

# *The Federal Employee Advocate*

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## Employer Best Practices for Workers with Caregiving Responsibilities

The Federal Employee Advocate is publishing here the EEOC's Guidance on Employer Best Practices for Workers with Caregiving Responsibilities issued in 2007, modified January 11, 2014. The law firm of Josh F. Bowers, P.C. has extensive experience representing Federal employees who suffered discrimination in the workplace.

### **Disclaimer**

The legal information in this article is intended as a general overview of this issue and is subject to change; it is not meant to serve as legal advice in any particular situation. The law is in a constant state of change as Congress amends statutes; Federal Agencies issue and amend regulations, and the courts issue decisions interpreting the laws and regulations. We recommend you consult a licensed lawyer who is knowledgeable about the area of law in question before you take action to address a legal matter.

*The U.S. Equal Employment Opportunity Commission*

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Currently, many workers juggle both work and caregiving responsibilities. Those responsibilities extend not only to spouses and children, but also to parents and other older family members, or relatives with disabilities.<sup>[3]</sup> While women, particularly women of color, remain disproportionately likely to exercise primary caregiving responsibilities, men have increasingly assumed caretaking duties for children, parents and relatives with disabilities.<sup>[4]</sup>

Employers adopting flexible workplace policies that help employees achieve a satisfactory work-life balance may not only experience decreased complaints of unlawful discrimination, but may also benefit their workers, their customer base, and their bottom line.<sup>[5]</sup> Numerous studies have found that flexible workplace policies enhance employee productivity, reduce absenteeism, reduce costs,<sup>[6]</sup> and appear to positively affect profits.<sup>[2]</sup> They also aid recruitment and retention efforts, allowing employers to retain a talented, knowledgeable workforce and save the money and time that would otherwise have been spent recruiting, interviewing, selecting and training new employees.<sup>[8]</sup> The benefits of these programs remain constant regardless of the economic climate, and some employers have implemented workplace flexibility programs as an alternative to workforce reductions.<sup>[9]</sup> Such programs not only enable employers to "go lean without being mean," but they also can position organizations to rebound quickly as soon as business improves.<sup>[10]</sup>

The following are examples of best practices for employers that go beyond federal nondiscrimination requirements and that are designed to remove barriers to equal employment opportunity.

## General

- **Be aware of, and train managers about, the legal obligations that may impact decisions about treatment of workers with caregiving responsibilities.** Those include federal employment statutes and regulations,<sup>[11]</sup> including the Americans with Disabilities Act of 1990, as amended;<sup>[12]</sup> the Equal Pay Act of 1963, as amended;<sup>[13]</sup> the Pregnancy Discrimination Act;<sup>[14]</sup> Title VII of the Civil Rights Act of 1964, as amended;<sup>[15]</sup> the Family and Medical Leave Act (FMLA);<sup>[16]</sup> the Employee Retirement Income Security Act (ERISA),<sup>[17]</sup> 42 U.S.C. §1983,<sup>[18]</sup> and Executive Order 13152.<sup>[19]</sup>
- **Develop, disseminate, and enforce a strong EEO policy** that clearly addresses the types of conduct that might constitute unlawful discrimination against caregivers based on characteristics protected by federal anti-discrimination laws.<sup>[20]</sup> An effective policy that addresses caregiver protections under the law should:
  - Define relevant terms, including “caregiver” and “caregiving responsibilities.”<sup>[21]</sup>
    - Provide an inclusive definition of “family” that extends beyond children and spouses and covers any individual for whom the applicant or employee has primary caretaking responsibilities.<sup>[22]</sup>
  - Describe common stereotypes or biases about caregivers that may result in unlawful conduct, including:
    - assuming that female workers’ caretaking responsibilities will interfere with their ability to succeed in a fast-paced environment;<sup>[23]</sup>
    - assuming that female workers who work part-time or take advantage of flexible work arrangements are less committed to their jobs than full-time employees;<sup>[24]</sup>
    - assuming that male workers do not, or should not, have significant caregiving responsibilities;<sup>[25]</sup>
    - assuming that female workers prefer, or should prefer, to spend time with their families rather than time at work;<sup>[26]</sup>
    - assuming that female workers who are caregivers are less capable than other workers;<sup>[27]</sup> and
    - assuming that pregnant workers are less reliable than other workers.<sup>[28]</sup>
  - Provide examples of prohibited conduct related to workers’ caregiving responsibilities, such as:
    - asking female applicants and employees, but not male applicants and employees, about their child care responsibilities;<sup>[29]</sup>
    - making stereotypical comments about pregnant workers or female caregivers;<sup>[30]</sup>
    - treating female workers without caregiving responsibilities more favorably than female caregivers;<sup>[31]</sup>
    - steering women with caregiving responsibilities to less prestigious or lower-paid positions;<sup>[32]</sup>

- treating women of color who have caregiving responsibilities differently than other workers with caregiving responsibilities due to gender, race and/or national origin-based stereotypes;<sup>[33]</sup>
  - treating male workers with caregiving responsibilities more, or less, favorably than female workers with caregiving responsibilities;<sup>[34]</sup>
  - denying male workers', but not female workers', requests for leave related to caregiving responsibilities;<sup>[35]</sup> and
  - providing reasonable accommodations for temporary medical conditions but not for pregnancy.<sup>[36]</sup>
- Prohibit retaliation against individuals who report discrimination or harassment based on caregiving responsibilities or who provide information related to such complaints.
  - Identify an office or person that staff may contact if they have questions or need to file a complaint related to caregiver discrimination.
- **Ensure that managers at all levels are aware of, and comply with, the organization's work-life policies.** In particular, front-line supervisors, middle management and other managers who regularly interact with employees or who are responsible for assignments, leave approval, schedules, promotions and other employment terms, conditions and benefits should be familiar with the organization's work-life policies and supportive of employees who take advantage of available programs.
    - Provide incentives for managers to ensure that their employees are aware of work-life balance programs and to support employees who choose to take advantage of such opportunities.
    - Assess supervisors' willingness to assist employees who have caregiving responsibilities on supervisors' performance evaluations.
  - **Respond to complaints of caregiver discrimination efficiently and effectively.** Investigate complaints promptly and thoroughly. Take corrective action and implement corrective and preventive measures as necessary to resolve the situation and prevent problems from arising in the future.
  - **Protect against retaliation.** Provide clear and credible assurances that if employees make complaints or provide information related to complaints about unfair treatment of caregivers, the employer will protect them from retaliation. Ensure that these anti-retaliation measures are enforced.

