Legislating Flexibility in the Post-Pandemic Workplace

Madeline Gyory

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Articles

LEGISLATING FLEXIBILITY IN THE POST-PANDEMIC WORKPLACE

MADELEINE GYORY*

Abstract

Working parents and caregivers in the United States struggle to balance the dual demands of work and care. Many working caregivers need flexible work arrangements (FWAs)—changes to their hours, schedule, or location—to allow them to balance work and care. But access to flexibility remains out of reach for many workers and is least accessible to the most marginalized. The COVID-19 pandemic underscored this problem, as huge numbers of women dropped out of the workforce to care for family. While no federal or state law requires employers to grant FWAs to caregivers, several states and localities have passed “right to request” laws, which establish steps employers must follow when workers ask for flexibility. Several cities go further to provide caregivers with limited rights to FWAs. One city, San Francisco, responded to the pandemic by granting caregivers robust legal rights to FWAs.

This Article offers the first analysis of FWA laws since the start of the pandemic and since passage of the nation’s strongest FWA law in San Francisco. This Article uses three case studies to interrogate how FWA statutes across the country protect or fail working caregivers and exposes...
gaps in protection. Using San Francisco’s law as a model, this Article argues that other states and cities should respond to the crisis of care exposed by the pandemic by passing comprehensive flexible workplace laws. This Article offers a roadmap for legislative action, recommending that future FWA laws should go beyond the right to request and grant broad, substantive protections that cover a diverse array of workers. Building on prior scholarship advocating for accommodation of caregivers in the workplace, this Article argues that legislative intervention is needed to ensure access to flexibility irrespective of income, education, race, or gender.
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LENA is a single mother who works at a fast-food restaurant in a large American city. After four years on the job, she had a child. She managed to find a spot for her infant in a subsidized day care center, which was not easy to come by. The day care center’s schedule started and ended an hour earlier than her work schedule, so she asked her manager to shift her schedule an hour earlier to allow her to transport her child to and from day care. Her manager said no. Desperate, she wrote a letter to the restaurant owner explaining the situation and requesting a shift in her hours. The owner never responded. Elena was terrified to lose her job because it provided both income and health insurance for her and her new baby. She forewent the subsidized day care spot and, unable to find care that aligned with her work schedule, hired a nanny. The cost of the nanny constituted half of her income.

Arthur is an administrative assistant at a small office with twelve employees located in a rural American town. He provides ongoing care to his elderly mother with dementia, who lives with him. Arthur began working for his current employer three months ago. Caring for his mother requires him to take her to doctor’s appointments every Thursday morning, occasionally administer medication, and be available by

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2. These individuals are based on an amalgamation of narratives from legislative testimony and advocacy efforts. See, e.g., Youth, Young Adult & Fams. Comm., Amending the Family Friendly Workplace Ordinance, City & Cnty. S.F., at 16:00 (Feb. 11, 2022), https://sanfrancisco.granicus.com/player/clip/40539/view_id=10&meta_id=923734&redirect=true#h=a96c9a30d1e8858ddbd214d796e758a3d [https://perma.cc/7RSM-7BNC] (testimony from Katherine Wutchiett, Senior Staff Attorney at Legal Aid at Work, presenting the story of a fast-food worker who lost her subsidized childcare spot due to employer denying schedule change); Testimony Before the N.Y.C. Council Comm. on C.R. Regarding Int. 0863-2012, 2013 N.Y.C. Council 18–19 (N.Y. 2013) (statement of Dena Adams) (describing termination from her job because she was denied scheduling accommodations to care for her child).

3. The national average cost of a nanny is nearly $40,000 per year. See Robyn Correll, How Much Does a Nanny Cost?, Care.com (Mar. 19, 2024), https://www.care.com/c/how-much-does-a-nanny-cost/ [https://perma.cc/P52C-L7GP] (reporting the national average cost of a nanny for one child was $766 per week or about $19.15 per hour). I multiplied this weekly rate by fifty-two to calculate the yearly cost, which is $39,832.

phone in case of emergency.\textsuperscript{5} Arthur told his boss he was caring for his mother and asked if he could work half days on Thursdays to allow him to take her to the doctor and make up the time during another day of the week. He also asked to check his personal cell phone periodically throughout the day to monitor communications from his mother. Arthur’s supervisor denied his requests.

Tammy is a data analyst for a large company and lives in an American suburban town. She cares for her adult brother who suffered injuries from a car accident and relies on a wheelchair for mobility.\textsuperscript{6} Six times per month, Tammy drives her brother to a physical therapy center located in another town.\textsuperscript{7} Because her office is located an hour’s drive from her home in the opposite direction, making these journeys from her office adds hours of driving time to each trip. Tammy asked her supervisor if she could work remotely on those days for ease of travel and to minimize work disruptions. Her supervisor said no.

Roughly 29 million American workers provide unpaid care for a sick or aging adult relative or friend.\textsuperscript{8} Over 50 million American workers have a child at home under age eighteen.\textsuperscript{9} About 7 million workers do both: provide care for an adult relative while also caring for a child at home.\textsuperscript{10} The number of working caregivers has risen in recent years and

\begin{itemize}
  \item \textsuperscript{5} Among unpaid caregivers of adults, about half report providing medicines, pills, or injections to their care recipient. \textit{Id.} at 33.
  \item \textsuperscript{6} Twelve percent of unpaid caregivers of adults report caring for someone whose main care need is related to mobility issues. \textit{Id.} at 27–28.
  \item \textsuperscript{7} Among unpaid caregivers of adults, eighty percent report providing help with transportation. \textit{Id.} at 33.
  \item \textsuperscript{8} \textit{Id.} at 9, 62 (reporting that around 47.9 million Americans provide unpaid care for an adult and about sixty-one percent worked at a paying job in the past year); \textsc{Lynn Friss Feinberg \& Laura Skufca}, AARP PUB. POL’Y INST., \textsc{MANAGING A PAID JOB AND FAMILY CAREGIVING IS A GROWING REALITY: NEARLY 50 MILLION FAMILY CAREGIVERS OF ADULTS ARE IN THE LABOR FORCE} 1 (Dec. 2020), \url{https://www.aarp.org/content/dam/aarp/ppi/2020/12/managing-a-paid-job-and-family-caregiving.pdf} [noting that sixty-one percent of the 47.9 million family caregivers of adults worked at a paying job in the past year, “making for an estimated 29.2 million employed caregivers of adults”). In addition, approximately 14.1 million people provide care to a child under eighteen with special needs. \textsc{Nat’l All. for Caregiving \& AARP}, \textit{supra} note 4, at 4. This statistic is not included above because these individuals will necessarily fall under the category of parents with children under eighteen years old. Additionally, I was unable to find data on how many of these caregivers are employed.
  \item \textsuperscript{9} Table 5. \textsc{Employment Status of the Population by Sex, Marital Status, and Presence and Age of Own Children Under 18, 2021–2022 Annual Averages}, U.S. BUREAU LAB. STATS. (Apr. 19, 2023), \url{https://www.bls.gov/news.release/famee.t05.htm} [perma link unavailable] [hereinafter \textit{Employment Status of the Population}].
  \item \textsuperscript{10} \textsc{Nat’l All. for Caregiving \& Caring Across Generations}, \textsc{Burning the Candle at Both Ends: Sandwich Generation Caregiving in the U.S} 7, 21 (2019), \url{https://www.adviceperiod.com/wp-content/uploads/2021/11/NAC_SandwichCaregiving_Report_digital112019.pdf} [estimating that 11 million caregivers, dubbed “sandwich caregivers,” provide unpaid care to an adult while also caring for children in the home, and finding that sixty-seven percent of sandwich caregivers report being employed while caregiving).
is expected to keep rising. One Harvard Business School study estimated that caregivers comprise seventy-three percent of the workforce.\(^{11}\)

Many working caregivers\(^ {12}\) need occasional, temporary, or permanent flexible work arrangements (FWAs)—such as modifications to their hours, schedule, or location—that would allow them to balance work and care responsibilities.\(^ {13}\) Studies show that flexible workplace policies benefit both employees and employers by improving employee health outcomes, increasing productivity, and reducing turnover.\(^ {14}\) But no federal or state law requires employers to grant FWAs to caregivers.\(^ {15}\) As a result, access to FWAs remains spotty and unequally distributed across income level, education level, race, and gender.

Without legal protections for FWAs, working parents and caregivers struggle to balance the demands of paid work with family care responsibilities. While the number of working women and mothers has increased significantly over the past seventy years, workplace policies and norms have not kept up with demographic shifts. Expectations around when, where, and how work is performed continue to assume employees are unfettered by care responsibilities and can outsource such care to a stay-at-home spouse, other family members, or paid providers—individuals who may not exist, may have work and care responsibilities of their own, or whose cost may be prohibitively expensive.\(^ {16}\) This puts many working caregivers in an impossible bind. They must either leave the workforce to attend to caregiving needs—often foregoing income and health insurance—or return to work and forfeit a significant and often unsustainable portion of their earnings toward paid care providers. As a result, many caregivers scale back their work hours or leave the workforce entirely.\(^ {17}\)

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12. In this Article, I use the term “caregiver” broadly to refer to parents caring for children under eighteen and anyone providing unpaid care for an adult or child with a disability or who needs help taking care of themselves. This definition is intentionally broad to encompass the diversity and breadth of caregiving responsibilities for which an employee might need flexibility in the workplace.

13. For example, flexible start and end times (“flex time”), reduced hours, part-time work, scheduling shifts, compressed workweek, job-sharing, hybrid work, or remote work. See Workplace Flexibility 2010, Geo. Univ. L. Ctr., https://scholarship.law.georgetown.edu/flexibility/ [https://perma.cc/4T9P-5FEL] (last visited Apr. 2, 2024) (noting that “Flexible Work Arrangements” are those that “alter the time and/or place that work is conducted on a regular basis, in a manner that is as manageable and predictable as possible for both employees and employers”).

14. See sources cited infra notes 41–44 and accompanying text.

15. See infra Section I.B for a discussion of why caregiver discrimination laws do not require FWAs.

16. See infra notes 27, 28, 31–34. For further discussion, see infra Section I.D.

17. See infra Sections I.A, I.D.
The COVID-19 pandemic both exposed and exacerbated this problem. The already tenuous nature of the nation’s care infrastructure became undeniable as school and childcare center closures led caregivers, most of whom were women, to drop out of the workforce in alarming numbers. On the other hand, many employers were forced to alter entrenched norms about when and where work was conducted to stay in business and retain employees. Amid this abrupt provision of FWAs during the pandemic, the sky did not fall on employers; indeed, some found that workers were more productive when granted the flexibility they needed to care for their families. While some workplaces have retained flexible arrangements implemented during the pandemic, many have already begun rolling back these policies and inequities in access remain, particularly for less educated and lower paid workers.\textsuperscript{18}

In recent years, several state and local jurisdictions have passed laws providing some protections for working caregivers seeking FWAs, but these laws do not go far enough. Most of these laws protect only the right to ask for FWAs rather than grant a right to the arrangement itself.\textsuperscript{19} Several others go further to provide caregivers with a limited right to flexible scheduling in some circumstances.\textsuperscript{20} One jurisdiction, San Francisco, passed a law granting caregivers robust rights to FWAs in direct response to pandemic-related strains on working caregivers.\textsuperscript{21}

This Article analyzes and interrogates these legislative efforts to require flexibility in light of major shifts in structural workplace norms spurred by the COVID-19 pandemic. Building on prior scholarship advocating for broader accommodation of caregivers in the workplace, this Article offers the first analysis of FWA laws since the start of the pandemic and since enactment of the nation’s strongest FWA law in San Francisco. Using the San Francisco law as a model, this Article argues that other jurisdictions should pass comprehensive flexible workplace laws and offers a roadmap for future legislative action.

In a broader sense, this Article draws on the urgency of the moment to insist that the pandemic should serve as a long overdue “tipping point” for workplace flexibility.\textsuperscript{22} Without legal protections for FWAs, we risk reverting back to a workplace culture built around anachronistic, 

\begin{itemize}
  \item \textsuperscript{18} See infra Section I.A.
  \item \textsuperscript{19} See infra Section II.A.
  \item \textsuperscript{20} See infra Section II.B.
  \item \textsuperscript{21} S.F., CAL., LAB. & EMP. CODE art. 32 (2023); see infra Section II.C.1.
\end{itemize}
outdated, and sexist notions of the ideal worker that do not account for the realities of American workers’ lives.

This Article proceeds in three Parts. Part I provides a brief historical background of the issues surrounding working caregivers, situates this Article within the scholarship, and lays out the broader landscape of protections for working caregivers. Part II examines and compares local, state, and federal efforts to legislate flexibility in the workplace. I divide such efforts into three categories: (1) “Good” laws and bills that protect the right to request flexible scheduling; (2) “Better” laws that grant a limited right to flexibility itself; and (3) “Best” laws and bills that grant a broad right to flexibility.

In Part III, I determine how Elena, Arthur, and Tammy’s requests would fare under the Good, Better, and Best legislative approaches laid out in Part II. Ultimately, I recommend robust substantive FWA protections that cover a diverse array of workers, define FWA broadly, define family inclusively, and minimize employee threshold and time worked requirements. Finally, I address several key criticisms of FWA laws. A brief conclusion follows.

I. Protections for Working Caregivers

This Part will provide a brief historical background of the issues surrounding working caregivers and examine several critical protections that exist for those balancing paid work with caregiving: discrimination laws, paid family leave, child and elder care, and pregnancy accommodation laws.

A. A Brief History of the Problem

1. Pre-Pandemic

All people will need care or provide care at some point in their lives. Yet governmental support for working caregivers trails the rest of the world. Massive demographic shifts in the number of working caregiver

the increase in flexibility brought on by COVID-19 and concluding “there has been a major shift in the working world and in society itself”).

23. See Martha Albertson Fineman, Cracking the Foundational Myths: Independence, Autonomy, and Self-Sufficiency, 8 Am. U. J. GENDER, SOC. POL’Y & L. 13, 18 (2000) (rejecting the political characterization of dependency as undesirable and asserting, “[a]ll of us were dependent as children, and many of us will be dependent as we age, become ill, or suffer disabilities”); Nicole Buonocore Porter, The Workplace Reimagined: Accommodating Our Bodies and Our Lives 112 (2023) (“We all begin life dependent on others, most of us will give care to others who depend on us, and almost all of us will end life dependent on others.”).

