivers to our children and elders and acknowledge how substantially our workplaces and communities also rely on those same women to participate in non-caregiving and caregiving roles.

Government leaders can no longer embrace the idea that legislation that "makes it easier or more convenient for mothers to come out of the home and let others raise their child [is not] a good direction for us to be going."<sup>173</sup> Women are already outside the home and the United States is

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<sup>169</sup> Judith Graham, *Family Caregivers, Routinely Left Off Vaccine Lists, Worry What Would Happen 'If I Get Sick'*, MODERN HEALTHCARE (Feb. 16, 2021), <https://www.modernhealthcare.com/safety-quality/family-caregivers-routinely-left-vaccine-lists-worry-what-would-happen-if-i-get-sick>. (Healthcare workers and vulnerable older adults in nursing homes have been prioritized in receiving Covid-19 vaccines, but family members caring for equally vulnerable seniors living in the community are grouped with the general population in most states and may not get vaccines for months)

<sup>170</sup> Childcare for Working Families Act, H.R. 1364, 116th Cong. (2019).

<sup>171</sup> Childcare is Essential Act, H.R. 7027, 116th Cong. (2020).

<sup>172</sup> Claire Cain Miller, *Why the U.S. Has Long Resisted Universal Child Care*, N.Y. TIMES (Apr. 15, 2019), <https://www.nytimes.com/2019/08/15/upshot/why-americans-resist-child-care.html>.

<sup>173</sup> See Brian Holmes, *Idaho Republican Votes Against Using Federal Funds for Early Education, Says It Makes It 'Easier for Mothers to Come Out of the Home'*, KTVB (Mar. 2, 2021), [https://www.ktvb.com/article/news/local/208/idaho-republican-votes-against-education-funds-convenient-for-mothers-to-come-out-of-the-home/277-645ae7a7-601e-4557-9d7c-f8df5c22949c?utm\\_campaign=snd-autopilot&fbclid=IwAR1kAwaeH-hakRTq7D6tZWY8XrOIPRuDkdIoxc4sOPDsHbhl6ll9653\\_8rA](https://www.ktvb.com/article/news/local/208/idaho-republican-votes-against-education-funds-convenient-for-mothers-to-come-out-of-the-home/277-645ae7a7-601e-4557-9d7c-f8df5c22949c?utm_campaign=snd-autopilot&fbclid=IwAR1kAwaeH-hakRTq7D6tZWY8XrOIPRuDkdIoxc4sOPDsHbhl6ll9653_8rA); see also Tucker Carlson, *Mitt Romney Supports the Status Quo. But for everyone else, It's Infuriating*, FOX NEWS

dependent on the value that they bring to our workplaces. Our government leaders are obligated to develop policy and legislation to support them. Amending state laws to expand anti-discrimination protections to “family caregivers” as a protected class is another way of better protecting working caregivers generally, including women, and one which would only require minor changes to existing laws. State antidiscrimination laws should “provide an inclusive definition of ‘family’ that extends beyond children and spouses and covers any individual for whom the . . . employee has primary caretaking responsibilities.”<sup>174</sup>

In addition to expanded legislation, employers also have an obligation to support their working caregivers—most of whom are women. Employers need to prioritize management training to recognize family responsibility discrimination and minimize the influence of gender and other kinds of bias on personnel decisions. Employers should adopt policies and develop workplace cultures that expand protections for and value caregivers including around attendance, leave, flexible work, compensation, promotion, discipline, and termination and to ensure the policies do not unfairly discriminate against caregivers. Finally, employers should identify ways to support their working caregivers including through flexible or remote work, subsidies for childcare, caregiving support groups, and mental health and wellness programs and support groups.

Caregiving is universal. Almost every employee will be a caregiver at some point in their career. Our society and our workplaces rely heavily on the work of our caregivers – and women shoulder the heaviest burden—both inside and outside of our homes. The caregiving crisis in the United States is too big for a single solution. It calls for reflection on and evaluation of our values and norms around work, family, gender roles, and community followed by meaningful and immediate reform to better support our caregivers.

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(Jan. 3, 2019), <https://www.foxnews.com/opinion/tucker-carlson-mitt-romney-supports-the-status-quo-but-for-everyone-else-its-infuriating>.

<sup>174</sup> Lisa P. Wiggan, *The Silver Tsunami: Employment Law Reform to Protect Family Caregivers of the Aging Population*, 93 N.Y.U. L. REV. 159, 172 (2018).

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