## Recruitment, Hiring, and Promotion

- **Focus on the applicant's qualifications** for the job in question. Do not ask questions about the applicant's or employee's children, plans to start a family, pregnancy, or other caregiving-related issues during interviews or performance reviews.
- **Review employment policies and practices**—particularly those related to hiring, promotion, pay, benefits, attendance, and leave—to determine whether they disadvantage workers with caregiving responsibilities.
- **Develop specific, job-related qualification standards** for each position that reflect the duties, functions, and competencies of the position and minimize the

potential for gender stereotyping and other unlawful discrimination against caregivers. Make sure these standards are consistently applied when choosing among candidates.

- Example: Employer A posts a job opening for a marketing director. The position requires frequent interaction with company executives, marketing staff, and external vendors. Alexis and David apply for the position. Both have extensive marketing experience; however, Alexis is the primary caregiver for her elderly father, who has Alzheimer's disease, and requests to work from home part-time, while David is available to work on-site full-time. Employer A selects Alexis for the position based on her familiarity with many of the top vendors in the industry, noting that she can communicate with relevant parties via phone and e-mail on the days that she is not in the office. In this situation, Employer A evaluated both candidates and made the selection decision based on specific, job-related criteria.
- Example: Same facts as above, except Employer A selects David for the position, commenting that, while it sympathizes with Alexis's family situation, it is concerned that her desire to prioritize family responsibilities over work responsibilities would have a detrimental effect on the company's marketing strategy, potentially discouraging future clients and decreasing revenue. Employer A should not have based its selection decision on Alexis's caregiving responsibilities.
- **Ensure that job openings, acting positions, and promotions are communicated** to all eligible employees regardless of caregiving responsibilities.
  - Do not assume that certain employees (for example, mothers of young children or single parents) will not be interested in positions that require significant travel or working long or unusual hours.
- **Implement recruitment practices that target individuals with caregiving responsibilities** who are looking to enter or return to the workplace.
  - Advertise positions in parenting magazines and other publications and web sites that are directed at caregivers.<sup>[37]</sup>
- **Identify and remove barriers to re-entry**<sup>[38]</sup> for individuals who have taken leaves of absence from the workforce due to caregiving responsibilities or other personal reasons.
  - When reviewing and comparing applicants' or employees' work histories for hiring or promotional purposes, focus on work experience and accomplishments and give the same weight to cumulative relevant experience that would be given to workers with uninterrupted service.
    - Example: Employer B posts a Customer Service Manager position. Joanne and Tim apply. Both have approximately three years of customer service experience; however, Joanne's experience is spread over a five year period due to two maternity leaves, while Tim's experience is uninterrupted by medical leave. Employer B selects Tim, reasoning that his continuous service demonstrates his commitment to his career. Employer B discriminated against Joanne if it refused to consider her for the job based on her use of maternity leave.
    - Example: Same facts as above, except that Tim worked for Employer B in a customer service capacity, while Joann worked for a company in a different field. If Employer B selected Tim based on his knowledge of and demonstrated commitment to the company, Employer B's decision was not discriminatory.

- Provide the skills and training necessary to enhance the competitiveness and competency of employees while they are on leaves of absence.<sup>[39]</sup>
  - Example: Employer C invites employees who are on personal leaves of absence to attend company-sponsored training and networking events to familiarize themselves with the latest industry developments. Employer C also recruits these employees, on a voluntary basis, to work on temporary assignments.
- **Ensure that employment decisions are well-documented and transparent** (to the extent feasible).
  - To prevent misunderstandings, clearly explain the reasoning behind employment decisions to relevant parties.
  - Retain records relevant to decisions about hiring, promotion, performance, pay, leave, benefits, awards, and other employment decisions for at least the length of time required by statute.

## Terms, Conditions, and Privileges of Employment

- **Monitor compensation practices and performance appraisal systems** for patterns of potential discrimination against caregivers. Ensure that performance appraisals are based on employees' actual job performance and not on stereotypes about caregivers.
- **Review workplace policies that limit employee flexibility**, such as fixed hours of work and mandatory overtime, to ensure that they are necessary to business operations.
- **Encourage employees to request flexible work arrangements** that allow them to balance work and personal responsibilities. Work with employees to create customized flexible work arrangements that meet the specific needs of the employee and employer. Ensure that managers do not discourage employees from requesting flexible work arrangements or penalize employees who make such requests. Flexible work arrangements may include:
  - **General Flexible Options:**
    - **Flextime Programs.** Flextime policies generally permit employees to vary their work day start and stop times within a certain range, such as allowing an employee to arrive at work at any time between 8:00 and 9:30 a.m. and then work for 8 hours.
    - **Flexible Week Opportunities.** Flexible week opportunities may include compressed work weeks, such as a workweek consisting of four ten-hour work days.
    - **Telecommuting, Work-at-Home, or Flexplace Programs.** These options enable employees to work from home or alternate office locations.
  - **Reduced-time options** – These options permit employees to work part-time while juggling other responsibilities, such as caregiving. Reduced-time options include:
    - **Part-time work opportunities.** Part-time workers should receive proportionate wages and benefits compared with full-time workers.<sup>[40]</sup> Similarly, part-time workers should receive proportionate credit for

relevant experience needed to qualify for promotions, training programs, or other employment opportunities.