24. For example, the United States is the only wealthy nation lacking paid family leave for new parents and spends less than half of one percent of its gross domestic product on childcare and early education. See Jacob Zinkula, Only One Developed Country Has a More Expensive Childcare System Than the US, BUS. INSIDER (Feb. 27, 2024, 6:03 AM), https://www.businessinsider.com/high-childcare-costs-in-us-women-workforce-cheapest-countries-kids-2024-2 [https://perma.cc/FSC9-DWCU]
women and mothers have occurred since the mid-twentieth century; today, seventy-three percent of American mothers of children work and two-thirds are primary, sole, or co-breadwinners for their family.\(^{25}\) At the same time, the prevalence of family caregiving has increased and is expected to keep rising.\(^{26}\)

Yet rigid norms around when, where, and how work is performed continue to dominate the workplace. Employers stubbornly continue to operate under the erroneous assumption that someone else—aside from the worker—can perform the child and family care that takes place outside of work.\(^{27}\) Such norms place working caregivers in a precarious position in which they must place their job in jeopardy or leave the workforce to attend to caregiving responsibilities, or else outsource family care at great expense.\(^{28}\)

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\(^{26}\) See Exec. Order No. 14095, 88 Fed. Reg. 24669, 24669 (Apr. 18, 2023) (noting that “even when high-quality care is available, it costs far more than many families and individuals can afford, causing them to forgo care altogether, seek lower-quality care options . . . reduce their own paid work hours, [or] drop out of the labor force”); infra Section I.D.
This “caregiving conundrum” is not accidental; rather, “[t]here is a politics to this.” It represents a relic of a short-lived but widely idealized mid-twentieth century conception of American life in which families were nuclear with one breadwinner (male) who worked outside the home and earned enough income to support a stay-at-home parent (female) who did the bulk of childcare and family care. The stay-at-home parent was available to watch young children during the day, ferry older children to and from school, prepare lunches and dinners, take care of sick children and aging parents, and cover any other care needs that arose.

This vision is largely anachronistic; for many working-class and non-white families, this paradigm never applied. Further, wage stagnation since the 1960s has made it increasingly out of reach for two-parent families to have one breadwinner and one full-time caregiver. Indeed, a minority of American families reflect this family configuration.

29. See Nicole Buonocore Porter, Why Care About Caregivers? Using Communitarian Theory to Justify Protection of “Real” Workers, 58 U. Kan. L. Rev. 355, 356 (2010) (coining the phrase “caregiver conundrum” to mean “the difficulty caregivers face when trying to balance their caregiving responsibilities with their work responsibilities” (footnote omitted)).

30. See CATHERINE A. MACKINNON, FEMINISM UNMODIFIED 34 (1987) (arguing that the sameness/difference debate in feminist legal theory problematically views women’s equality only in relation to men and declaring: “There is a politics to this. Concealed is the substantive way in which man has become the measure of all things.”).

31. See Lucinda M. Finley, Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate, 86 Colum. L. Rev. 1118, 1126–27 (1986) (noting that many “workplaces remain structured around an eight-hour day, five days a week, even though such a schedule conflicts with employees’ needs”); Hochschild & Machung, supra note 27, at xiv (discussing how women’s careers were “originally designed to suit a traditional man whose wife raised his children”).

32. See, e.g., Rose M. Kreider & Diana B. Elliott, Historical Changes in Stay-at-Home Mothers: 1969 to 2009, at 3 (2010) (unpublished manuscript) (on file with the U.S. Census Bureau), https://www.census.gov/content/dam/Census/library/working-papers/2010/demo/asa2010-kreider-elliott.pdf [https://perma.cc/5JH3-YSPF] (noting that the stay-at-home mother phenomenon was racialized and class-based, with Black mothers likely to work outside of the home during World War II and through the 1960s, and noting that low-income families did not have “the luxury of having a mother who was able to stay at home”).


even more strapped for financial and care support.\footnote{See Gretchen Livingston, The Changing Profile of Unmarried Parents, Pew Rsch. Ctr. (Apr. 25, 2018), https://www.pewresearch.org/social-trends/2018/04/25/the-changing-profile-of-unmarried-parents/ [https://perma.cc/34LE-AL7X].} At the same time, women continue to do the lion’s share of caregiving in the United States, comprising the majority of those caring for adults and performing significantly more childcare than men, even when both parents work.\footnote{See Nat’l All. for Caring & AARP, supra note 4, at 89 (noting that sixty-one percent of family caregivers are women); Lauren Bauer, Sara Estep & Winnie Yee, Time Waited for No Mom in 2020, The Hamilton Project, Brookings Inst. (July 22, 2021), https://www.hamiltonproject.org/publication/paper/time-waited-for-no-mom-in-2020/ [https://perma.cc/QG5C-F3DC] (finding that working mothers spent about three hours more per day than fathers on childcare). For a foundational work in this field, see Hochschild & Machung, supra note 27, at 3–4 (analyzing studies from the 1960s and 1970s on time use and finding that women spent an average of fifteen hours more per week than men on work, childcare, and housework).}

This is not a new problem. Legal scholars, activists, and others have been writing for decades about the failure of American law and policy to provide necessary support for working caregivers.\footnote{See, e.g., Joan Williams, Unbending Gender: Why Family and Work Conflict and What to Do About It 64–113 (2000) (asserting workplaces are designed around men’s bodies and lives in ways that are harmful to women and arguing for restructuring work and family in ways that value family caregiving); Vicki Schultz, Life’s Work, 100 Colum. L. Rev. 1881, 1936–37 (2000) (calling for structural changes such as a reduced workweek and paid sabbaticals for family caregiving); Mary Joe Frug, Securing Job Equity for Women: Labor Market Hostility to Working Mothers, 59 B.U. L. Rev. 55, 56 (1979) (writing that the labor market “is organized as if workers do not have family responsibilities”); see also Jessica Fink, Sidelined Again: How the Government Abandoned Working Women Amidst a Global Pandemic, 2022 Utah L. Rev. 469, 485 (noting that “[v]olumes have been written about the extent to which the American legal regime falls short” for working caregivers).} Some scholars have advocated for laws requiring employers to provide reasonable accommodations for parental obligations modeled on the religious accommodation provision in Title VII of the Civil Rights Act of 1964 or the disability accommodation requirement in the Americans with Disabilities Act (ADA), while others worried that those mandates had been interpreted so narrowly by courts as to be unproductive models.\footnote{See Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e(j) (2024); Americans with Disabilities Act of 1990, 42 U.S.C. § 12112(b)(5)(A) (2024); see, e.g., Peggie R. Smith, Accommodating Routine Parental Obligations in an Era of Work-Family Conflict: Lessons from Religious Accommodations, 2001 Wis. L. Rev. 1443, 1465–66 (proposing parental accommodation based on Title VII religious accommodation); Debbie N. Kaminer, The Work-Family Conflict: Developing a Model of Parental Accommodation in the Workplace, 54 Am. U. L. Rev. 305, 322–40 (2004) (supporting parental accommodation law based on Title VII); 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, 457 (2001) (discussing potential of both the Americans with Disabilities Act (ADA) and Title VII to serve as models for caregiver accommodations); Rachel Arnow-Richman, Accommodation Subverted: The Future of Work/Family Initiatives in a “Me, Inc.” World, 12 Tex. J. Women & L. 345, 366–67 (2005) (discussing potential of the ADA accommodation mandate to “revolutionize” employers’ treatment of caregivers, but noting that judicial interpretation has been narrow); Michelle A. Travis, Recapturing the Transformative Potential of Employment Discrimination Law, 62 Wash. & Lee L. Rev. 3, 21–46 (2005) (lamenting...}
Others have written about “right to request” laws as a fruitful model for protecting caregivers who seek FWAs, though none have explored these frameworks since the start of the pandemic.39

This Article argues that flexible scheduling and other FWAs represent a critical piece of the infrastructure needed to support working families. Indeed, caregivers cite workplace flexibility as a major concern in their ability to balance work and care.40 While employers may be resistant to transferring power over work arrangements to workers, research shows that flexible workplace policies benefit employers as well as employees. Access to flexibility at work reduces employees’ stress and improves employees’ health outcomes.41 Parents with access to workplace flexibility are more likely to be involved in their children’s education and medical care.42 Family caregivers with access to workplace policies like judges’ refusal to question exclusionary workplace structures under the ADA and Title VII). More recently, Nicole Buonocore Porter has advocated for a two-tiered approach in which urgent requests are treated similarly to the ADA model and less urgent requests are treated akin to the Title VII model. Porter, supra note 23, at 146–58.


41. See, e.g., Diane F. Halpern, How Time-Flexible Work Policies Can Reduce Stress, Improve Health, and Save Money, 21 Stress & Health 157, 163 (2005) (finding that availability of flexible work policies enhanced workers’ loyalty to their employer, reduced symptoms of stress, and reduced costs to the employers due to reductions in lateness, missed deadlines, and absenteeism).

flexible scheduling, flexible hours, and remote work are more likely to remain in their job. When employers institute flexible workplace policies, they see increased employee productivity, higher retention rates, and reduced turnover. A 2010 report by the President’s Council of Economic Advisors estimated that instituting flexible workplace policies would save billions of dollars each year in absenteeism.

2. Post-Pandemic

The COVID-19 pandemic brought the issue of working caregivers into the national spotlight. Nationwide closures of schools and childcare centers, coupled with social distancing protocols, meant parents could no longer rely on typical childcare providers. Hospital overcrowding, quarantine guidelines, and fear of infection severely limited family caregivers’ ability to care for their relatives. A constant barrage of news stories chronicled the exhausting, unsustainable dance many families performed each day—working from home, monitoring virtual schooling, and caring for young children.

43. Nat’l All. for Caregiving & AARP, supra note 4, at 67, 69–70.
44. See Bird, supra note 39, at 336 (reviewing data showing increased productivity and retention where workers had access to flexibility); The Benefits of Working from Home, AirTasker Blog (Jan. 3, 2024), https://www.airtasker.com/blog/the-benefits-of-working-from-home/ [https://perma.cc/4A3Z-5WK7] (finding that remote employees work on average 1.4 more days per month than employees who commute); Halpern, supra note 41 and accompanying text.
It soon became clear that women were bearing the brunt of this crisis. By April of 2020, the number of working mothers with school-age children had fallen twenty-two percent compared to the previous year.49 Between February and October of 2020, more than 2 million women left the workforce, many citing caregiving as the reason.50 As women left the workforce in greater numbers than their male counterparts and mothers reduced their hours to a greater extent than fathers, the gendered nature of what many termed the “caregiving crisis” grew undeniable.51 The media warned that the “exodus” of women from the labor market was a “national emergency” heralding “the first female recession.”52


51. See Joelle Gamble & Shilpa Phadke, COVID-19 Has Exacerbated the Economic Inequality and Caregiving Crisis Facing Women of Color. Here’s How the American Rescue Plan Helps, White House BLOG (Mar. 23, 2021), https://www.whitehouse.gov/briefing-room/blog/2021/03/23/covid-19-has-exacerbated-the-economic-inequality-and-caregiving-crisis-facing-women-of-color-heres-how-the-american-rescue-plan-helps/ [https://perma.cc/KR54-RUNX] (“Our country’s caregiving crisis has compounded the effects of the economic downturn; women have borne the brunt of increased caregiving demands, contending with closed schools and child care centers and caring for sick family members.”); Bauer, Estep & Yee, supra note 36 (finding that between May and December of 2020, working mothers of young children spent on average 8.3 hours per day on childcare, compared to 5.2 hours spent by working fathers); Who Is Missing Work Due to Childcare Issues?, USA FACTS (Feb. 7, 2023), https://usafacts.org/data-projects/childcare-work-absences/utm_campaign=earned&utm_content=link&utm_medium=affiliate&utm_source=us-news [https://perma.cc/2YC2-XCKA] (finding that mothers are four times more likely than fathers to miss work due to childcare).

This caregiving crisis brought on by the pandemic led to renewed calls for stronger government support for working parents and caregivers.53 And while the cry for stronger care infrastructure and better social support for parents and caregivers was nothing new, what was new about the pandemic-era crisis was that employers could no longer ignore workers’ need for flexibility. To retain workers and stay in business, employers were forced to alter entrenched workplace norms about when and where work was conducted. Many offices went remote seemingly overnight.54 Workers shifted their schedules or pared back their hours to accommodate the child(ren) or family members they could no longer take to school, day care, or elder care.55 In other words, FWAs became available to workers because employers had no other choice.56

Incredibly to many employers, increased flexibility and remote work did not destroy their businesses. In fact, some found that workers were just as productive, and sometimes even more productive, from home as they were in the office.57 While some employers have retained flexible

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53. See, e.g., Leanne Fuith & Susan Trombley, COVID-19 and the Caregiving Crisis: The Rights of Our Nation’s Social Safety Net and a Doorway to Reform, 11 U. Mia. Race & Soc. Just. L. Rev. 159, 183–86 (2021) (calling for employers to adopt policies and develop workplace cultures that expand protections for and value caregivers); Fink, supra note 37, at 503–08 (discussing women’s hardships during the pandemic and the gendered consequences of government inaction); Melissa Murray & Caitlin Millat, Pandemics, Privatization, and the Family, 96 N.Y.U. L. Rev. Online 106, 126–27 (2021) (asserting that the pandemic highlighted the state’s meager supports for caregiving and revealed the American presumption that care should be privatized within the family).

54. See Kim Parker, Juliana Menasce Horowitz & Rachel Minkin, How the Coronavirus Outbreak Has—and Hasn’t—Changed the Way Americans Work, Pew Res. Ctr. (Dec. 9, 2020), https://www.pewresearch.org/social-trends/2020/12/09/how-the-coronavirus-outbreak-has-and-hasnt-changed-the-way-americans-work/ [https://perma.cc/25UY-ZSSF] (finding that seventy percent of workers whose job could be done remotely were doing so all or most of the time, compared with almost none prior to the pandemic and noting that the “abrupt closure of many offices and workplaces . . . ushered in a new era of remote work for millions of employed Americans”).

55. See Travis, supra note 38, at 217–18 (discussing how employers embraced remote work, flextime, and temporary work interruptions during the pandemic by relaxing attendance rules, altering shift requirements, and issuing unpaid leaves).

56. See Americans Are Embracing Flexible Work—and They Want More of It, supra note 22 (“The flexible working world was born of a frenzied reaction to a sudden crisis but has remained as a desirable job feature for millions.”).

work policies instituted during the pandemic, they are free to roll back these policies at any time and indeed many have already done so. In addition, access to these policies is concentrated among higher earning and more educated workers, while low-income workers, disproportionately women and people of color, are least likely to have access to FWAs.

B. Caregiver Discrimination Laws

No federal law explicitly prohibits discrimination based on caregiving responsibilities. While courts and the Equal Employment Opportunity Commission (EEOC) have interpreted various federal laws, including the ADA, the Pregnancy Discrimination Act (PDA), Title VII of the Civil Rights Act of 1964 (Title VII), and the Family and Medical Leave Act (FMLA), to bar discrimination against workers who have family caregiving responsibilities in certain circumstances, these laws protect caregivers only indirectly.


