OUTSIDE PERSPECTIVE

Legal Update

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A large and growing share of the workforce is caring for someone, whether that be a young child, an aging parent, a spouse recovering from surgery, or a sibling with a disability. When those obligations impact work, the employer has to sort out what the law requires, what it merely permits, and where a well-meant accommodation quietly turns into a liability. There is no single "caregiver rights" statute. What exists instead is a patchwork of leave laws, disability laws, and antidiscrimination laws that overlap in some places and leave real gaps in others.

Who counts as a "caregiver"?

The term has no fixed legal meaning, and that is precisely the problem. Federal law does not protect "caregivers" as a class. It protects certain employees, with certain relationships, at certain employers, for certain reasons. An employee caring for a parent with cancer may be fully protected; the same employee caring for a father-in-law under the same circumstances may have no federal leave rights at all. Employers that think in terms of "caregiver policy" rather than in terms of the specific statutes that apply tend to be surprised by the contours of the actual obligations.

What legal protections actually exist?

Several statutes may apply, and most caregiving situations implicate more than one:

- **The Family and Medical Leave Act (FMLA):** The FMLA provides up to twelve (12) weeks of unpaid, job-protected leave in a twelve-month period to eligible employees, including leave to care for a spouse, child, or parent with a serious health condition; for the employee's own serious health condition; and for the birth or placement and bonding of a child. Eligibility is narrow: the employer must have fifty (50) or more employees within a seventy-five (75) mile radius, and the employee must have worked there for at least twelve (12) months and 1,250 hours. Military caregiver leave extends to twenty-six (26) weeks. Leave may be taken intermittently or on a reduced schedule where medically necessary.
- **The Americans with Disabilities Act (ADA):** The ADA operates in two distinct ways with respect to caregivers. First, it prohibits "associational" discrimination — an employer may not take adverse action against an employee because of that employee's known relationship or association with a person who has a disability, such as refusing to hire an applicant whose child has a serious medical condition out of concern about absenteeism or health-plan costs. Second, the ADA requires reasonable accommodation of the employee's own disability, which sometimes arises from the strain of caregiving itself. Critically, the ADA does not require an employer to accommodate an employee because of a family member's disability.
- **Title VII and pregnancy-related protections:** Title VII does not name caregivers, but it prohibits sex

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discrimination, and adverse treatment rooted in caregiver stereotypes (like assuming a new mother is less committed, or that a father does not need leave) is a recognized theory of sex discrimination. The Pregnancy Discrimination Act requires that pregnant employees be treated no less favorably than other similarly situated employees. The Pregnant Workers Fairness Act (PWFA) goes further, requiring accommodation of known limitations arising from pregnancy, childbirth, or related conditions, and the PUMP Act requires break time and private, non-bathroom space for nursing employees.

- **State and local law:** Many states provide broader leave than the FMLA and, increasingly, paid leave. New Jersey is illustrative: the New Jersey Family Leave Act applies to employers with thirty (30) or more employees and defines family far more broadly than federal law — in-laws, siblings, grandparents, civil union and domestic partners, and others in the equivalent of a family relationship — while New Jersey's Family Leave Insurance program provides wage replacement. Additionally, New Jersey's Earned Sick Leave law applies to employers of every size. A growing number of jurisdictions, including New York City and the District of Columbia, go further still, and other jurisdictions are beginning to follow suit.

Where are the gaps?

The gaps are larger than most assume. The FMLA's employer-size and hours thresholds exclude a significant portion of the private workforce, and its definition of family is limited to spouse, child, and parent — not siblings, not grandparents, not in-laws, and not the "chosen family" arrangements that carry real caregiving weight in practice. A "child" generally means a child under eighteen (18), or an adult child incapable of self-care because of a disability.

FMLA leave is also unpaid. Absent a state paid-leave program or employer-provided benefit, the practical question for many employees is not whether leave is available but whether it is affordable. Routine caregiving, like school closures, a child's ordinary illness, or routine eldercare logistics, falls almost entirely outside the federal framework and is governed, if at all, by state-specific leave laws and employer policy.

What responsibilities do employers have?

Beyond granting leave to which an employee is entitled, the obligations that generate the most litigation are procedural and behavioral. Covered employers must post and provide FMLA notices and must designate qualifying leave as FMLA leave in order to avail themselves of the statutory limits to that leave (generally, 12 weeks in a year). An employer that lets an employee burn through vacation for a qualifying absence without designating it as FMLA leave may find the twelve-week entitlement still intact.

Employers must:

- restore an employee taking FMLA leave to the same or an equivalent position,
- maintain group health coverage during leave,
- keep medical certifications confidential and separate from personnel files, and
- stay well clear of anything that looks like interference or retaliation with protected FMLA leave.

Where the Pregnant Workers Fairness Act or ADA applies, employers must engage in an interactive dialogue about accommodation rather than issuing a unilateral yes or no. And employers must apply their own policies consistently, because a flexibility practice granted informally to some employees and denied to others is evidence, not a defense.

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Where do employers inadvertently create legal risk?

Most claims relating to leave do not arise from an employer refusing leave outright. They arise from how the employer behaves around the leave. Common risk points include the following:

- **Benevolent steering:** Removing a returning parent from a travel-heavy account, passing over an employee with a sick spouse for a promotion, or declining to staff someone on a demanding matter "for their own good."
- **Attendance and performance systems that absorb protected leave:** Counting FMLA absences as occurrences under a no-fault attendance policy, prorating a bonus for a leave period without a lawful and consistently applied formula, or writing "availability" and "responsiveness" critiques into a review that reflects protected absences.
- **Discouraging leave:** Telling an employee the timing is bad, suggesting the team cannot manage, or asking them to remain reachable while out. Interference claims do not require that leave was actually denied.
- **Discretionary flexibility applied unevenly:** Informal remote-work and schedule accommodations granted manager by manager are a frequent source of comparator evidence, particularly when the pattern breaks along lines of sex or age. If flexibility is a benefit, it should be a documented one with articulated criteria.
- **Mishandling the interactive process:** Demanding more medical documentation than the applicable statute permits or rejecting a request without exploring alternatives.
- **Assuming federal law is the ceiling:** Handbooks built solely around the FMLA routinely understate the leave to which employees in New Jersey, New York, and other states are entitled, and multi-state employers frequently apply the wrong jurisdiction's rules or assume that federal law creates the ceiling and not the floor for leave and other employee entitlements.

Key takeaways and considerations for employers

Caregiver protections are cumulative, not alternative. A single employee request may trigger the FMLA, a state leave statute, a state paid-leave program, the ADA, and the PWFA at once, each with its own eligibility rules, notice obligations, and documentation requirements. That analysis has to happen as soon as possible after an employee's need or request for leave becomes known. And the absence of a legal obligation is not the end of the inquiry because what is lawful and what is defensible are not always the same thing.

Employers are encouraged to audit their handbooks, leave and attendance policies, accommodation procedures, remote and flexible work practices, and reduction-in-force criteria with counsel, and to confirm that policies reflect the law of every state in which they have employees.

ABOUT THE AUTHOR

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