- **Example:** José works 3 days a week and spends the other 2 days caring for his young children. José should receive 3/5 of the wages and benefits he would receive if he worked full-time.
- **Example:** Employer D posts a job that requires three years of relevant work experience. Nadia and Jermaine apply for the job. Both have the required qualifications and three years of work experience; however, Nadia has worked full-time for the past three years, while Jermaine has worked three days a week for the past five years while caring for his father, who has Parkinson's disease. Employer D should base its decision on the applicants' qualifications and experience, rather than on their schedules.
- **Job sharing.** Job sharing programs permit two employees to share one full-time position. In general, employees participating in job sharing programs receive a proportionate share of the salary and benefits.
- **If overtime is required, make it as family-friendly as possible.** Determine whether a voluntary, rather than mandatory, overtime system would meet the needs of the organization. If not, permit employees to schedule overtime in advance so they can arrange for child care, elder care, or other caregiving responsibilities.
  - **Example:** Employer E requires employees to work overtime during peak periods to meet customer demand. Employer E first asks for volunteers and then, if necessary, requires employees to sign up for any remaining shifts. Employer E circulates the overtime schedule in advance to enable employees to adjust their personal obligations accordingly.
- **Reassign job duties that employees are unable to perform** because of pregnancy or other caregiving responsibilities.
  - **Example:** Suriya's doctor recommends a 15 pound lifting restriction during her pregnancy. Employer F adjusts Suriya's workload by reassigning her heavy lifting duties to one of her co-workers and assigning Suriya some of the co-worker's duties.
  - **Example:** Jack and Lily work on the same team. Jack requests permission to readjust his schedule so that he can leave work early to pick up his daughter from pre-school. Lily requests a delayed start time so that she can take her mother to her weekly physical therapy sessions. Amar, their supervisor, grants both requests on the condition that Jack represent the team at early morning meetings and Lily represent the team at late afternoon meetings.
- **Provide reasonable personal or sick leave to allow employees to engage in caregiving** even if not required to do so by the Family and Medical Leave Act of 1993 (FMLA).<sup>141</sup>
  - Permit employees to use sick leave to care for family members who are ill and/or to handle medical emergencies involving family members.<sup>142</sup>
  - Engage in dialogue with employees to determine the amount of leave that is appropriate and acceptable based on their workload, upcoming deadlines and personal circumstances.

- Ensure that leave policies exist and are available to male and female employees on an equal basis. Train managers to ensure that both male and female employees are aware of leave policies and are not implicitly or explicitly discouraged from requesting leave.
    - Example: Employer F offers maternity and paternity leave to employees upon the birth or adoption of a child. Sue requests maternity leave to have a baby. Bob requests paternity leave after he and his wife adopt a baby. Employer F approves Sue's request but denies Bob's request, commenting that as the "family breadwinner," Bob had a responsibility to focus on his career. Employer F acknowledged that the company policies provided for paternity leave, but noted that the policy was rarely enforced and implied that men who took time off risked losing out on high-profile assignments. Employer F should ensure that managers enforce leave policies consistently and without regard to the gender of the requesting employee. Employer F should not discourage or punish male employees from requesting leave related to caregiving responsibilities.
  - To the extent feasible, permit employees to take leave with little notice in case of an emergency and to use leave in short increments, rather than full days or weeks. Caregiving issues may arise suddenly and unexpectedly, and may be resolved in a relatively short amount of time.
    - For example, a child or elderly parent may get sick during the day and need to see a doctor. Or, a parent may need to make a quick phone call to ensure that his or her child got home from school safely.
    - With appropriate communication procedures and leave policies in place, these situations may be addressed with minimal inconvenience or cost to the employer.
  - Establish leave donation banks that enable employees to voluntarily contribute their leave to co-workers.<sup>[43]</sup> Some organizations have "use or lose" leave policies which prohibit employees from accruing and retaining large amounts of leave. Leave donation banks ensure that leave does not go to waste and foster an atmosphere of collegiality and cooperation.
- **Post employee schedules as early as possible** for positions that have changing work schedules so that employees can arrange in advance for child care or address other personal responsibilities, thereby enabling them to more readily fulfill work responsibilities.
- **Promote an inclusive workplace culture.** Cultivate a professional work environment that recognizes and appreciates the contributions of all staff members and demonstrates respect for employees' personal lives and obligations.
  - Example: Employer G ensures that all employees, including employees who work part-time or have flexible work schedules, are eligible to receive awards and recognition for their achievements.
  - Example: Employer H schedules all-employee meetings and events on "core days" when employees who work flexible schedules are in the office and able to attend.
- **Develop the potential of employees, supervisors, and executives** without regard to caregiving or other personal responsibilities.
  - Provide **training** to all workers, including caregivers, to provide them with the information necessary to perform their jobs well.

- **Example:** When Nejb has to miss Employer I's annual training session to take his wife to the doctor, Nejb's supervisor e-mails him copies of the training presentations and handouts and provides him with contact information for the presenters in the event he has questions or comments. In this situation, Employer I has ensured that Nejb has both access to the information presented and the ability to follow up with the appropriate individuals, as necessary, for additional information.
- Ensure that employees are given **equal opportunity to participate on complex or high-profile work assignments** that will enhance their skills and experience and help them ascend to upper-level positions.
  - **Example:** Employer J solicits assistance from employees on a large-scale project for an important client. Nicole has a flexible work schedule that enables her to work from home several days a week so she can care for her young son. Nicole volunteers to assist with the project and is selected for the team. The majority of work for the project can be performed off-site and circulated electronically to team members. Nicole also volunteers to come to the office for meetings with the client.
  - **Example:** Same facts as above, except Nicole is not selected for the project. Necessary files and equipment are stored on-site and cannot be removed. Furthermore, impromptu team meetings occur frequently so project members can discuss new developments and share information. As a result, it would be very difficult for an employee who works remotely to participate in this assignment. Employer J is justified in refusing Nicole's request to participate on this basis.
- Provide employees with **equal access to workplace networks** to facilitate the development of professional relationships and the exchange of ideas and information.
  - **Example:** Employer K has a mentor program that matches experienced employees with more recent hires. All employees, including employees who work part-time or have a flexible work schedule, are eligible to participate in the program.
- Provide **support, resource, and/or referral services** that offer caregiver-related information to employees. Such services may include referral services for local child care centers or assisted living facilities, adoption assistance services, parenting education classes, college financing classes, or a toll-free caregiver hotline that provides guidance and advice to employees who have work-life balance questions or concerns.<sup>[44]</sup>

Studies have demonstrated that flexible work policies have a positive impact on employee engagement and organizational productivity and profitability.<sup>[45]</sup> The practices outlined above have the potential to benefit all workers, regardless of caregiver-status. Furthermore, these practices have the potential to benefit employers, enabling them to recruit and retain talented, productive, committed employees. Finally, these practices will help ensure that all workers enjoy equal opportunity to compete, advance, and succeed in the workplace.