59. See Americans Are Embracing Flexible Work—and They Want More of It, supra note 22 (finding that those with higher incomes and education levels have greater access to workplace flexibility); Parker, Horowitz & Minkin, supra note 54 (reporting a “clear class divide between workers who can and cannot telework,” with sixty-two percent of college-educated workers reporting their work can be done remotely compared to twenty-three percent of workers without a college degree); Jocelyn Frye, On the Frontlines at Work and at Home: The Disproportionate Economic Effects of the Coronavirus Pandemic on Women of Color, CTR. FOR AM. PROGRESS (Apr. 23, 2020), https://www.americanprogress.org/article/frontlines-work-home/ [https://perma.cc/DQ7T-6SZY] (noting that “[w]omen of color disproportionately work in low-wage jobs with fewer workplace supports”).


61. Plaintiffs experiencing caregiver discrimination must use a different legal “hook” to trigger protection under federal law, such as sex under Title VII, association with someone with a disability under the ADA, pregnancy under the PDA, or interference with leave rights under the FMLA. See Americans with Disabilities Act of 1990, 42 U.S.C. § 12112(b)(4) (2024) (prohibiting discrimination based on a worker’s association with an individual with a disability); Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k) (2024) (barring discrimination based on pregnancy, childbirth, and related medical conditions); Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1) (2024) (prohibiting employment discrimination
While no federal law addresses caregiver discrimination directly, five states, Washington, D.C., and around 200 cities and localities have passed laws explicitly prohibiting discrimination against parents, also referred to as “family responsibility discrimination.”62 A 2020 survey by the Center for WorkLife Law at the University of California College of the Law, San Francisco (formerly U.C. Hastings), found that nearly 50 million employees—almost one-third of the workforce—are covered by one of these laws.63 These laws generally prohibit discrimination against employees based on parenthood, “familial status,” caregiver status, or “family responsibilities.”64 These laws vary in terms of which employees are covered and what types of caregivers qualify for protection.65 The vast majority of such laws cover only parents and do not cover caregivers of other family members.66

Caregiver discrimination laws fill an important gap in federal law by granting those with certain caregiving responsibilities the right to equal treatment without the need to tether such treatment to gender, disability, or pregnancy. However, discrimination laws alone are insufficient to address the problem of workplace flexibility for caregivers because they impose no obligation on employers to provide FWAs to caregivers.67


62. Alaska, Delaware, Maine, Minnesota, New York, and Washington, D.C. protect parents against discrimination in the workplace. ALASKA STAT. § 18.80.220 (2023); DEL. CODE ANN. tit. 19, §§ 710(9), 711(l)(1) (2023); ME. STAT. tit. 5, § 4572 (2023); MINN. STAT. § 363A.08 (2023); N.Y. EXEC. LAW § 296 (McKinney 2023); D.C. CODE § 2-1402.11 (2023). Delaware, Maine, and Washington, D.C. protect certain family caregivers as well as parents. DEL. CODE ANN. tit. 19, §§ 710(9), 711(l)(1) (prohibiting discrimination based on “family responsibilities” and defining “family responsibilities” as “obligations of an employee to care for any family member who would qualify” for coverage under the FMLA); ME. STAT. tit. 5, §§ 4553(5-A)(B-1), 4572(1) (A) (prohibiting discrimination based on “familial status” and defining “familial status” to include caring for adults who are unable to care for themselves); D.C. CODE § 2-1401.02(12), -1402.11(a) (barring discrimination based on “family responsibilities” and defining “family responsibilities” to include contributing to the support of a person “in a dependent relationship”); see CALVERT, supra note 60, at 3; Laws Protecting Family Caregivers at Work, CTR. FOR WORKLIFE L. (Apr. 2023), https://worklifelaw.org/wp-content/uploads/2022/11/FRD-Law-Table.pdf [https://perma.cc/X32G-2RE7] (charting and categorizing all state and local caregiver discrimination laws).

63. CALVERT, supra note 60, at 7.

64. Id. at 7–9; see, e.g., ALASKA STAT. §18.80.220(a) (parenthood); ME. STAT. tit. 5, § 4572(1) (familial status); N.Y.C., N.Y., ADMIN. CODE § 8-107(1)(a) (2024) (caregiver status); DEL. CODE ANN. tit. 19, § 711(l)(1) (family responsibilities).

65. CALVERT, supra note 60, at 7–8, 12.

66. See id. at 7 (finding that less than one-fifth of the family responsibility laws across the country cover family caregivers as well as parents).

67. See Arnow-Richman, supra note 38, at 355 (discussing the “inadequacy of the traditional discrimination model in addressing caregiving” issues); Nicole Buonocore Porter, Caregiver Conundrum Redux: The Entrenchment of Structural Norms,
Rather, they require that employers treat caregivers who request FWAs or other accommodations for caregiving the same as they treat non-caregivers who make similar requests. If employers refuse all workers’ requests for flexible scheduling, remote work, or occasional shift changes, they can refuse a new parent’s request. Thus, employers are free under discrimination law to “level down” and grant no one a flexible arrangement for any reason.

This reflects the traditional purpose of discrimination law, which is to ensure formal equality, not substantive equality. In circumstances where workers need additional or different treatment to participate fully in the workplace, such as in the context of pregnancy or disability, antidiscrimination mandates alone have not been sufficient to bring about meaningful change.

In addition, discrimination law poses practical and structural challenges to caregivers who need a FWA. Workers challenging an employer’s denial of a requested FWA under a caregiver discrimination law must produce evidence showing that the employer granted similar FWAs to non-caregivers. Uncovering such evidence, even if it exists, can be a high burden for employees who may lack access to knowledge of how their employer treats other employees. This is particularly true among low-wage workers who are more likely to work in settings isolated from coworkers and to lack the freedom to converse with colleagues about their work arrangements.

For instance, if Arthur is unaware whether

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91 Deven. U. L. Rev. 963, 975 (2014) (noting that many scholars who support caregiver discrimination laws also “recognize that anti-discrimination provisions are not enough without an accommodation mandate”).

68. See, e.g., Del. Code Ann. tit. 19, § 711(l)(2) (providing that the family responsibility discrimination law “does not create any obligation for an employer to make special accommodations for an employee with family responsibilities, so long as all policies related to leave, scheduling, [and] absenteeism” are “applied in a nondiscriminatory manner”).

69. See Deborah L. Brake, When Equality Leaves Everyone Worse Off: The Problem of Leveling Down in Equality Law, 46 Wm. & Mary L. Rev. 513, 522 (2004) (describing the problem of employers “leveling down” and asserting that the threat of such action undermines equality rights and deters individuals from bringing discrimination claims).


71. See Deborah A. Widiss, Pregnant Workers Fairness Acts: Advancing a Progressive Policy in Both Red and Blue America, 22 Neb. L.J. 1131, 1141 (2022) (discussing why antidiscrimination mandates in the PDA and the ADEA were insufficient to protect pregnant workers who needed accommodations).


73. See id.
any of his coworkers have ever requested to shift their hours or check their cell phones, he would have no way to prove he was treated less well than non-caregivers.\(^\text{74}\)

C. Paid Family Leave

Paid family leave is a critical policy need for working caregivers. Paid leave allows workers to take paid time off from work to bond with and care for a new child or to provide care and support for ill family members without fear of losing their job or health insurance.\(^\text{75}\) Workers with access to paid leave are healthier and more financially secure, and mothers with access to paid leave have better physical and mental health following the birth of a child.\(^\text{76}\)

While some employers offer paid family leave to workers, most do not.\(^\text{77}\) Low-income workers are significantly less likely to have access to paid leave.\(^\text{78}\) The United States has no federal paid family leave law.\(^\text{79}\) The sole federal leave law, the FMLA, only guarantees unpaid leave and

\(^{74}\) See supra text accompanying notes 4–5 for a discussion of Arthur’s story.


\(^{78}\) A Look at Paid Family Leave by Wage Category in 2021, supra note 77 (finding that among the lowest ten percent of earners in the private sector, only six percent had access to paid family leave).

\(^{79}\) See Donovan, supra note 75, at 1 (noting that “federal law does not require private-sector employers to provide paid leave of any kind”). Workers in the United States have no federal right to a single day of paid sick time or paid vacation time, making the U.S. the only advanced economy in the world to lack such a law. See Sick Leave, U.S. Dep’t Lab., https://www.dol.gov/general/topic/workhours/sick-leave [https://perma.cc/PETS-5KVU] (last visited Apr. 3, 2024); Vacation Leave, U.S. Dep’t Lab., https://www.dol.gov/general/topic/workhours/vacation_leave [https://perma.cc/9YVQ-XKNL] (last visited Apr. 3, 2024); Adele Marie, Ctr. for Econ. & Pol’y Rsch., No Vacation Nation, Revised 3–5 (2019) (reviewing legal right to paid vacation in twenty-one of the richest countries in the world, including the U.S., and finding that the U.S. was the only country without mandated paid vacation).
nearly half of workers are not covered under the law’s rigid eligibility requirements.80 Many of those who are covered do not exercise their full rights under the law because they cannot afford to forego twelve weeks of wages.81 Low-income workers and single parents are less likely to be covered by the FMLA and more likely to forego needed leave even when they are eligible.82

To fill the gap left by federal law, thirteen states and Washington, D.C. have passed paid family and medical leave laws.83 These laws provide covered workers with the right to job-protected, paid time off to bond with a new child, care for an ill family member, or deal with their own serious

80. Family and Medical Leave Act, 29 U.S.C. § 2612(c) (2024) (providing right to unpaid leave for qualifying workers); id. § 2611(2) (restricting FMLA eligibility to employees who have been employed by their current employer for at least twelve months, have worked at least 1,250 hours for that employer in the past twelve months, and whose employer has fifty or more employees within a seventy-five-mile radius of the employee’s worksite); see SCOTT BROWN, JANE HERR, RADHA ROY & JACOB ALEX KLERMAN, ABT ASSOC., EMPLOYEE AND WORKSITE PERSPECTIVES OF THE FMLA: WHO IS ELIGIBLE? 1 (2020), https://www.dol.gov/sites/dolgov/files/OASP/evaluation/pdf/WHD_FMLA2018SurveyResults_FinalReport_Aug2020.pdf [https://perma.cc/525E-7HHN] (reporting that fifty-six percent of U.S. employees were eligible for FMLA leave in 2018).

81. SCOTT BROWN, JANE HERR, RADHA ROY & JACOB ALEX KLERMAN, ABT ASSOC., EMPLOYEE AND WORKSITE PERSPECTIVES OF THE FAMILY AND MEDICAL LEAVE ACT: EXECUTIVE SUMMARY FOR RESULTS FROM THE 2018 SURVEYS 4 (2020), https://www.dol.gov/sites/dolgov/files/OASP/evaluation/pdf/WHD_FMLA2018SurveyResults_ExecutiveSummary_Aug2020.pdf [https://perma.cc/4FU4-MD4B] (finding the most common reason employees forego needed leave is inability to afford it and that most employees who receive partial or no pay while on leave report experiencing financial difficulty); see also Albiston & Trimble O’Connor, supra note 27, at 7 (finding fear of retaliation and stigma around taking leave led to eligible workers foregoing needed leave).

82. BROWN, HERR, ROY & KLERMAN, supra note 80, at 2 (reporting thirty-eight percent of workers earning less than $15 per hour were FMLA-eligible, compared to sixty-three percent of those earning $15 or more and forty-three percent of employees in single-parent households were eligible, compared to sixty-three percent of those in dual-parent households); SCOTT BROWN, JANE HERR, RADHA ROY & JACOB ALEX KLERMAN, ABT ASSOC., EMPLOYEE AND WORKSITE PERSPECTIVES OF THE FAMILY AND MEDICAL LEAVE ACT: RESULTS FROM THE 2018 SURVEYS 41–43 (2020), https://www.dol.gov/sites/dolgov/files/OASP/evaluation/pdf/WHD_FMLA2018SurveyResults_FinalReport_Aug2020.pdf [https://perma.cc/9Q4V-WCU7] (finding unmet need for leave more common among low-wage employees and those in single-parent households); see also Ann O’Leary, How Family Leave Laws Left Out Low-Income Workers, 28 BERKELEY J. EMP. & LAB. L. 1, 38–49 (2007) (discussing legislative history of the FMLA and noting that the law’s passage entailed compromises particularly harmful to low-wage women).

83. 28 R.I. GEN. LAWS §28-39-1 (2023); CAL. UNEMP. INS. CODE § 2601 (West 2023); N.J. STAT. ANN. § 43:21-25 (West 2023); N.Y. WORKERS’ COMP. LAW § 200 (McKinney 2023); D.C. CODE § 32-541.01 (2023); WASH. REV. CODE 50A.05.005 (2023); MASS. GEN. LAWS ch. 175M, § 1 (2023); CONN. GEN. STAT. § 31-49e (2023); OR. REV. STAT. § 657B.005 (2023); COLO. REV. STAT. § 8-13-3-501 (2023); MD. CODE ANN., LAB. & EMP. § 8-3-101 (West 2023); DEL. CODE ANN. tit. 19, § 3701 (2023); H.F. 2, 93d Leg., Reg. Sess. (Minn. 2023); ME. STAT. tit. 26, § 850 (2023); Comparative Chart of Paid Family and Medical Leave Laws in the United States, A BETTER BALANCE (Jan. 2, 2024), https://www.abetterbalance.org/resources/paid-family-leave-laws-chart/ [https://perma.cc/BPR9-9RHN].
health needs.\textsuperscript{84} Furthermore, the laws tend to cover more workers than the FMLA and define family more inclusively than the FMLA.\textsuperscript{85}

While state paid family and medical leave laws represent a crucial support for parents and caregivers, less than a third of states have passed such laws. New mothers in the thirty-seven states that lack such a law might find themselves returning to work just weeks after giving birth to ensure they do not lose their jobs, income, and health insurance.\textsuperscript{86}

And while paid leave is necessary for working parents and caregivers, it is not sufficient on its own to address workers’ ongoing needs for FWAs. State paid leave protections generally provide up to twelve weeks of leave per year for qualifying reasons, such as the birth or adoption of a child or a family member’s serious health needs. Caregivers who need FWAs other than paid leave, such as adjustments to their hours, schedule, or location of work, are not covered by paid leave laws. Thus, a new parent who needs a schedule adjustment once they return from parental leave, like Elena, would not be covered.\textsuperscript{87} A family caregiver who needs to work remotely, like Tammy, would also not be covered.\textsuperscript{88}