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## ENDNOTES



[1] EEOC, *Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities* (2007), available at <http://www.eeoc.gov/policy/docs/caregiving.html> [hereinafter *Caregiver Guidance*]. Title VII of the Civil Rights Act of 1964 prohibits, inter alia, discrimination based on sex. 42 U.S.C. § 2000e-2 (2009). The Americans with Disabilities Act of 1990 prohibits discrimination based on a worker's association with an individual with a disability. 42 U.S.C. § 12112(b)(4) (2009). Section 501 of the Rehabilitation Act provides the same protection to federal workers. 29 U.S.C. § 791(g) (2009) (incorporating ADA standards). Neither the 2007 Guidance nor this document create a new prohibited basis for discrimination. Rather, these documents illustrate circumstances in which stereotyping or other forms of discrimination may violate Title VII or the Americans with Disabilities Act.

[2] Additional resources on best practices include: EEOC, "Best" Equal Employment Opportunity Policies, Programs, and Practices in the Private Sector (2d ed. 1998), available at [http://www.eeoc.gov/eeoc/task\\_reports/best\\_practices.cfm](http://www.eeoc.gov/eeoc/task_reports/best_practices.cfm); Univ. of California, Hastings Coll. of Law, Center for Work-Life Law, <http://www.worklifelaw.org/>; Families & Work Inst., Nat'l Study of Employers 2008, available at <http://familiesandwork.org/site/research/reports/main.html>; WorkingMother, "100 Best Companies of 2008," <http://www.workingmother.com/?service=vp&age/109>. See also *infra* notes 5 - 9.

[3] See Bureau of Labor Statistics, Dep't of Labor, *Employment Characteristics of Families*, Table 4 (2008), available at <http://www.bls.gov/news.release/famee.t04.htm> (reporting that 90.7 % of families with children under age 18 had at least one employed parent and 62.2 % of married couple families with children had two employed parents).

Jodie Levin-Epstein, Ctr. for Law & Soc. Policy, *Getting Punched: The Job and Family Clock* 7 (2006), available at [http://www.clasp.org/publications/getting\\_punched\\_fullnotes.pdf](http://www.clasp.org/publications/getting_punched_fullnotes.pdf) (acknowledging that approximately one in four workers cares for an elderly relative, and almost one in ten workers cares for both children and elderly relatives).

Dep't of Health & Human Servs., *Informal Caregiving: Compassion in Action* 11 (1998), available at <http://aspe.hhs.gov/daltcp/reports/carebro2.pdf> (stating that 88 % of individuals with caregiving responsibilities for ill or disabled relatives or friends worked at least 35 hours per week); U.S. Census Bureau, *Disability and American Families: 2000* 3, 16 (2005), available at <http://www.census.gov/prod/2005pubs/censr-23.pdf> (finding that approximately two in seven families have at least one family member with a disability, and approximately one in ten families with children under 18 years of age includes a child with a disability).

[4] See, e.g., Laura T. Kessler, *The Attachment Gap: Employment Discrimination Law, Women's Cultural Caregiving, and the Limits of Economic and Liberal Legal Theory*, 34 U. MICH. J.L. REFORM 371, 378-80 (2001) (noting that women continue to serve as the primary caregivers for children and sick or disabled relatives); *Caregiver Guidance*, *supra* note 1, at nn.15-20 (describing the disproportionate caretaking duties exercised by employed women of color); Nat'l Alliance for Caregiving and AARP, *Caregiving in the U.S.* vi (2004), available at <http://www.caregiving.org/pubs/data.htm> (reporting that 39 % of caregivers are men).

[5] See, e.g., Boston Coll. Ctr. for Work & Family, *Overcoming the Implementation Gap: How 20 Leading Companies are Making Flexibility Work*, Exec. Summary 8-13 (2008) (listing the benefits of workplace flexibility programs, including employee commitment; talent recruitment and retention; enhanced customer service; increased productivity; reduced absenteeism; and coverage across multiple time zones); Inst. for a Competitive Workforce, *Workplace Flexibility: Employers Respond to the Changing Workforce* 2

(2008) [hereinafter Workplace Flexibility: Employers Respond] (describing workplace flexibility practices that reinforce the economic competitiveness of particular geographic regions); Ellen T. Galinsky, James T. Bond and E. Jeffrey Hill, *When Work Works: A Status Report on Workplace Flexibility 22-24 (2004)*, available at <http://familiesandwork.org/3w/research/downloads/status.pdf> (reporting the correlation between access to flexible work arrangements and enhanced employee engagement, loyalty, job satisfaction and mental health).

[6] See generally *Corporate Voices for Working Families, Business Impacts of Flexibility: An Imperative for Expansion 4(2005)*, available at <http://www.cvworkingfamilies.org/publications/2/9> [hereinafter Business Impacts] (reviewing the positive impacts of workplace flexibility policies on talent management; employee satisfaction, commitment and engagement; customer retention; and financial performance and productivity); Families & Work Inst., *When Work Works: 2008 Guide to Bold New Ideas for Making Work Work 83-84*, available at <http://familiesandwork.org/site/research/reports/main.html> [hereinafter Bold New Ideas] (outlining the business results of flexibility, including increased employee engagement and retention, decreased turnover, decreased absenteeism and sick days, increased customer satisfaction, reduced business costs, increased productivity and profitability, improved staffing coverage, and enhanced innovation and creativity).

[7] See, e.g., *Workplace Flexibility: Employers Respond*, *supra* note 5, at 9 (quoting Kaye/Bassman CEO Jeff Kaye, who permits employees to shift from part-time to full-time and back and offers reduced hours and job-sharing: "Flexibility makes us money"); *Business Impacts*, *supra* note 6, at 20 (describing First Tennessee Bank's implementation of work-life balance policies which resulted in \$106 million in profits based on a 50 % increase in employee retention and satisfaction and a 7 % increase in customer retention). "[F]lexibility is a driver of financial performance and productivity and is correlated to increased revenue generation." *Id.* at 4. See also *Bold New Ideas*, *supra* note 6, at 16 (noting the rapid expansion of retail contact lens business 1-800-CONTACTS from \$3 million to \$250 million in sales in 11 years, an achievement due in large part, according to the company, to its flexible workplace policies).

[8] See, e.g., *Business Impacts*, *supra* note 6, at 4 ("flexibility has saved individual companies millions of dollars in prevented turnover"). For example, Deloitte & Touche saved \$41.5 million in turnover-related costs in 2003. *Id.* at 10. See generally *Bold New Ideas*, *supra* note 6 (summarizing successful work-balance policies that strengthened retention rates and decreased turnover rates to well below industry averages for a wide range of organizations).

[9] See Sue Shellenbarger, *Perking Up: Some Companies Offer Surprising New Benefits*, *Wall St. J.*, March 18, 2009, at D1 (describing a variety of programs employers have adopted to enhance employee morale and retention, including child-care centers, backup child care, academic scholarships, concierge services, adoption benefits and expanded health care); Dep't of Labor, Women's Bureau, *Flex Options Teleconference: Using Workplace Flexibility as Part of a Downsizing Strategy 5-7, 10-11 (Feb. 12, 2009)*, available at <http://we-inc.org/20090212transcript.pdf> [hereinafter *Flex Options Teleconference*] (reviewing workplace flexibility programs such as contract work, reduced hours and unpaid vacations with full benefits, which enable businesses to cut costs, retain employees, and increase productivity); Matt Richtel, *More Companies Are Cutting Labor Costs Without Layoffs*, *N.Y. Times*, Dec. 22, 2008, available at <http://www.nytimes.com/2008/12/22/business/22layoffs.html> (reporting an increasing trend of employers imposing four-day workweeks, unpaid vacations and flexible schedules in an effort to prevent layoffs). *But see* Annys Shin, *As Cuts Loom, Will Working From Home Lead to a Layoff?*, *Wash. Post*, March 23, 2009, at A1 (referring to companies that use flexible work arrangements to cut costs as "the exception" and noting the reluctance of middle management to embrace such policies).

[10] See *Flex Options Teleconference*, *supra* note 9, at 20 (recalling the speaker's recommendation in 1990 that law firms use flexible work arrangements rather than layoffs "as a way of going lean without being mean."). Flexible work arrangements are "a broad cost cutting and business growth strategy not only to retain valued employees in a difficult economy but also to meet customer demands, improve productivity, manage workloads—both up and down cycles—and work smarter." *Id.* at 10.

[11] State and local laws also may prohibit discrimination based on parental status or caregiving responsibilities. See generally Ctr. for WorkLife Law, *Preventing Discrimination Against Employees with Family Responsibilities: A Model Policy for Employers 7-8*, available at <http://www.worklifelaw.org/EmployerModelPolicy.html>.

[12] 42 U.S.C. § 12101 et seq. (2009).

[13] 29 U.S.C. § 206(d) (2009).

[14] 42 U.S.C. § 2000e(k) (2009).

[15] 42 U.S.C. § 2000e et seq. (2009).

[16] 29 U.S.C. § 2601 et seq. (2009). The FMLA is enforced by the U.S. Department of Labor.

[17] 29 U.S.C. § 1001 et seq (2009). ERISA is enforced by the U.S. Department of Labor.

[18] See, e.g., *Back v. Hastings on Hudson Union Free Sch. Dist.*, 365 F.3d 107 (2d Cir. 2004) (gender stereotyping claims based on an employee's status as a working mother are legitimate claims under section 1983).

[19] 65 Fed. Reg. 26,115 (May 2, 2000) (prohibiting discrimination based on parental status in federal employment practices).

[20] In addition to the federal statutes and regulations that may impact workers with caregiving responsibilities, several states and localities have enacted legislation that prohibits employment discrimination based on parental status or caregiving responsibilities. See, e.g., Alaska Stat. § 18.80.220 (West 2008) (prohibiting discrimination based on "parenthood"); D.C. Code Ann. § 2-1402.11 (2009) (prohibiting discrimination based on "family responsibilities"); Atlanta, Ga., Ordinances ch. 94, art. V, § 112 (2009) (prohibiting discrimination based on "parental status" and "familial status"); Milwaukee, Wis., Ordinances ch. 109, subch. 3, § 45 (2008) (prohibiting discrimination based on "familial status"); Tampa, Fla. Ordinances ch. 12, art. II, § 26 (2009) (prohibiting discrimination based on "familial status"); Cook County, Ill., Ordinances ch. 42, art. II, § 35 (prohibiting discrimination based on "parental status"); Howard County, Md., Ordinances tit. 12, subtit. 2, § 208 (2008) (prohibiting discrimination based on "familial status"). See also Stephanie Bornstein and Julie Weber, *Policy Brief: Addressing Family Responsibilities Discrimination* (Sloan Work and Family Research Network, Boston College and Center for WorkLife Law, UC Hastings College of Law), Dec. 2008, at 3 (asserting that more than 55 localities prohibit employment discrimination based on "familial status," "family responsibilities," "parenthood" or "parental status").

[21] See, e.g., *Caregiver Guidance*, *supra* note 1, at I.A., available at <http://www.eeoc.gov/policy/docs/caregiving.html#caregive> (describing the range of caregiving responsibilities performed by workers, including child care, elder care and care for immediate family members with disabilities).