\section{D. Access to Affordable Child and Elder Care}

\subsection{Childcare}

For working parents, access to affordable childcare is essential in order to be able to return to work. The United States does not provide free universal childcare until kindergarten, when children are about five years old.\textsuperscript{89} Eligibility for free or low-cost early childcare differs by

\begin{itemize}
\item \textsuperscript{84} See Comparative Chart of Paid Family and Medical Leave Laws in the United States, supra note 83.
\item \textsuperscript{85} The FMLA defines “family” narrowly to include only an employee’s spouse, child, or parent. 29 U.S.C. § 2612(a)(1)(C); see Deborah A. Widiss, \textit{Chosen Family, Care, and the Workplace}, 131 \textit{Yale L.J.} 215, 232 (2021) (noting that all state paid family leave laws have broader family definitions than the FMLA). \textit{But see} Widiss, supra note 70, at 2207–12 (arguing that paid family leave laws exacerbate existing inequalities by granting single-parent families half as much support as two-parent families).
\item \textsuperscript{86} See, e.g., Sharon Lerner, \textit{The Real War on Families: Why the U.S. Needs Paid Leave Now}, In These Times (Aug. 18, 2015), https://inthesetimes.com/article/the-real-war-on-families [https://perma.cc/D44Z-GB8L] (reporting Abt Associates analysis finding that one in four women returned to work within two weeks of giving birth).
\item \textsuperscript{87} See supra text accompanying notes 2–3 for a discussion of Elena’s story; see also Joan Williams, \textit{Our Economy of Mothers and Others: Women and Economics Revisited}, 5 \textit{J. Gender, Race \\& Just.} 411, 430 (2002) (commenting on the limited duration of the FMLA’s leave allowance of three months for childcare and childrearing—“a task that lasts twenty years”); Arnow-Richman, supra note 38, at 368 (noting that the FMLA does not “address the full range of caregiving responsibilities that employees coping with childbirth or serious family illness are likely to experience”).
\item \textsuperscript{88} See supra text accompanying notes 6–7 for a discussion of Tammy’s story.
\item \textsuperscript{89} See Table 1.3: \textit{Types of State and District Requirements for Kindergarten Entrance and Attendance, by State: 2020}, \textit{NAT'L CTR. FOR EDUC. STATS.}, https://nces.ed.gov/programs/statecompform/tab1_3-2020.asp [https://perma.cc/2W2F-6BGW] (last visited Apr. 4, 2024); Claire Cain Miller, \textit{How Other Nations Pay for Child Care. The U.S. Is an
state and remains out of reach for most families. 90 Less than a fifth of states provide universal pre-K for three and four-year-olds, and the ones that do often lack sufficient funding to admit all families who apply. 91

The lack of free or low-cost childcare prior to age five leaves many parents on their own to secure and finance childcare for their child’s first five years of life, which can be difficult to secure and prohibitively expensive. 92 While federal standards consider childcare “affordable” when it represents seven percent or less of a family’s income, the national average cost of childcare exceeds $10,000 per year, representing more than ten percent of the median income for a married couple and over thirty-five percent of the median income for a single parent. 93 In many states, costs run higher. In New York, the average annual cost of infant care is $15,394; in Massachusetts, it is $20,913. 94 In the Bronx, N.Y., families spend an average of forty-seven percent of their median family income on care for a single child. 95 In thirty-three states and Washington, D.C., infant care is more expensive than in-state tuition for a four-year public


91 See Exec. Order No. 14095, 88 Fed. Reg. 24669, 24669 (Apr. 21, 2023) (noting that in 2019, more than three-quarters of U.S. households had difficulty finding childcare); Widiss, supra note 70, at 2188 (noting that even before the pandemic, there were about five children for every available slot in a licensed childcare center and nine children for each slot in rural areas); see also Murray & Millat, supra note 53, at 111 (“Put simply: The state provides public education, but the family is supposed to provide everything else.”).

92 See Child Care and Development Fund (CCDF) Program, 45 C.F.R. § 98 (2024) (establishing new federal benchmark for affordable family childcare co-payments); Child Care Aware of Am., Demanding Change: Repairing Our Child Care System 38–41 (2022), https://info.childcareaware.org/hubfs/FINAL-Demanding%20Change%20Report-020322.pdf [perma link unavailable]; Nicolas Vega, Child Care Now Costs More Than $10,000 Per Year on Average—Here’s Why That’s a Problem, CNBC (Feb. 21, 2022, 9:00 AM), https://www.cnbc.com/2022/02/21/average-cost-of-childcare-is-now-more-than-10000-dollars-per-year.html [https://perma.cc/7F38-EL5K] (summarizing Demanding Change report).


college.\textsuperscript{96} These numbers take into account childcare centers and home-based centers that provide care for multiple children at a time;\textsuperscript{97} they do not incorporate the cost of private care providers like nannies, which cost families an average of nearly $40,000 per year.\textsuperscript{98}

The rising cost of childcare has led the federal government to deem it a “failed market” and recommend substantial policy intervention.\textsuperscript{99} Unsurprisingly, the higher the cost of childcare in a given area, the lower the rate of maternal employment.\textsuperscript{100} As with paid leave, the United States trails the international community in its paltry provision of early childhood care, spending an average of $500 per year per child, compared to the $14,000 per year other wealthy countries spend.\textsuperscript{101}

Scholars and feminists have long called for greater government provision of early childcare to allow working parents, and particularly

\begin{itemize}
  \item \textsuperscript{96} Child Care Costs in the United States, supra note 94.
  \item \textsuperscript{97} Child Care Aware of Am., supra note 93, at 39–40 (discussing methodology). The Economic Policy Institute’s childcare calculator uses data from childcare centers only. See Email from Nick Kauzlarich, Media Rels. & Digit. Dir. Econ. Pol’y Inst., to Madeleine Gyory, Acting Assistant Professor of Lawyering, N.Y.U. Sch. of L. (Apr. 28, 2023) (on file with author). For an excellent analysis of how government childcare subsidies incentivize formalization and disproportionately harm low-income families, see Yiran Zhang, Subsidizing the Childcare Economy, 34 Stan. L. & Pol’y Rev. 67 (2023).
  \item \textsuperscript{98} See Correll, supra note 3. In New York City, the estimated cost of a nanny for one child is $43,680 per year. See Calculate Your Child Care Costs, CARE.COM, https://www.care.com/app/enrollment/seeker/cc/tax-calculator [https://perma.cc/MBD5-9D42] (last visited Apr. 4, 2024) (enter 10010 under “Where You Live”; choose “1” from dropdown under “Number of Kids”; then choose “40” from dropdown under “Hours a Week You Need Care”). The calculator shows that for this New York City zip code, the average cost of a nanny for one child is $840 per week. \textit{Id.} In San Francisco, the estimated cost of a nanny for one child is nearly $50,000 per year. \textit{Id.} (figure calculated by entering zip code 94115). The calculator shows that for this San Francisco zip code, the average cost of a nanny for one child is $960 per week. \textit{Id.}
  \item \textsuperscript{99} See Landivar, Graf, & Rao, supra note 95, at 8–9 (noting that childcare funding “is reliant primarily on overburdened families and underpaid childcare workers,” which has “contribute[d] to what the U.S. Treasury Department calls a failed market requiring substantial government investment”). President Biden’s Build Back Better plan recognized this underinvestment and aimed to provide universal free preschool and day care subsidies to ensure families did not pay over seven percent of their income on childcare, but policy disagreements and budget concerns essentially halted the legislation. \textit{The Build Back Better Framework}, \textit{White House} (Oct. 28, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/10/28/build-back-better-framework/ [https://perma.cc/NS66-KV9L]; see Dustin Jones, Despite Infighting, It’s Been a Surprisingly Productive 2 Years for Democrats, Nat’l Pub. Radio (Jan. 1, 2023, 5:00 AM), https://www.npr.org/2023/01/01/114319435/ despite-infighting-its-been-a-surprisingly-productive-2-years-for-democrats [https://perma.cc/NN9C-M9KK]; see also Noah D. Zatz, Supporting Workers by Accounting for Care, 5 Harv. L. & Pol’y Rev. 45, 46, 48–50 (2011) (arguing that government failure to consider childcare costs when engaging in means-testing for public benefits has led to “child-care invisibility”).
  \item \textsuperscript{100} Landivar, Graf, & Rao, supra note 95, at 9–10.
  \item \textsuperscript{101} See Miller, supra note 89.
working mothers, to return to the labor market. Access to flexibility at work is essential for parents navigating the uneven, unpredictable, and expensive patchwork of childcare in the United States. Indeed, parents of young children are twice as likely to miss work for childcare-related reasons than parents of older children.

But even if the U.S. ensured access to affordable childcare for all families, caregivers would still need access to FWAs. Parents need flexibility for when childcare providers inevitably cancel or close and, as was the case for Elena, when the best childcare option for a given family operates on a different schedule from a parent’s work hours. Furthermore, parents may need flexibility to deal with caregiving issues unrelated to their childcare provider, such as staying home with a sick child or taking their child to the doctor.

2. **Eldercare**

Eldercare can take various forms, including nursing home care, in-home care with a home health aide, and care in an assisted living facility. While adults become eligible for Medicare at age sixty-five, Medicare does not cover long-term daily care in the home or in a full-time nursing facility. To qualify for Medicaid, which does provide home health care, one must have less than $2,000 in assets. Even then, there are over 800,000 people on the waiting list for home care assistance and the average wait time is over three years.

Instead, many families end up paying out of pocket for eldercare, but costs can be prohibitive. The median yearly cost of care in an assisted living facility in the United States in 2021 was $54,000. For in-home care with a home health aide, the cost was $61,776. For a private room in a nursing home, the cost was $108,405.

Unsurprisingly, many families try to avoid these costs as much and as long as possible, with children and other family stepping in to provide

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104. See supra text accompanying notes 2–3 for a discussion of Elena’s story.


108. *Id.*

109. *Id.*
needed care. An estimated 41.8 million people, or 16.8% of the population, currently provides care for an adult over age fifty. Elder care can involve monitoring medication, preparing meals, changing diapers, bathing, coordinating finances, and providing transportation to medical appointments. Such care can be grueling, exhausting, and all-consuming for family caregivers, putting their jobs, savings, and mental health in jeopardy.

Access to flexibility at work is essential for family caregivers. Caregivers with access to flexible work hours, leave, and remote work are more likely to remain working than those without access to such policies. Workplace policies that permit scheduling, hours, and location flexibility would allow family caregivers like Arthur and Tammy to remain in the workforce, earning necessary income while continuing to provide care.

E. Pregnancy Accommodation Laws

Pregnancy accommodation laws, known as Pregnant Workers Fairness Acts (PWFAs), are laws that require employers to grant certain job modifications to pregnant workers regardless of their policy toward non-pregnant workers. PWFAs grew largely out of the failure of the federal Pregnancy Discrimination Act to enable pregnant workers to stay healthy and employed during their pregnancy. Thirty states and 110. The National Alliance for Caregiving (NAC) and American Association of Retired Persons (AARP) found that twenty-seven percent of caregivers struggled to hire affordable care in their area. Nat’l All. for CAREGIVING & AARP, supra note 4, at 71; see also Widiss, supra note 85, at 220–21 (“Over eighty percent of senior citizens live on their own or only with a spouse or partner. They often turn to their middle-aged children for support, many of whom are also raising their own children . . . .” (footnote omitted)).

111. Nat’l All. for CAREGIVING & AARP, supra note 4, at 4.

112. Id. at 5 (“The data suggest many caregivers may be taking on this role without adequate and affordable services and supports in place.”); id. at 50 (finding that roughly one in four caregivers find it difficult to take care of their own health due to caregiving responsibilities); Petersen, supra note 106 (writing that among family caregivers, “28 percent have stopped saving, 23 percent have taken on more debt, 22 percent have used up their personal short-term savings, and 11 percent reported being unable to cover basic needs”).

113. Nat’l All. for CAREGIVING & AARP, supra note 4, at 67. Nearly half of those who left their job for caregiving reasons did so because they lacked sufficient time away from work to provide care and fifteen percent did so because their jobs lacked flexible work hours. Id. at 69–70.

114. See supra text accompanying notes 4–7 for a discussion of Arthur’s and Tammy’s stories.


116. See Widiss, supra note 71, at 1136–49 (discussing the inadequacy of both the PDA and the ADA to protect pregnant women who needed accommodations
Washington, D.C. have PWFAs, and Congress passed a federal Pregnant Workers Fairness Act in December of 2022, which went into effect on June 27, 2023.\textsuperscript{117} PWFAs represent a tremendous step toward providing equal opportunity in the workplace to pregnant and postpartum workers. However, they do not address working caregivers’ ongoing need for FWAs after pregnancy and childbirth. PWFAs are meant to address temporary limitations caused by the condition of being pregnant and giving birth.\textsuperscript{118} As with paid leave laws, once the postpartum period ends, parents who need accommodations for childcare or other caregiving reasons unrelated to their physical recovery are not protected under these laws.\textsuperscript{119} Additionally, PWFAs by definition do not cover non-birth parents or adoptive parents nor do they address family caregivers of adults.

II. Legislative Efforts Toward a Flexible Workplace

This Part presents three types of legislative efforts to protect workplace flexibility: (1) laws protecting the right to request flexible scheduling, which I deem “Good;” (2) laws granting a limited right to flexibility itself, which I deem “Better;” and (3) laws granting a broad right to flexibility itself, which I deem “Best.”

A. Good: Right to Request

“Good” right to request (RTR) laws generally prohibit employers from retaliating against employees who request FWAs.\textsuperscript{120} They also generally establish procedures employers must follow when they receive a flexibility request, which can include “good faith” consideration of the request, meeting with the employee to discuss the request, and providing
a written response.\textsuperscript{121} By creating a framework employers must follow when receiving flexibility requests, RTR laws help normalize such requests and reduce stigma around asking for flexibility.\textsuperscript{122} They also remove the danger of retaliation for broaching the subject with an employer, empowering employees to submit requests without fear of punishment. These protections are particularly salient given that the vast majority of private sector workers are not unionized.\textsuperscript{123}

While RTR laws protect the right to ask for a FWA, they do not protect the right to the arrangement itself. Rather, they are “soft-touch” procedural laws in that they guide and protect the process, but do not guarantee an outcome.\textsuperscript{124} RTR laws have been enacted in several countries around the world, including the United Kingdom, Finland, the Netherlands, Germany, New Zealand, Australia, and Belgium.\textsuperscript{125} In the

\begin{footnotesize}
\begin{enumerate}
\item[121] See, e.g., \textit{Berkeley, Cal., Mun. Code} \textsection 13.101.050 (2024) (requiring employers who receive FWA requests to meet with the employee and respond in writing).
\item[122] See Robert C. Bird, \textit{Precarious Work: The Need for Flextime Employment Rights and Proposals for Reform}, 37 \textit{Berkeley J. Emp. & Lab. L.} \textsection 1, 30 (2016) (asserting that even though employers are “under no obligation to accept the request, the process still has meaning” because RTR laws establish collaborative communication procedures and allow workers to feel that “at least . . . their voices have been heard”).
\item[123] See \textit{Boushey}, supra note 27, at 176–77 (noting that unions historically provided protection to employees negotiating scheduling issues, but that “[w]ithout unions, employees have no clear guidance on how to negotiate schedules, and many are afraid to even ask about schedules that fit family life”). While one-third of the private sector workforce was unionized in the 1950s, only about six percent are unionized today. \textit{The State of Our Unions, White House Blog} (Sept. 5, 2022), https://www.whitehouse.gov/cea/written-materials/2022/09/05/the-state-of-our-unions/\#text=Union\%20membership\%20peaked\%20in\%20the,bargaining\%20 position\%20relative\%20to\%20workers [https://perma.cc/7YMF-RWLM].
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past decade, several U.S. states and localities have passed RTR laws, and a federal bill has been introduced in Congress.