[22] See, e.g., *Achieving Work/Family Balance: Employer Best Practices for Workers with Caregiving Responsibilities: Equal Employment Opportunity Commission Meeting on the Commission's Enforcement Guidance on Unlawful Disparate Treatment of Workers with Caregiving Responsibilities* (May 23, 2007) [hereinafter *Work/Family Balance Meeting*] (statement of Horacio D. Rozanski, Vice President and Chief Personnel Officer of Booz Allen Hamilton; Member of the Hidden Brain Drain Taskforce), available at <http://www.eeoc.gov/eeoc/meetings/archive/5-23-07/rozanski.html> [hereinafter Rozanski statement] (noting that many women have "work-life challenges that go beyond biological children and the nuclear family," such as elder-care and extended-family responsibilities); *Work/Family Balance Meeting* (statement of Dr. Anika K. Warren, Research Director, Catalyst, Inc.), available at <http://www.eeoc.gov/eeoc/meetings/archive/5-23-07/warren.html> [hereinafter Warren statement] (observing that the definition of "family" may vary based on cultural norms and traditions, and may include individuals who are not biologically related to each other).

Sexual orientation and marital status are not protected characteristics under federal employment law. However, state and local law, as well as company policies, may prohibit such discrimination. See, e.g., Human Rights Campaign Foundation, *The State of the Workplace for Lesbian, Gay, Bisexual and Transgender Americans 2007 – 2008* 1 (reporting that 20 states, the District of Columbia, and more than 180 cities and counties prohibit employment discrimination based on sexual orientation). Discrimination against caregivers of unmarried partners based on their caregiving responsibilities might violate such state or local prohibitions. In addition, 85 % of Fortune 500 companies and 94 % of Fortune 100 companies protect workers from discrimination based on sexual orientation. *Id.* Furthermore, several states prohibit workplace discrimination based on marital status. See, e.g., Alaska Stat. § 18.80.220 (West 2008); Cal. Govt. Code § 12940 (West 2009); Colo. Rev. Stat. § 8-17-101 (2008) (public works); Fla. Stat. Ann. § 760.10 (West 2009); Haw. Rev. Stat. Ann. § 378-2 (West 2008); 775 Ill. Comp. Stat. 5/1-102 (2009); Mich. Comp. Laws Ann. § 37.2202 (West 2008); Minn. Stat. § 363A.08 (2009); Neb. rev. Stat. § 48-1104 (2008); N.Y. Hum. Rts. Law § 296 (McKinney 2009); N.D. Cent. Code § 34-11.1-04.1 (2008) (state employment); Wash. Rev. Code Ann. § 49.60.180 (West 2009); Wis. Stat. Ann. § 111.321 (West 2007). In jurisdictions which prohibit employment discrimination based on sexual orientation or marital status, discrimination against caregivers of unmarried partners based on their caregiving responsibilities may be held unlawful.

[23] See, e.g., *Caregiver Guidance*, *supra* note 1, at Example 2, available at <http://www.eeoc.gov/policy/docs/caregiving.html#gender>; *Back*, 365 F.3d at 115 (elementary school psychologist denied tenure after her superiors repeatedly voiced concerns about her ability to juggle her caregiving and work responsibilities, including comments that it was "not possible for [plaintiff] to be a good mother and have this job" and that her job was "not for a mother"); *Santiago-Ramos v. Centennial P.R. Wireless Corp.*, 217 F.3d 46 (1st Cir. 2000) (telecommunications company director of finance and administration terminated after senior executives questioned how she managed to juggle her work, child care and marital responsibilities; asked how her husband was doing since she was not home to cook for him; and inquired whether plaintiff would be able to do her job after having a second child). Noting that his secretary no longer worked late after having children, one executive commented "that is what happens when we hire females in the child-bearing years." *Id.* at 51. See also *Trezza v. Hartford, Inc.*, 1998 WL 912101, at \*2 (S.D.N.Y. Dec. 30, 1998) (defendant commented that working mothers could not effectively juggle both work and caregiving responsibilities, remarking "I don't see how you can do either job well"); *Moore v. Alabama State Univ.*, 980 F. Supp. 426 (M.D. Ala 1997) (university admissions assistant denied promotion based on defendant's belief that the position, which required travel, would prevent her from caring for her family).

[24] See, e.g., *Caregiver Guidance*, *supra* note 1, at Example 5, available at <http://www.eeoc.gov/policy/docs/caregiving.html#assumption>.

[25] See, e.g., *Caregiver Guidance*, *supra* note 1, at II.C, available at <http://www.eeoc.gov/policy/docs/caregiving.html#discrmale>. See also *Knussman v. Maryland*, 272 F.3d 625, 630 (4th Cir. 2001) (rejecting male plaintiff's request for leave to care for his wife and newborn baby, defendant declared that plaintiff would qualify as a primary care giver only if his wife were "in a coma or dead").

[26] See, e.g., *Caregiver Guidance*, *supra* note 1, at Examples 7 and 8, available at <http://www.eeoc.gov/policy/docs/caregiving.html#benevolent>; *Sheehan v. Donlen Corp.*, 173 F.3d 1039, 1043 (7th Cir. 1999) (accounts manager, a mother of three, terminated and told "[h]opefully this will give you some time to spend at home with your children"); *Plaetzer v. Borton Automotive, Inc.*, 2004 WL 2066770, at \*1 (D. Minn. 2004) (sales manager told plaintiff, a mother of four, that she should "do the right thing" and stay home with her children); *Trezza*, 1998 WL 912101 at \*1 (defendant assumed that plaintiff, a mother of two, would not be interested in a promotion to a position that required frequent travel because of her family responsibilities); *Bailey v. Scott-Gallaher, Inc.*, 480 S.E.2d 502, 503 (Va. 1997) (defendant terminated plaintiff after she gave birth, contending that "[her] place was at home with her child").

[27] See, e.g., *Caregiver Guidance*, *supra* note 1, at II.A.4, available at <http://www.eeoc.gov/policy/docs/caregiving.html#effects>; *Santiago-Ramos*, 217 F.3d at 50-51 (defendant admitted that it preferred to hire single women without children who would give 150 % to their job and expressed concern that women with multiple children would not be able to manage work and family responsibilities); *Trezza*, 1998 WL 912101, at \*2 (defendant commented that "women are not good planners, especially women with kids" and stated that working mothers could not successfully be good mothers and good workers).