1. **State and Local Right to Request Laws**

   In 2013, Vermont became the first state to pass a RTR law. The Vermont law grants covered workers the right to “request a flexible working arrangement,” defined as “intermediate or long-term changes in the employee’s regular working arrangements,” which can include “changes in the number of days or hours worked, changes in the time the employee arrives at or departs from work, work from home, or job-sharing” at least twice per calendar year. The law requires an employer to consider whether the request is consistent with its business operations and discuss it “in good faith” with the employee. The employer must notify the employee of its decision and may not retaliate against the employee for making the request.

   Three years later, in 2016, New Hampshire passed a skeletal RTR law that barred retaliation but did not lay out procedural requirements for the process. Rather, the law provides only:

   No employer shall retaliate against any employee solely because the employee requests a flexible work schedule. Nothing in this section shall be construed to require any employer to accommodate a flexible work schedule. Nothing in this section shall be construed to create a cause of action for failure to provide a flexible work schedule at an employee’s request.

   The original bill language mirrored Vermont’s law by including analogous definitions and procedural requirements for employers considering requests, but that language was removed from the law prior to passage.

   In 2017, Oregon passed a limited RTR law that gave workers in the retail, hospitality, and food service industries the right to “request not to be scheduled for work shifts during certain times or at certain locations.”

   The law barred employers from retaliating against employees

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128. Id. § 309(b) (1)-(2).
129. Id. § 309(c), (f).
who made such requests but noted, “[a]n employer is under no obligation to grant an employee’s request.”133 The state legislature amended the law in 2021 to explicitly reference childcare needs as an example of why an employee might make a scheduling request.134

Several cities have passed RTR laws. New York City’s law grants limited rights to flexible schedule changes and will be addressed in Section II.B below.135 San Francisco’s RTR law was amended in 2022 to provide broader rights to FWAs and will be addressed in Section II.C.1 below.136 Berkeley passed the Family Friendly and Environment Friendly Workplace Ordinance in 2017.137 The law’s passage followed a 2014 ballot initiative in which Berkeley voters had expressed broad support for a RTR law.138 Under the law, covered workers are entitled to request a “Flexible or Predictable Working Arrangement” twice per year unless they experience a “Major Life Event,” in which case they can make an additional request.139 A major life event includes the birth, adoption, or foster placement of a child or “an increase in an Employee’s care giving duties” for a family member with a “Serious Health Condition.”140

Under the Berkeley law, employees are protected from retaliation for making FWA requests.141 If an employer denies a request, it must provide a written explanation that sets out a business reason for the denial.142 As long as the employer provides a business reason for the denial, its decision is not reviewable by the enforcing agency.143

133. OR. REV. STAT. § 653.450(4).
135. N.Y.C., N.Y., ADMIN. CODE § 20-1262(a) (2024); see infra Section II.B.
140. Id. § 13.101.030(H).
141. Id. § 13.101.060.
142. Id. § 13.101.050(C). Business reason is not defined.
143. Id. § 13.101.090(C) (“The Department’s finding of a violation shall not be based on the validity of the Employer’s business reason for denying an Employee’s request for a Flexible or Predictable Working Arrangement. Instead, the Department’s review shall be limited to an Employer’s adherence to procedural, posting and documentation requirements . . . .”).
Similar RTR laws are on the books in Chicago, Philadelphia, Los Angeles, and Emeryville, California. However, these cities protect a more limited swathe of workers. For instance, Chicago’s law applies to employees who earn $50,000 per year or less and work in building services, healthcare, hotels, manufacturing, restaurants, retail, or warehouse services. Los Angeles’s law applies to employees who work for retail establishments with 300 or more employees globally. Laws in other cities and counties offer even less protection, simply providing that certain employees may request or agree with their employer on a FWA, but providing no protection against retaliation.

2. Federal Right to Request Bill: Working Families Flexibility Act

Right to request legislation has been introduced, though not enacted, at the federal level. In 2007, then-Senators Edward Kennedy, Hillary Clinton, and Barack Obama introduced the Working Families Flexibility Act (WFFA). The most recent version of the bill, introduced in 2012, would have granted covered employees the right to apply to their employer once per year for a “temporary or permanent change” relating to their hours, schedule, work location, or how much advance notification they receive of work schedule assignments. The bill prohibited retaliation against employees who make requests and mandated that employers meet with the employee and provide an explanation in writing if they reject the request. The WFFA would have applied to all workers

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144. CHI., ILL., MUN. CODE § 6-110-080 (2023) (“A Covered Employee has the right to request a modified Work Schedule, including, but not limited, to additional shifts or hours; changes in days of work; changes in shift start and end times; permission to exchange shifts with other employees; limitations on availability; part-time employment; job sharing arrangements; reduction or change in work duties; or part-year employment.”).

145. PHILA., PA., CODE § 9-4602(2) (2023) (providing covered employees “the right to make work schedule requests,” including requests for certain hours, days, or locations of work, requests for more or fewer work hours, and not to work on-call shifts).

146. L.A., CAL., MUN. CODE ch. 17, art. 5, § 185.03 (2023).


148. CHI., ILL., MUN. CODE § 6-110-020.

149. L.A., CAL., MUN. CODE § 185.01(C)–(D).

150. See MILWAUKEE CNTRY., WIS., CODE OF ORDINANCES § 17.15(3) (2023) (county employee and employer “may” agree on a flexible workweek or workday); SAN LUIS OBISPO, CAL., CNTRY. CODE § 2.44.110(f) (2023) (county employees eligible for flexible work “may” request a flexible workweek but are not entitled to one and are not protected against retaliation).


152. Working Families Flexibility Act, H.R. 4106, 112th Cong. § 4(a), (c) (2012).

153. Id. §§ 5–6.
covered under the Fair Labor Standards Act (FLSA) whose employer has fifteen or more employees and who work at least twenty hours per week or 1,000 hours per year. The most recent version of the bill, introduced in 2012, did not progress to a vote. In 2014, then-President Barack Obama extended a right to request FWAs to federal employees via presidential memorandum.

B. Better: Limited Right to Flexibility

“Better” laws go beyond typical RTR laws by providing some form of substantive right to certain schedule changes for caregivers. However, the laws stop short of granting a robust right to FWAs by limiting the right’s scope, frequency, duration, or coverage. Two jurisdictions have passed “Better” laws granting limited rights to FWAs.

1. Time and Scope Limitations: New York City Temporary Schedule Change Law

New York City provides an example of a “Better” law that grants a substantive right to certain FWAs but limits the scope and duration of the request. In 2018, New York City enacted the Temporary Schedule Change Law, which provides covered employees the right to temporary changes to their work schedule for specified “personal events” twice per year. Under the law, employees are entitled to temporary changes...
to their work schedule on two occasions per year, for one day each.\footnote{158} The law prohibits employers from retaliating against workers who make requests for temporary schedule changes or any other schedule changes, even those that the employer is not obligated to grant.\footnote{159}

Under the Temporary Schedule Change Law, a “temporary change” means a “limited alteration” in the hours, times, or location an employee is expected to work, which can include using paid or unpaid leave, working remotely, or swapping or shifting work hours with a coworker.\footnote{160} An employer must grant the schedule change if the employee needs it due to a specified “personal event,” which includes the need to care for a child and the need to care for a person with a disability who is a family or household member and relies on the employee for medical care or to meet the needs of daily living.\footnote{161}

When a covered employee requests a temporary schedule change under the law, the employer can either grant the request or provide the employee with unpaid leave for the requested time.\footnote{162} For requests that do not qualify as personal events or exceed the employee’s annual allotment, the employer must provide a written response explaining the denial.\footnote{163} The law covers those who work in New York City and have worked for their employer for about four months but excludes all government workers.\footnote{164}

The New York City Temporary Schedule Change Law represents a significant improvement on the “Good” RTR laws discussed above.

\footnotesize{158. N.Y.C., N.Y., Admin. Code § 20-1262(a)(1); N.Y.C. Dep’t Consumer Affs., Temporary Schedule Change Law: What Employers and Workers Need to Know (2018), https://www.nyc.gov/assets/dca/downloads/pdf/workers/TemporaryScheduleChange-Overview.pdf [https://perma.cc/TPG6-CLDQ]. Employers may alternatively grant an accommodation lasting two days, but they need only grant one such request per year.  


161. Id. §§ 20-1261(a), -1262(a); N.Y.C. Dep’t Consumer Affs., supra note 158. “Personal event” also includes attending certain legal proceedings and any other reason covered under the N.Y.C. Paid Safe and Sick Leave Law. N.Y.C., N.Y., Admin. Code § 20-1261(a).  

162. N.Y.C., N.Y., Admin. Code § 20-1262(a)(3)(a) (providing that an employer’s response to an employee’s request must state “[w]hether the employer will agree to the temporary change to the work schedule in the manner requested by the employee, or will provide the temporary change to the work schedule as leave without pay, which does not constitute a denial”).  

163. Id. § 20-1262(a)(3).  

164. Id. § 20-1263(a)(2) (exempting workers who have been employed by their employer for fewer than 120 days); id. § 20-1201 (defining “employee” and exempting all federal, state, and city government workers). City government workers account for roughly twelve percent of N.Y.C. workers. N.Y.C. Dep’t Lab., Labor Market Briefing: New York City 1 (Mar. 2024), http://doLny.gov/system/files/documents/2024/05/new-york-city.pdf [https://perma.cc/8CXF-G7DR].}
It protects the right to request like the laws discussed in Section II.A, while adding a substantive right to certain schedule changes themselves. At the same time, the right conferred by the law is limited in time and narrow in scope. A protected schedule change under the law must be “temporary” in that it need only last one day. This restricts the law’s reach to emergency situations such as a childcare provider’s illness or an adult care center’s closure, allowing employees to fill in during gaps in care provision twice per year.

To be sure, providing a right to a scheduling change in an emergency is certainly better than RTR laws alone, which leave the decision entirely up to employers. But any law modeled on the New York City Temporary Schedule Change Law will fail to protect employees whose need for flexibility lasts longer than one day at a time. An employee who needs a longer term scheduling change due to new care responsibilities would not be entitled to such a change. Further, while employees can request a schedule change in any “manner” they wish, employers can satisfy their obligations under the law by granting unpaid leave. This makes some sense considering the time-limited nature of the scheduling change at stake—two days per year—but would not work for many longer term flexibility requests where workers are not seeking (or cannot afford to take) long periods of unpaid leave.

2. Coverage Limitations: Seattle Secure Scheduling Ordinance

The city of Seattle offers an example of a “Better” law that grants a substantive right to certain FWAs but limits coverage to a narrow swathe of workers and constrains the scope of protected flexible arrangements. In September 2016, Seattle passed the Secure Scheduling Ordinance (SSO), which went into effect July 1, 2017. The SSO grants covered workers the right to request “not to be scheduled for work shifts during certain times or at certain locations and the right to identify preferences for the hours or locations of work.” Covered employees may request a particular schedule, including which days of the week, which hours, and

165. N.Y.C., N.Y., ADMIN. CODE § 20-1262(a) (1).
166. Id. § 20-1262(a) (3); N.Y.C. DEP’T CONSUMER AFFS., supra note 159, at 2 (“Although Rose’s employer must grant Rose a temporary change to her work schedule on up to two occasions each calendar year, her employer does not have to grant the specific type of temporary change proposed by Rose. Instead, her employer can tell Rose that she can take unpaid leave from 2 p.m. to 4 p.m. to accommodate her personal event.”).
which locations they prefer, but may not request a specific number of hours or days per week.\footnote{169}

Notably, the law applies only to employees of retail or food establishments whose employer has 500 or more employees worldwide.\footnote{170} Employees are covered only if they work at a fixed point of sale location in Seattle at least fifty percent of the time.\footnote{171} Employees must submit their request at least fourteen days in advance.\footnote{172}

The Seattle law shares a similar procedural structure to New York City’s Temporary Schedule Change Law, while covering a broader range of family relationships. Under the Seattle law, employers must grant a schedule request if an employee needs it “due to a major life event,” which includes an “employee’s responsibilities as a caregiver,” unless the employer has a “bona fide business reason for denial.”\footnote{173} The law defines caregiver broadly to encompass the “[o]ngoing care or education, including responsibility for securing the ongoing care or education of a child.”\footnote{174} With regard to family care, the law covers the ongoing care or responsibility for securing care of the employee’s parent or any other individual who has “a serious health condition” and has a “family relationship with the employee.”\footnote{175} A family relationship includes those related by “affinity, whose close association with the employee is the equivalent of a family relationship.”\footnote{176}

Guidance issued by the Seattle Office of Labor Standards notes explicitly that “major life event” applies when an employee is aligning their work schedule with their child’s day care or school, attending a parent/teacher conference, or taking a relative with a serious health condition to the doctor.\footnote{177} As under the New York City law, when an employee’s request is not due to a major life event, the employer must

\footnotesize{\begin{itemize}
\item \footnote{169. SEATTLE OFF. LAB. STANDARDS, SECURE SCHEDULING ORDINANCE: QUESTIONS AND ANSWERS 17 (2023), https://www.seattle.gov/documents/Departments/Labor-Standards/SS%20QA_FINAL_02272023%20comprehensive.pdf [https://perma.cc/9N5Q-32WD] (“Does an employee have a right to request to work a certain number of hours or days? No. . . . The employee does not have a protected right to request a specific number of hours (e.g., ‘I would like to work 35 hours per week’) or specific number of days a week (e.g., ‘I would like to reduce my schedule from 4 days to 3 days’ or ‘I would like to work an additional day a week.’”).}
\item \footnote{170. SEATTLE, WASH., MUN. CODE § 14.22.020(A). If the employer is a “full service restaurant,” it must also have forty or more locations worldwide. \textit{Id}.}
\item \footnote{171. \textit{Id}. § 14.22.015 (limiting coverage to employees who “[w]ork at a fixed point of sale location . . . in a physical location that is within the geographic boundaries of the City at least 50 percent of the time”).}
\item \footnote{172. SEATTLE OFF. LAB. STANDARDS, \textit{supra} note 169, at 12.}
\item \footnote{173. SEATTLE, WASH., MUN. CODE § 14.22.010, .030(B) (2). In addition to caregiving responsibilities, a major life event is one “related to the employee’s access to the workplace due to” their transportation, housing, serious health condition, enrollment in a career-related training program, or other job(s). \textit{Id}. § 14.22.010.}
\item \footnote{174. \textit{Id}.}
\item \footnote{175. \textit{Id}.}
\item \footnote{176. \textit{Id}.}
\item \footnote{177. SEATTLE OFF. LAB. STANDARDS, \textit{supra} note 169, at 13–14.}
\end{itemize}}
engage in an interactive process but may deny the request for “any reason that is not unlawful.”178

Employers must grant a requested schedule change due to a major life event absent a bona fide business reason for denial.179 A bona fide business reason means a “significant and identifiable” cost burden or negative effect on the employer’s ability to meet organizational demands.180 The law’s enforcement provisions specify that an employer who fails to provide a written response for its denial of a schedule request due to a major life event may be subject to a fine but does not address whether an employer’s bona fide business reason itself is subject to review by the enforcing agency.181

While the Seattle law provides workers with caregiving responsibilities an affirmative right to a requested schedule change, I categorize the law as “Better” rather than “Best” due to its employee coverage limitations and the limited scope of its FWA entitlements. Namely, the law applies only to shift workers in the food and retail industries. To be sure, access to flexible and predictable scheduling is critical for workers in these industries who tend to be low-wage and subject to erratic and unfair scheduling practices.182 At the same time, these are by no means the only industries that employ low-wage workers.183 Limiting FWA entitlements to these industries leaves out many workers in other sectors that tend to employ large numbers of low-wage workers, including the hospitality, healthcare, entertainment, administrative services, and janitorial industries. Further, it excludes most middle- and high-income earners who have caregiving needs from the law’s protection.184

C. Best: Broad Right to Flexibility

“Best” laws and bills provide a comprehensive, substantive right to FWAs to a broad array of workers without limiting the duration, frequency, or scope of permissible FWAs. One jurisdiction, San Francisco, has passed a “Best” law granting covered workers a comprehensive right

179. Id. § 14.22.030(B)(2).
180. Id. § 14.22.010.
181. Id. § 14.22.075. The rules and guidance issued by the Seattle Office of Labor Standards similarly do not directly address this question.
182. The Seattle law notes that its purpose is “to establish predictable work schedules that advance race and social equity, promote greater economic security,” and “create opportunity for employee input into scheduling practices.” Id. § 14.22.012.
184. Additionally, as the law only covers shift workers who work on-site at fixed locations, the law does not cover requests for remote work.
to FWAs.\textsuperscript{185} Both the U.S. Congress and New York City have introduced bills that would grant a comprehensive right to FWAs, but neither have been enacted into law.\textsuperscript{186}

1. \textit{San Francisco Family Friendly Workplace Ordinance}

a. The Original Ordinance

In October 2013, San Francisco enacted a RTR law known as the Family Friendly Workplace Ordinance (FFWO), which went into effect on January 1, 2014.\textsuperscript{187} The law granted covered employees the right to request a:

Flexible or Predictable Working Arrangement to assist with caregiving responsibilities for 1) a Child . . . for whom the Employee has assumed parental responsibility, 2) a person . . . with a Serious Health Condition in a Family Relationship with the Employee, or 3) a parent age 65 or older.\textsuperscript{188}

The request could relate to the hours, times, or location of the employee’s work, assignments, or schedule predictability.\textsuperscript{189} The law applied to employees who worked for an employer with at least twenty employees and who had been employed by their employer for at least six months.\textsuperscript{190}

Employers who received requests were required under the ordinance to meet with the employee and respond within twenty-one days.\textsuperscript{191}

\textsuperscript{185} S.F., Cal., Lab. & Emp. Code art. 32 (2023). San Francisco’s Family Friendly Workplace Ordinance originally appeared in Chapter 12Z of the Administrative Code, and now appears in Article 32 of the Labor and Employment Code. In November 2023, Chapter 12Z of the San Francisco Administrative Code was redesignated as the Labor and Employment Code. See S.F., Cal., Ordinance 221-23 (Dec. 12, 2023) (redesignating Administrative Code Chapter 12Z as Labor & Employment Code Article 32).


\textsuperscript{188} Id. § 12Z.4(a) (current version at S.F., Cal., Lab. & Emp. Code art. 32, § 32.4(a)).

\textsuperscript{189} Id. (current version at S.F., Cal., Lab. & Emp. Code art. 32, § 32.4(a)).

\textsuperscript{190} Id. § 12Z.3–4(a) (current version at S.F., Cal., Lab. & Emp. Code art. 32, § 32.3–4(a)).

\textsuperscript{191} Id. § 12Z.5(b) (current version at S.F., Cal., Lab. & Emp. Code art. 32, § 32.5(b)).
Employers who denied a request had to explain the denial in writing and provide a “bona fide business reason for the denial,” which could include the cost of the requested change, the effect of the change on the ability to meet customer demands, or the inability to organize work among other employees.\(^{192}\)

Covered employees could make such a request twice per year absent a major life event, which entitled them to additional requests without fear of retaliation.\(^{193}\) Although the ordinance required employers to provide a bona fide business reason if they denied a worker’s flexibility request, it limited enforcement to the law’s procedural requirements only and expressly prohibited agency review of the reason itself.\(^{194}\)

The ordinance presented several findings that emphasized shifts in national workplace demographics, such as increases in single-parent households and women in the workforce and decreases in households with a stay-at-home parent.\(^{195}\) The findings noted that work culture nonetheless continued to idealize the employee who was willing to work long hours and had no commitments competing with their job, a view that was historically available only because of a “gendered division of labor” in which “women performed full-time childcare and domestic duties.”\(^{196}\)

The findings indicated flexible scheduling was needed because the costs of outsourcing care “may constitute an unsustainable proportion of family income” and there may be no other family members who can step in to do the care work.\(^{197}\) The findings further noted that low-wage workers, women, workers of color, and workers without a college degree were less likely to have access to FWAs.\(^{198}\)

\(^{192}\) Id. § 12Z.5(c), .6(c). This language was removed from the current version of the law in Article 32 of the San Francisco Labor and Employment Code. See S.F., Cal., Lab. & Emp. Code art. 32, § 32.5.

\(^{193}\) S.F., Cal., Admin. Code § 12Z.4(c), .7. This provision does not appear in the current version of the law in Article 32 of the San Francisco Labor and Employment Code. See S.F., Cal., Lab. & Emp. Code art. 32, § 32.4.

\(^{194}\) S.F., Cal., Admin. Code § 12Z.10(a)(1) (”The Agency’s finding of a violation may not be based on the validity of the Employer’s bona fide business reason . . . . Instead, the Agency’s review shall be limited to an Employer’s adherence to procedural, posting and documentation requirements . . . .”). This language was removed from the current version of the law. See S.F., Cal., Lab. & Emp. Code art. 32, § 32.10; see also Off. Labs. Standards Enf’t, Family Friendly Workplace Ordinance 10 (2021), https://sfgov.legistar.com/View.ashx?M=F&ID=9607736&GUID=01BF0A3B-E801-4597-96FD-45CD50B4CBA [perma link unavailable] (noting that the Office of Labor Standards Enforcement “does not have the authority to review the validity of an employer’s reason for denying the request”).

\(^{195}\) S.F., Cal., Admin. Code § 12Z.2(1)–(4) (current version at S.F., Cal., Lab. & Emp. Code art. 32, § 32.2(a)–(d)).

\(^{196}\) Id. § 12Z.2(8) (current version at S.F., Cal., Lab. & Emp. Code art. 32, § 32.2(f)).

\(^{197}\) Id. § 12Z.2(9) (current version at S.F., Cal., Lab. & Emp. Code art. 32, § 32.2(g)).

\(^{198}\) Id. § 12Z.2(11) (current version at S.F., Cal., Lab. & Emp. Code art. 32, § 32.2(i)).
In July 2021, the Youth, Young Adult, and Families Committee of the Board of Supervisors held a hearing on the FFWO to consider ways to strengthen the law in light of the impact of the COVID-19 pandemic on workplace norms and caregivers’ needs. Public comments and testimony submitted subsequently emphasized that the pandemic heightened the need for updated protections.

The Office of Labor Standards Enforcement (OLSE), the San Francisco agency that enforces the FFWO, reported at the 2021 hearing that it received nearly 300 complaints in the seven years since the law was enacted, but performed only four investigations during that time because the ordinance authorized them to investigate only whether an employer had followed proper procedures and not whether the employer’s reason for its denial was legitimate.

b. The Amended Ordinance

On March 8, 2022, the San Francisco Board of Supervisors amended the Family Friendly Workplace Ordinance, which was signed into law by Mayor London Breed on March 14, 2022 and took effect on July 12, 2022. This law expands the rights granted in the original Family Friendly Workplace Ordinance in several ways. Most significantly, where the original FFWO had created the right to request a FWA, the amended FFWO grants the right to a FWA itself absent undue hardship. To do this, the Board of Supervisors literally deleted the word “request” in the

200. See Letter on Family Friendly Workplace Ordinance from Julia Parish, Senior Staff Att’y, Legal Aid at Work to S.F. Bd. of Supervisors (Feb. 10, 2022, 1:16 PM) (on file with the author) (testimony submitted in support of San Francisco’s amended FFWO, asserting that the pandemic “intensified the need for accommodations for parents and caregivers”); Letter on Family Friendly Workplace Ordinance from Am. Ass’n of Univ. Women et al. to S.F. Bd. of Supervisors (Feb. 9, 2022) (on file with the author) (testimony submitted in support of San Francisco’s amended FFWO, signed by thirty-one organizations, stating “[t]he COVID-19 pandemic has underscored the importance of the Ordinance and we must act now to protect the wellbeing of working families”).

201. Youth, Young Adult & Fams. Comm., supra note 2, at 19:00; Off. Lab. Standards Enf’t, supra note 194, at 11–12 (noting that OLSE received 295 inquiries between 2014 and 2020, many involving matters the agency could not investigate because it “does not have the authority to review those cases when the employer complied with the specified process”).

202. S.F., Cal., Ordinance 39-22 (Mar. 1, 2022) (amending S.F., Cal., ADMIN. CODE § 12Z) (current version at S.F., Cal., LAB. & EMP. CODE art. 32, § 32.2(p)).

203. S.F., Cal., ADMIN. CODE § 12Z.4 (2022) (current version at S.F., Cal., LAB. & EMP. CODE art. 32, § 32.4).
2013 law so that the right was transformed from one of seeking permission for flexibility to the right to flexibility itself.\textsuperscript{204}

The amended law also changes the procedural requirements for employers receiving such requests. Under the amended law, an employer who denies a requested arrangement must "engage in an interactive process" to try "in good faith," to find an alternative arrangement that is "acceptable to both the Employee and Employer."\textsuperscript{205} The amended law removes all language regarding a "bona fide business reason" for denial and instead requires employers to grant an employee’s request unless it "would cause the Employer undue hardship" through "significant expense or operational difficulty when considered in relation to the size, financial resources, nature, or structure of the Employer’s business."\textsuperscript{206} The amended law preserves the same factors for considering whether an employer has a bona fide business reason but replaces the phrase with "undue hardship."\textsuperscript{207} Advocates supporting the amendments noted that the "undue hardship" standard adopted by the new ordinance was already in effect in San Francisco for lactation accommodations.\textsuperscript{208}

The amended FFWO updates the meaning of "Flexible or Predictable Working Arrangement" to include examples of possible requests related to work hours, such as "part-time work, part-year employment, or job sharing arrangements"; requests related to work schedules, such as "modified hours, variable hours, predictable hours, or other schedule changes or flexibilities"; and requests related to work location, such as telework, for which a definition was added into the law.\textsuperscript{209} The new law also extends coverage to workers who telework outside of San Francisco but whose employer maintains an office or worksite within San Francisco where the employee may work or was permitted to work before the pandemic.\textsuperscript{210} The law further expands the flexibility right by removing the twice per year frequency limitation.\textsuperscript{211} The law also broadens the
definition of caregiver to include those caring for more relatives over age sixty-five, not just a parent.\textsuperscript{212}

The amended FFWO also strengthens the law’s enforcement mechanism by removing the language restricting agency enforcement to procedural requirements only.\textsuperscript{213} The law increases penalties for violations, permitting the agency to fine an offending employer up to the “cost of care the Employee . . . incurred.”\textsuperscript{214}

The new law amends the findings of the ordinance in several ways that explicitly reference the COVID-19 pandemic as an impetus for the amendments. The findings assert that the pandemic placed more strain on family caregivers, with “the impacts felt most dramatically among economically and socially vulnerable populations.”\textsuperscript{215} The findings note that the pandemic “forced many businesses and government entities to adopt full-time work from home and other workplace flexibilities for their employees,” and that “many employers found that employees were more productive and effective working from home.”\textsuperscript{216} The findings further note that while some companies have pledged to continue telework policies instituted during the pandemic, such flexibility will be concentrated among workers whose jobs can be done remotely.\textsuperscript{217} “For employees working in positions where remote work is simply not possible,” the findings warn, “the ability to request flexibility or predictability may be especially critical.”\textsuperscript{218}

San Francisco is the first jurisdiction in the United States to amend a RTR law to grant the right to a flexible arrangement itself. It is also the first jurisdiction to affirmatively require FWAs for caregivers. The significance of the amended ordinance was reflected in media coverage

\textsuperscript{212} Id. § 12Z.3 (current version at S.F., Cal., Lab. & Emp. Code art. 32, § 32.3).

\textsuperscript{213} Id. § 12Z.10 (current version at S.F., Cal., Lab. & Emp. Code art. 32, § 32.10(a)(1)) (removing enforcement restriction); see Cathy Feldman & Elizabeth M. Levy, \textit{Oh Mylanta! San Francisco Amends Its Family Friendly Workplace Ordinance}, Cal. Peculiarities Emp. L. Blog (June 22, 2022), https://www.calpeculiarities.com/2022/06/22/oh-mylanta-san-francisco-amends-its-family-friendly-workplace-ordinance/ [https://perma.cc/27RZ-VXBY] (“Under the original FFWO, the OLSE could only review and issue a finding as to whether the employer had complied with the procedural, posting, and documentation requirements . . . . The amendments broaden the scope of the OLSE’s review to include the validity of an employer’s claimed undue hardship.”).

\textsuperscript{214} S.F., Cal., Admin. Code § 12Z.10(a) (2) (current version at S.F., Cal., Lab. & Emp. Code art. 32, § 32.10(a) (2)).

\textsuperscript{215} Id. § 12Z.2(a) (current version at S.F., Cal., Lab. & Emp. Code art. 32, § 32.2(a)).

\textsuperscript{216} Id. § 12Z.2(o) (current version at S.F., Cal., Lab. & Emp. Code art. 32, § 32.2(o)).