[28] See, e.g., *Caregiver Guidance*, *supra* note 1, at II.B, available at <http://www.eeoc.gov/policy/docs/caregiving.html#pregnancy>; *Bailey*, 480 S.E.2d at 503 (defendant terminated plaintiff because "she was no longer dependable since she had delivered a child . . . babies get sick sometimes and [plaintiff] would have to miss work to care for her child . . . [Defendant] needed someone more dependable").

[29] See, e.g., *Caregiver Guidance*, *supra* note 1, at II.A.3, available at <http://www.eeoc.gov/policy/docs/caregiving.html#gender>; *Gallina v. Mintz, Levin, et. al.*, 2005 WL 240390 (4th Cir. 2005) (defendant expressed disapproval that plaintiff had not admitted during her interview that she had a child); *Back*, 365 F.3d at 115 (defendant asked plaintiff how she was "planning on spacing [her] offspring," requested that she "wait until [her son] was in kindergarten to have another child," and informed plaintiff that she was being denied tenure so defendant could have another year to "assess [her] child care situation"); *Santiago-Ramos*, 217 F.3d at 50 (defendant asked plaintiff several times about her ability to juggle work and family responsibilities); *Barbano v. Madison County*, 922 F.2d 139 (2d Cir. 1990) (female applicant was asked about her plans to start a family and was informed that the hiring official did not want to hire a woman who would get pregnant and quit).

[30] See, e.g., *Caregiver Guidance*, *supra* note 1, at II.A.3-4, II.B, available at <http://www.eeoc.gov/policy/docs/caregiving.html#gender>; *Gallina*, 2005 WL 240390, at \*1-2 (defendant ordered plaintiff to decide whether she wanted to be "a successful mommy or a successful lawyer" and described a "commitment differential" between male and female attorneys, noting that "women lawyers have more demands place[d] on them, and it's very hard for them to balance when they have a family"); *Back*, 365 F.3d at 115 (plaintiff's supervisor requested that plaintiff wait until the supervisor retired

before getting pregnant, repeatedly told plaintiff that it was “not possible for [her] to be a good mother and have this job,” and questioned her commitment to her job based on her family responsibilities); *Plaetzer*, 2004 WL 2066770, at \*1 (refusing plaintiff’s request for a fixed schedule during the summer to enable her to make child care arrangements, defendant stated that his wife did not have child care issues, that he did not have to be family friendly and that he did not care about plaintiff’s problems). Defendant also told plaintiff that, as a woman with a family, she would always be at a disadvantage at work. *Id.* See also *Trezza*, 1998 WL 912101, at \*2 (defendant asserted that “women are not good planners, especially women with kids” and commented that working mothers could not be both good mothers and good workers); *Sigmon v. Parker, Chapin, Flattau & Kimpl*, 901 F. Supp. 667, 672 (S.D.N.Y. 1995) (defendant commented, in the presence of two pregnant employees, “With all these pregnant women around, I guess we should stop hiring women”); *Bailey*, 480 S.E.2d at 503 (defendant terminated plaintiff based on its belief that she was no longer reliable after having a baby, that she belonged at home with her baby, and that her baby would require her to take time off work).

[31] See, e.g., *Santiago-Ramos*, 217 F.3d at 51 (a senior executive admitted that he preferred to hire single women without children who would give 150 % to the job; a fellow executive said he did not like women with children working for the company); *Trezza*, 1998 WL 912101, at \*1-2 (defendant passed over plaintiff, a mother of two, to offer promotions to female colleagues without children, despite plaintiff’s qualifications and experience).

[32] See, e.g., *Caregiver Guidance*, *supra* note 1, at II.A.3-4, available at <http://www.eeoc.gov/policy/docs/caregiving.html#gender>. See also *Lust v. Sealy, Inc.*, 383 F.3d 580 (7th Cir. 2004) (plaintiff’s manager failed to consider her for a promotion because he assumed, despite plaintiff’s express interest in receiving a promotion, that she would not want to relocate her family); *Trezza*, 1998 WL 912101, at \*1 (defendant assumed that plaintiff, a mother of two, would not be interested in a promotion to a position that required frequent travel because of her family responsibilities).

[33] See, e.g., *Caregiver Guidance*, *supra* note 1, at II.D, available at <http://www.eeoc.gov/policy/docs/caregiving.html#discrwomen>. See also *Work/Family Balance Meeting*, Warren statement, *supra* note 22 (concluding that women of color confront stereotypes based on gender, race, ethnicity, and socio-economic status that are “uniquely different” than stereotypes confronted by other groups).

[34] See, e.g., *Caregiver Guidance*, *supra* note 1, at II.A.2, available at <http://www.eeoc.gov/policy/docs/caregiving.html#male>; *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971) (concluding that Title VII prohibits the implementation of distinct hiring policies for women with young children and men with young children); *Trezza*, 1998 WL 912101, at \*1-2 (defendant repeatedly passed over plaintiff, a mother of two, to offer promotions to male colleagues with children, despite plaintiff’s superior qualifications and seniority). See also *infra* note 35.

[35] See, e.g., *Caregiver Guidance*, *supra* note 1, at II.C, available at <http://www.eeoc.gov/policy/docs/caregiving.html#discrmale>; *Knussman*, 272 F.3d at 630 (denying plaintiff’s request for leave to care for his wife and newborn baby, defendant stated that plaintiff could qualify as a primary care giver only if his wife were “in a coma or dead”); *Shafer v. Bd. of Pub. Educ.*, 903 F.2d 243 (3d Cir. 1990) (male teacher denied unpaid leave of absence to care for his son; school policy expressly provided such leave to female employees); *Schultz v. Advocate Health & Hosp. Corp.*, 2002 WL 32154732 (N.D.Ill. Oct. 30, 2002) (male maintenance worker alleged defendant interfered with his FMLA rights and terminated him in retaliation for requesting unpaid leave to care for his parents).