\textsuperscript{217} Id. (current version at S.F., Cal., Lab. & Emp. Code art. 32, § 32.2(o)).

\textsuperscript{218} Id. (current version at S.F., Cal., Lab. & Emp. Code art. 32, § 32.2(o)); see also Sarah Woolston, \textit{San Francisco Updates Family Friendly Workplace Ordinance (FFWO)}, Cal. Chamber Com.: HR Watchdog (June 16, 2022), https://hrwatchdog.calchamber.com/2022/06/san-francisco-updates-family-friendly-workplace-ordinance-ffwo/ [https://perma.cc/5ZM8-HKEQ] (reporting that “[t]he amendments were largely implemented in response to the COVID-19 pandemic”).
of the change, which referred to the new law as “significantly expanded” and creating “significant changes” to the existing law.\textsuperscript{219}

2. \textit{Bills Proposing Broad Flexibility: The New York City Caregiver Accommodation Bill and the Federal Schedules That Work Act}

Two bills—one introduced in the New York City Council (N.Y.C. Council) and one introduced in the U.S. Congress—have sought to grant covered workers broad workplace flexibility rights.

New York City passed a law barring employment discrimination against caregivers on December 16, 2015, which went into effect on May 4, 2016.\textsuperscript{220} The law did not include a requirement to provide scheduling or other accommodations to caregivers. However, several prior versions of the bill did require such accommodations.

The New York City Human Rights Law (HRL) prohibits employment discrimination against employees based on a variety of characteristics and requires employers to provide reasonable accommodations to four categories of workers: (1) those who are pregnant or recovering from childbirth; (2) those with a disability; (3) those who need religious accommodation; and (4) those who need accommodation related to their status as a victim of domestic violence, stalking, or human trafficking.\textsuperscript{221} A reasonable accommodation under the HRL is one that does not cause an “undue hardship” for the employer and, in the context of disability, one that would enable the employee “to satisfy the essential requisites of a job or enjoy the right or rights in question.”\textsuperscript{222} The HRL sets out factors that may be taken into consideration when evaluating whether an accommodation causes “undue hardship,” including the accommodation’s cost, the overall resources of the employer, and the size of the employer’s business.\textsuperscript{223}


\textsuperscript{220} This law added “caregiver status” to the list of employee characteristics employers are barred from considering in hiring, discharge, or in the terms, conditions, or privileges of employment. N.Y.C., N.Y., Local Law No. 108-A § 3 (Jan. 5, 2016) (codified at N.Y.C., N.Y., Admin. Code § 8-107(1)(a) (2024)).

\textsuperscript{221} N.Y.C., N.Y., Admin. Code § 8-107(1)(a) (listing all protected classes); id. § 8-102 (defining “reasonable accommodation” for pregnant workers and domestic violence victims); id. § 8-107(22) (pregnancy); id. § 8-107(15) (workers with disabilities); id. § 8-107(3) (religious observance); “id. § 8-107(27)(b) (victims of domestic violence, stalking, or human trafficking).

\textsuperscript{222} Id. § 8-102 (laying out factors for determining undue hardship); id. § 8-107(15) (a) (requiring reasonable accommodation for disability); id. § 8-107(3) (b) (laying out undue hardship factors for religious accommodation).

\textsuperscript{223} Id. §§ 8-102, -107(3).
Prior to the caregiver discrimination law’s passage, several versions of the bill were introduced in the N.Y.C. Council between April 2007 and December 2015, with most versions including an explicit requirement that employers accommodate caregivers absent undue hardship. The first version of the bill mandating accommodations was introduced in December 2007 and required covered employers to provide reasonable accommodations that would “enable a caregiver to satisfy the essential requisites of a job or enjoy the right or rights in question.” However, subsequent versions of the bill narrowed the reasonable accommodation requirement, and the final version of the bill removed it completely.

The December 2007 bill, as well as a later version of the bill introduced in 2012, granted accommodation rights to those caring for a child or someone with a disability “with whom the caregiver lives in a familial relationship.” However, a subsequent version of the bill introduced in September 2015 narrowed the scope of protections to childcare or eldercare emergencies—occasions when a care arrangement was unavailable with fewer than twenty-four hours’ notice. That version of the bill foreshadowed the New York City Temporary Schedule Change Law, enacted three years later, in protecting caregivers’ right to flexibility in


226. N.Y.C., N.Y., Local Law No. 108-A (Jan. 5, 2016) (codified at N.Y.C., N.Y., ADMIN. CODE § 8-107(1)(a)).


228. N.Y.C., N.Y., Proposed Intro. No. 108-A § 4(a), 2015 Leg., Reg. Sess. (Sept. 2015) (providing that the reasonable accommodation requirement applied only “where the caregiver is: (1) caring for an individual with a disability; (2) caring for a child or children in facilitating involvement in education; or (3) providing care in the event of a childcare or eldercare emergency”); id. § 2(c) (defining “childcare emergency” as “an occasion when a caregiver’s childcare arrangement is unavailable with fewer than 24 hours notice, due to, but not limited to, illness of the childcare provider, closing of the childcare facility, weather emergency or transportation failure”).
limited emergency situations.\textsuperscript{229} The final version of the bill, introduced in December 2015 and signed into law the following month, removed the accommodation requirement entirely and included only the antidiscrimination provision.\textsuperscript{230}

A bill requiring employers to grant FWAs to caregivers has also been introduced in Congress. In July of 2014, Senators Tom Harkin, Elizabeth Warren, and Sherrod Brown, along with Representative George Miller, introduced the Schedules That Work Act.\textsuperscript{231} The most recent version of the bill, introduced in 2023, would grant covered employees the right to request a change related to the hours, schedule, or location the employee is required to work.\textsuperscript{232} In addition, if an employee requests a change under the Schedules That Work Act and specifies that the request is “because of . . . the employee’s responsibilities as a caregiver” or due to several other reasons, the employer would be required to grant the request unless it had a “bona fide business reason” for denial.\textsuperscript{233} The bill defines “caregiver” similarly to the Seattle Secure Scheduling Ordinance, covering care for chosen family as well as individuals related by blood and marriage.\textsuperscript{234}

Unlike the federal Working Families Flexibility Act, the Schedules That Work Act would not limit protection to one request per year; the bill contains no limitations on the frequency of requests.\textsuperscript{235} The bill would apply to all workers covered under the FLSA whose employer has at least fifteen employees.\textsuperscript{236}

Congresswoman Rosa DeLauro and Senator Warren reintroduced the bill in every Congress since 2015 and most recently in September

\textsuperscript{229} N.Y.C., N.Y., Admin. Code § 20-1262 (originally enacted as N.Y.C., N.Y., Local Law No. 1399-A (Jan. 19, 2018)); see infra Section II.B.1. The caregiver accommodation bill, however, did not have time or frequency limitations, as did the Temporary Schedule Change Law. N.Y.C., N.Y., Admin. Code § 20-1262(a)(1).

\textsuperscript{230} N.Y.C., N.Y., Local Law No. 108-A (Jan. 5, 2016) (codified at N.Y.C., N.Y., Admin. Code § 8-107(1)(a)).


\textsuperscript{232} Schedules That Work Act, H.R. 5563, 118th Cong. § 3(a) (2023); Schedules That Work Act, S. 2851, 118th Cong § 3(a) (2023). The assertions made about these bills are the same pertaining to both the House and Senate versions of them.

\textsuperscript{233} H.R. 5563 § 3(c). In addition to caregiving responsibilities, if an employee makes a request because of their own serious health condition, enrollment in a career-related training program, or due to a second job, the employer must grant the request absent a bona fide business reason. Id.

\textsuperscript{234} Id. § 2(3), (12)(B) (defining “family relationship” to include “any individual related to the employee involved by blood or affinity, whose close association with the employee is the equivalent of a family relationship”); Seattle, Wash., Mun. Code § 14.22.010 (2024) (defining family relationship); see supra Section II.B.2 for a discussion of Seattle’s law.

\textsuperscript{235} See H.R. 5563 (containing no reference to frequency or time limitations of protected requests); cf. Working Families Flexibility Act, H.R. 4106, 112th Cong. § 4(c) (2012) (limiting protections to one application per year).

\textsuperscript{236} H.R. 5563 § 2(6)(A)(i), (10)(A).
The House bill was referred to the Committee on Education and the Workforce and the Committees on House Administration, Oversight and Accountability, and the Judiciary. The Senate bill did not progress to committee.

III. Application, Recommendations, and Critiques

This Part analyzes how Elena, Arthur, and Tammy’s requests would fare under the “Good,” “Better,” and “Best” laws discussed in Part II. This Part utilizes the outcome of this analysis to make concrete recommendations for how future FWA laws can best protect working caregivers. Finally, this Part offers responses to several anticipated critiques of FWA laws.

A. Application

1. Elena

Elena requested to shift her work schedule an hour earlier to align with her child’s day care hours. Elena would not be entitled to her requested FWA under a Good law, she may be entitled to her request under a Better law, and she would be entitled to her request under a Best law.

a. Good

Elena would not be entitled to her requested FWA under a Good RTR law. A Good RTR law would ensure that Elena was not fired or retaliated against for asking for a shift in her hours. However, because RTR laws do not require a particular outcome or response, Elena’s employer would be entitled to deny her request.

b. Better

Elena may be entitled to her requested FWA under a Better law. She would not be entitled to the FWA under the New York City Temporary


239. For the details of Elena’s circumstances, see supra text accompanying notes 2–3.

240. While a Good law may require Elena’s employer to provide a written response to her request explaining its denial, that denial would not be reviewable by an enforcement agency. See, e.g., BERKELEY, CAL., MUN. CODE § 13.101.090(C) (2024) (limiting agency review to an “[e]mployer’s adherence to procedural, posting and documentation requirements”).
Schedule Change Law, but she would be entitled to the change under the Seattle Secure Scheduling Ordinance depending on the size of her employer.

Under the New York City Temporary Schedule Change Law, Elena would be a covered employee but would not be entitled to the ongoing scheduling shift she requested. While caring for her child would qualify as a "personal event" under the law, she would be entitled only to a temporary schedule change for one day, twice per year. She could therefore obtain a one-day flexibility request to coordinate or fill in for canceled childcare for her daughter, but she would not be entitled to an ongoing schedule shift.

Under the Seattle Secure Scheduling Ordinance, Elena would likely be entitled to her requested schedule shift, as long as she requested it fourteen days in advance and prior to the posted shift schedule. Elena’s responsibilities as a caregiver constitute a "major life event" under the Seattle law and attempting to align her work schedule with her child’s care provider falls within this definition. Elena’s request would be for a "particular schedule" because it pertains to start and end times, rather than a specific number of hours or days per week. Elena would be covered under this law as long as the fast-food restaurant she works for belongs to a large company with at least forty locations and 500 employees worldwide. If she works for a small, local fast-food restaurant, she would not be covered.

c. Best

Elena would be entitled to her requested FWA under a Best law. Under the amended San Francisco FFWO, Elena would be entitled to her requested scheduling shift absent undue hardship to her employer. Her childcare needs would constitute "caregiving responsibilities" which would entitle her to a "Flexible or Predictable Working Arrangement," including requests for "modified hours, variable hours, predictable

241. Elena would be covered by the N.Y.C. law because she does not work for the government and has been working for her employer for over four months. N.Y.C., N.Y., ADMIN. CODE §§ 20-1201, -1263(a)(2) (2024).

242. Id. §§ 20-1261(a), -1262(a)(1) (defining "personal event" and establishing the right to a schedule change twice per year for up to one business day per request).

243. SEATTLE, WASH., MUN. CODE § 14.22.030 (2024) (entitling workers to make scheduling and location requests); id. § 14.22.040(A) (requiring employers to provide workers with a written work schedule fourteen calendar days prior to a worker’s first day on the schedule); SEATTLE OFF. LAB. STANDARDS, supra note 169, at 12 (“Employees can make schedule requests for the times (e.g., hours of the day, length of work shifts, etc.) and location of work prior to the employer’s provision of a 14-day advance notice of schedule.”).

244. SEATTLE, WASH., MUN. CODE § 14.22.010; SEATTLE OFF. LAB. STANDARDS, supra note 169, at 13–14.

245. SEATTLE OFF. LAB. STANDARDS, supra note 169, at 17.

hours, or other schedule changes or flexibilities.”247 Her request for a one-hour schedule shift would fall squarely within this definition. Elena would be covered under the San Francisco law because she likely works for an employer with twenty or more employees and has been employed for over six months.248

If the earliest version of the New York City caregiver accommodation bill had become law, Elena would be entitled to her requested scheduling shift absent undue hardship to her employer.249 As a parent who “is a contributor to the ongoing care of a child for whom [she] has assumed parental responsibility,” Elena would qualify as a “caregiver” under the bill and would be entitled to a “reasonable accommodation” that would enable her to satisfy the essential requisites of her job.250 She would be covered under the N.Y.C. bill because she likely works for an employer with at least four employees.251

If the federal Schedules That Work Act were enacted into law, Elena would be entitled to her requested FWA unless her employer had a “bona fide business reason” for denial.252 Elena’s childcare needs would constitute “responsibilities as a caregiver,” and would entitle her to changes involving “the times when the employee is required to work or be on call for work.”253 Elena would be covered under the Act because she likely works for an employer with fifteen or more employees and is covered under the FLSA.254

2. Arthur

Arthur requested to work half days on Thursdays to take his mother to the doctor and make up the time during another day of the week. He also requested to check his personal cell phone periodically throughout the day to monitor communications from his mother.255 Arthur would not be entitled to his requested FWAs under a Good law or a Better law. He would likely not be entitled to his requests even under a Best law

247. S.F., CAL., LAB. & EMP. CODE art. 32 § 32.4(b) (2023).
248. Id. § 32.3, 4(a).
251. N.Y.C., N.Y., ADMIN. CODE § 8-102 (2024) (excluding from its definition of "employer" those that employ fewer than four people).
252. Schedules That Work Act, H.R. 5563, 118th Cong. § 3(c) (2023).
253. Id. § 3(a), (c).
254. Id. § 2(6)(A)(i), (10).
255. For the details of Arthur’s circumstances, see supra text accompanying notes 4–5.
because he works for a small employer and has worked there only a short time.

a. Good

Arthur would not be entitled to his requested FWAs under a Good RTR law. A Good RTR law would ensure that he was not fired or retaliated against for asking for the scheduling shift. However, because RTR laws do not require a particular outcome or response, Arthur’s employer would be entitled to deny his request.256

b. Better

Arthur would not be entitled to his requested FWAs under a Better law. Under the New York City Temporary Schedule Change Law, Arthur would not be entitled to his requested scheduling shift because of the limited scope of the law and because of the time worked requirement. While caring for his mother would qualify as a “personal event” under the law, this would entitle Arthur only to a temporary schedule change for one day, twice per year.257 He would thus not be entitled to work half days every Thursday and make up the hours on other days. Arthur’s other request, for permission to check his cell phone throughout the day, would not be covered because the law covers scheduling-related requests only.258 Additionally, Arthur would not yet be covered by the N.Y.C. law because he has worked for his employer for three months, about a month shy of the 120 days required by the law.259

Arthur would not be covered under the Seattle Secure Scheduling Ordinance because he does not work for a retail or food establishment.260 If Arthur worked for a large retail or food employer, he would likely be entitled to his requested schedule change absent a bona fide business reason for denial.261 Arthur would not, however, be entitled to

256. While a Good law may require Arthur’s employer to provide a written response to his request explaining its denial, that denial would not be reviewable by an enforcement agency. See, e.g., BERKELEY, CAL., MUN. CODE § 13.101.090(C) (2024) (limiting agency review to an “[e]mployer’s adherence to procedural, posting and documentation requirements”).