[36] *Walker v. Fred Nesbit Distrib. Co.*, 331 F. Supp. 2d 780 (S.D. Iowa 2004) (defendant denied female truck driver's request for reassignment to light duty work or imposition of lifting restrictions during her pregnancy but accommodated male employees with temporary disabilities due to non-work-related activities); *Stansfield v. O'Reilly Auto., Inc.*, 2006 WL 1030010 (S.D. Tex. 2006) (defendant refused to permit plaintiff to request assistance lifting objects during her pregnancy, although female employees were routinely invited to solicit assistance from male employees when lifting heavy objects).

[37] A recent Internet search yielded the following organizations. Please note that these are a few examples of U.S. recruitment and staffing agencies that target caregivers. EEOC does not endorse these organizations or vouch for the services they provide by referencing them herein. See, e.g., *Employmoms*, available at <http://www.employmoms.com>; *Ivy Exec*, available at <http://www.ivyexec.com>; *Jobs and Moms*, available at <http://www.jobsandmoms.com>; *Mom Corps*, available at <http://www.momcorps.com>; *Momentum Resources*, available at <http://www.momentum.com>; *On Ramps*, available at <http://www.on-ramps.com>; *Smart-Moms*, available at <http://www.smart-moms.net>; *Women for Hire*, available at <http://www.womenforhire.com>; *Work-Life Initiative, LLC*, available at <http://www.worklifeinitiative.com>; *W2W Ventures*, available at <http://www.w2wventures.com>; *2Hats Network, LLC*, available at <http://www.2hatsnetwork.com>.

[38] Women re-entering the workforce after interruptions of service are often significantly disadvantaged. For example, women lose an average of 11% of their earning power when they exit the workforce for less than one year. Sylvia Ann Hewlett & Carolyn Buck Luce, *Off-Ramps and On-Ramps: Keeping Talented Women on the Road to Success*, Harv. Bus. Rev., Mar. 2005, at 43, 46. When women spend three years or more out of the workforce, they lose an average of 37% of their earning power. *Id.*

[39] For example, consulting firm Booz Allen has reported that it has used a "ramp up, ramp down" flexible work program to contract as needed with current employees and employees who recently exited the workforce. This program enables workers to remain connected to the workplace through small projects and helps them to keep their skills and competencies sharp and updated. The program also enables Booz Allen to contract out projects to trusted workers and helps the company become the "employer of choice" for many former employees, especially mothers, when they decide to re-enter the workforce. *Id.* at 52. Similarly, investment company Lehman Brothers developed the Encore Program to provide female bankers and traders who had been out of the workforce for several years with opportunities to update their skills and interview for jobs. Ernst & Young, Deloitte & Touche and PriceWaterhouseCoopers have developed similar recruitment programs. See *Work/Family Balance Meeting*, *supra* note 22 (testimony of Dr. Anika Warren, Research Director, Catalyst, Inc., and Horacio D. Rozanski, Vice President and Chief Personnel Officer of Booz Allen Hamilton; Member of the Hidden Brain Drain Taskforce), available at <http://www.eeoc.gov/eeoc/meetings/archive/5-23-07/transcript.html>.

[40] The practice of paying part-time workers at a lower hourly rate than full-time workers might violate the Equal Pay Act. See *Lovell v. BBNT Solutions, LLC*, 295 F. Supp. 2d 611 (E.D. Va. 2003) (part-time female worker could compare herself with full-time male worker for purposes of establishing a prima facie case under the EPA); Section 10: *Compensation Discrimination*, § 10-IV F.2.h, EEOC Compliance Manual, Volume II (BNA) (2000) ("employer can justify paying part-time or temporary workers disproportionately less than full-time or permanent workers only if it can show that this justification is related to a legitimate business purpose and is used reasonably in light of that purpose").

[41] 29 U.S.C. § 2601 et. seq. (2009). The FMLA covers private sector employers with at least 50 employees within a 75-mile radius. Employees must have worked for the employer for at least 12 months or 1,250 hours. Covered employers are required to provide up to 12 weeks of unpaid medical leave during a 12-month period to eligible employees for child birth and newborn care, adoption or foster care placement, care for immediate family members with a serious health condition, or to handle a serious personal health condition. The FMLA was recently updated to provide up to 26 weeks of leave to immediate family members of servicemen and women in certain circumstances. *Id.* § 2612 (a)(1)(E), (a)(3). *See also The 15th Anniversary of the Family Medical Leave Act: Achievements and Next Steps: Hearing Before the House Subcomm. on Workforce Prot., Comm. on Educ. & Labor, 110th Cong. 5-6 (2008) (statement of Debra Ness, President, National Partnership for Women & Families) (noting that nearly 40 % of workers in the United States work for employers with less than 50 employees and that approximately 25 % of workers had worked for their current employer for 12 months or less).*

[42] *See, e.g., Work/Family Balance Meeting, supra* note 22 (statement of Donna Klein, President and Chief Executive Officer, Corporate Voices for Working Families), *available at* <http://www.eeoc.gov/eeoc/meetings/archive/5-23-07/klein.html> [hereinafter Klein statement](describing H-E-B Grocery Company's MedBank sick leave program, which provides paid leave for eligible employees who miss work due to personal illness or injury or the illness or injury of immediate family members, including spouses, children, parents and in-laws, and siblings).

[43] For example, the federal government has a voluntary leave transfer program which enables employees to donate annual leave to other federal employees who have exhausted their available paid leave. 5 U.S.C. § 6331 - 6340 (2009). *See also* Montgomery County Educ. Ass'n Sick Leave Bank: Rules of Procedure 3-4, 8, *available at* [http://mcea.nea.org/members/sick\\_leave\\_bank.php](http://mcea.nea.org/members/sick_leave_bank.php) (providing up to 360 days of leave to qualifying members for extended personal illness or disability purposes).

[44] *See, e.g., Work/Family Balance Meeting, Klein statement, supra* note 22 (discussing the Marriot, International, Inc. Associate Resource Line, which provides employees with confidential assistance in juggling work and family responsibilities).

[45] *See supra* notes 5 - 8.

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