257. N.Y.C., N.Y., ADMIN. CODE §§ 20-1261(a), -1262(a)(1) (2024) (defining “personal event” to include the need to provide care for a person with a disability who is (1) a family member or who resides in the caregiver’s household and (2) relies on the caregiver for medical care or to meet the needs of daily living).

258. Id. § 20-1262(a) (entitling covered workers to a “temporary change to the employee’s work schedule . . . with a temporary change meaning a limited alteration in the hours or times that or locations where an employee is expected to work”).

259. Id. § 20-1263(a)(2).


261. Id. § 14.22.030(A) (granting employees the right to request not to be scheduled for shifts at certain times or locations and to identify preferences for work hours or locations). Because the Seattle law is designed to cover shift workers, Arthur’s request to work a partial day on Thursdays and work extra hours another day of the week does not quite align with the ordinance’s language around
his request to check his phone because the law covers scheduling-related requests only.262

c. Best

Arthur would likely not be entitled to his requested FWAs under a Best law because he works for an employer too small to qualify and may not have worked for his employer long enough to be eligible.

Arthur would not be entitled to his requested FWAs under the amended San Francisco FFWO because his employer has twelve employees—not enough to qualify for coverage. If Arthur worked for a larger employer, he would likely be entitled to both of his requests after working for his employer for another three months.263 Arthur’s care for his mother constitutes “caregiving responsibilities” and his request to work a partial day on Thursdays and extra hours another day of the week falls within the FWAs contemplated by the ordinance.264 His request to check his phone would likely be covered because the law defines “flexible working arrangement” broadly and does not limit the scope to scheduling-related requests only.265

If the earliest version of the New York City caregiver accommodation bill had become law, Arthur would be entitled to his requested FWAs absent undue hardship to his employer.266 Arthur’s care for his mother would have qualified him as a caregiver under the bill, entitling him to a reasonable accommodation that would enable him to satisfy the essential requisites of his job.267 Because the bill did not limit the scope

FWAs. However, his scheduling request would likely be covered because it involves a “request not to be scheduled for work shifts during certain times.” Id. Arthur’s responsibilities as a caregiver to his mother would constitute a “major life event” under the law and taking a relative with a serious health condition to the doctor expressly falls within this definition. Id. §§ 14.22.010, .030(B)(2); SEATTLE OFF. LAB. STANDARDS, supra note 169, at 13–14.

262. SEATTLE, WASH., MUN. CODE § 14.22.030(A) (“The employee has the right to request not to be scheduled for work shifts during certain times or at certain locations and the right to identify preferences for the hours or locations of work.”).

263. The amended San Francisco FFWO applies only to employees who work for employers with twenty or more employees and who have worked for their current employer for at least six months. S.F., CAL., LAB. & EMP. CODE art. 32 § 32.3, 4(a) (2023).

264. Id. § 32.4(a)–(b).

265. Id. § 32.3 (defining “flexible working arrangement” as “a change in an Employee’s terms and conditions of employment that provides flexibility to assist an Employee with caregiving responsibilities”).


267. N.Y.C., N.Y., Proposed Intro. No. 565-A §§ 3(a), 5, 2007 Leg., Reg. Sess. (Dec. 2007) (defining caregiver as someone “who is a contributor to the ongoing care . . . of a person or persons in a dependent relationship with the caregiver and
of accommodations to scheduling-related requests, both of Arthur’s requests would likely have been protected. He would have been covered because his employer has more than four employees.\(^{268}\)

If the federal Schedules That Work Act were enacted into law, Arthur would not be entitled to his requested hours shift because his employer has twelve employees—not enough to qualify for coverage.\(^{269}\) If Arthur worked for a larger employer, he would be entitled to scheduling changes because his care for his mother qualifies as “responsibilities as a caregiver.”\(^{270}\) His request to work a partial day on Thursdays and work extra hours another day would be covered because it relates to the number of hours and times he is required to work.\(^{271}\) However, his request to check his phone periodically would not be covered as the bill limits protection to scheduling-related requests only.\(^{272}\)

3. Tammy

Tammy requested to work remotely six days per month to cut down on the transportation time of driving her disabled brother to his physical therapy appointments.\(^{273}\) Tammy would not be entitled to her requested FWA under a Good law or a Better law. She would likely be entitled to her request under a Best law depending on how explicitly the law covers remote working arrangements.

a. Good

Tammy would not be entitled to her requested FWA under a Good RTR law. A Good RTR law would ensure that she was not fired or retaliated against for asking to work remotely several times per month. However, because RTR laws do not require a particular outcome or response, Tammy’s employer would be entitled to deny her request.\(^{274}\)

b. Better

Tammy would not be entitled to her requested FWA under a Better law. Under the New York City Temporary Schedule Change Law, Tammy

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\(^{268}\) N.Y.C., N.Y., ADMIN. CODE § 8-102 (2024) (excluding from its definition of “employer” those that employ fewer than four people).

\(^{269}\) The bill applies to employees who work for employers with fifteen or more employees. Schedules That Work Act, H.R. 5563, 118th Cong. § 2(6)(A)(i) (2023).

\(^{270}\) Id. §§ 2(3), 3(c).

\(^{271}\) Id. § 3(a).

\(^{272}\) Id. (limiting the bill’s protection to requests concerning the hours, times, and the location that the employee is required to work, the amount of notification the employee receives of work schedule assignments, and fluctuations in the number of hours the employee is scheduled to work).

\(^{273}\) For the details of Tammy’s circumstances, see supra text accompanying notes 6–7.

\(^{274}\) While a Good law may require Tammy’s employer to provide a written response to her request explaining its denial, the explanation would not
is likely a covered employee but would not be entitled to her remote work request because it exceeds the law’s limited scope.\textsuperscript{275} While caring for her brother would qualify as a “personal event” under the law, this would entitle her only to a temporary schedule change for one day, twice per year.\textsuperscript{276} Tammy would thus not be entitled to her request to work remotely six days per month. She would at most be entitled to work remotely two days per year. However, her employer is not required to grant her scheduling change in the manner requested and could instead offer Tammy unpaid leave for the time she is taking her brother to his appointment.\textsuperscript{277}

Tammy would not be covered under the Seattle Secure Scheduling Ordinance because she does not work for a retail or food establishment and because her request for remote work does not fall within the articulated FWAs outlined in the ordinance.\textsuperscript{278} While the ordinance covers requests “not to be scheduled for work shifts during certain times or at certain locations,” it limits coverage to workers who work at discrete on-site locations and thus does not contemplate or address requests for remote work.\textsuperscript{279}

c. Best

Tammy would likely be entitled to her requested FWA under a Best law depending on whether the law covers remote work requests. Under the amended San Francisco FFWO, Tammy would be entitled to the requested FWA absent undue hardship to her employer. Tammy’s care for her brother constitutes “caregiving responsibilities” entitling her to be reviewable by an enforcement agency. See, e.g., \textbf{Berkeley, Cal., Mun. Code § 13.101.090(C)} (2024) (limiting agency review to an “[e]mployer’s adherence to procedural, posting and documentation requirements”).

275. Tammy would be covered by the N.Y.C. law as long as she has worked for her employer for at least four months, as she does not work for the government. \textbf{N.Y.C., N.Y., ADMIN. CODE §§ 20-1201, -1263(a)(2)} (2024).

276. \textit{Id.} §§ 20-1261(a), -1262(a)(1) (establishing right to schedule change and defining “personal event” to include the need to provide care for a family member with a disability who relies on the caregiver for medical care or for the needs of daily living).


278. \textbf{Seattle, Wash., Mun. Code § 14.22.020(A)} (2024) (limiting coverage of the law to employees who work for a retail or food establishment with 500 or more employees worldwide). The law is designed to cover shift workers and does not contemplate remote work. \textit{Id.} § 14.22.030(A) (granting employees the right to identify limitations or changes to their work schedule availability and to request not to be scheduled for shifts at certain times or locations); \textit{id.} § 14.22.010 (defining “Work schedule” as “the hours, days and times, including regular and on-call shifts, when the employee is required by the employer to perform duties of employment for which the employee will receive compensation for a given period of time”).

279. \textit{Id.} § 14.22.030(A) (emphasis added) (entitling covered workers to request “not to be scheduled for work shifts during certain times or at certain locations and the right to identify preferences for the hours or locations of work”); \textit{id.} § 14.22.015(B) (limiting coverage to employees who work at a “fixed, point of sale location of a covered employer”).
a “flexible working arrangement.” Tammy’s request to work remotely falls within the flexible arrangements contemplated by the ordinance, which explicitly include “telework.” Tammy would be covered by the San Francisco law as long as she has worked for her employer for at least six months. Because she works for a large, private company, her employer likely has more than twenty employees.

If the earliest version of the New York City caregiver accommodation bill had become law, Tammy would be entitled to her requested scheduling shift absent undue hardship to her employer. Her care for her brother qualifies her as a caregiver, entitling her to a reasonable accommodation that would enable her to satisfy the essential requisites of her job. Tammy would be covered because she works for a large company with at least four employees.

If the federal Schedules That Work Act were enacted into law, Tammy may be entitled to the requested FWA. Tammy would be covered because she works for a large company with at least fifteen employees. Tammy’s care for her brother qualifies as “responsibilities as a caregiver,” entitling her to scheduling changes covered by the bill. However, her request to work remotely may not fall within the FWAs contemplated by the bill. The bill provides that requests may relate to “the location where the employee is required to work,” but nowhere does it mention remote work, telework, or virtual work. Thus, the location referenced may refer to physical on-site locations only.

280. S.F., CAL., LAB. & EMP. CODE art. 32 § 32.4(a) (2023) (granting covered employees the right to a flexible or predictable working arrangement to assist with caregiving responsibilities for a family member aged sixty-five or older or who has a serious health condition).
281. Id. § 32.3, 4(b) (defining “telework”).
282. Id. § 32.4(a).
283. Id. § 32.3.
285. N.Y.C., N.Y., Proposed Intro. No. 565-A § 3(a), (b) 2007 Leg., Reg. Sess. (Dec. 2007) (defining caregiver as someone “who is a contributor to the ongoing care . . . of a person or persons in a dependent relationship with the caregiver and who suffer[s] from a disability” and defining “dependent relationship” to include those related by blood to the caregiver); id. § 5 (entitling caregivers to reasonable accommodation).
286. N.Y.C., N.Y., ADMIN. CODE § 8-102 (2024) (excluding from its definition of “employer” those that employ fewer than four people).
288. Id. §§ 2(3), 3(c).
289. Id. § 3(a) (3).
B. Recommendations for Future FWA Laws

This Section provides five recommendations for jurisdictions seeking to pass FWA legislation. Taking into account the results of Section III.A above, this section recommends that future FWA laws: (1) provide a substantive right to FWAs absent undue hardship; (2) cover a diverse array of workers; (3) define FWA broadly to include non-scheduling requests and remote work; (4) provide an inclusive definition of family; and (5) minimize employee threshold and time worked requirements.

1. Provide a Substantive Right to the FWA Absent Undue Hardship

Future laws aiming to support working caregivers who need FWAs should follow the Best law model presented in Section II.C and provide a substantive right to the requested FWA absent undue hardship to the employer. Good FWA laws that protect only the right to request will not engender meaningful change in helping caregivers balance work and care. Indeed, none of the three individuals from Section III.A were entitled to their request under a Good RTR law because such laws do not require any particular response from employers. Better laws that provide only a limited right to the FWA in emergency situations, such as the New York City Temporary Schedule Change Law, are also insufficient. None of the individuals in Section III.A were entitled to their FWA under the N.Y.C. law because such a law does not cover ongoing flexibility requests.

Following the Best law model for future FWA laws would not obligate employers to grant every FWA request they receive. The undue hardship standard provides a balancing test that takes account of the cost and difficulty of implementing a FWA, as well as an employer’s resources and capacity.

2. Include All Workers, Regardless of Industry

FWA laws should cover workers regardless of industry. FWA laws that cover only certain industries, such as the Seattle Secure Scheduling Ordinance, leave out workers like Arthur and Tammy and do not entitle them to a particularized analysis of whether their requested FWA would impose an undue hardship to their employer.

3. Define FWA Broadly to Include Non-Scheduling Requests and Remote Work

FWA laws should have inclusive language that permits arrangements other than scheduling. The San Francisco amended FFWO offers a good example of a FWA law that provides an expansive definition of FWAs: the law defines “flexible working arrangement” broadly as “a change in

290. See supra Section III.A.
291. Id.; N.Y.C., N.Y., ADMIN. CODE § 20-1262(a) (1).
an Employee’s terms and conditions of employment that provides flexibility to assist an Employee with caregiving responsibilities.”293 Because this language does not cabin FWAs to scheduling-related requests only, a request like Arthur’s—to check his cell phone periodically to monitor communications about his mother’s condition—would likely be covered. This broad language permits employees to request the FWA that best aligns with their particular needs and circumstances. The undue hardship standard ensures that an employer’s capacity and resources are taken into account when evaluating requests.

FWA laws should also cover remote work arrangements and have explicit language addressing remote work. The San Francisco amended FFWO offers a great example: the law includes telework in its examples of FWAs and defines the term “telework” in its definition section.294 In contrast, the federal Schedules That Work Act does not address whether remote work is covered, so Tammy’s request to work remotely may not be covered under that bill.295 Including remote work in FWA laws ensures that workers seeking such arrangements are entitled to be heard. The undue hardship standard ensures that employers’ capacity and resources are taken into account when evaluating requests for remote work, including the threshold question of whether a worker’s job can be done remotely at all.

4. Define Family Broadly

FWA laws should define family broadly to include nonmarital partners, extended family, and other individuals who have close association with the employee. Defining family broadly is necessary to encompass the diversity and breadth of family configurations and relationships. Both the Seattle Secure Scheduling Ordinance and the federal Schedules That Work Act define family relationship to include “[a]ny individual related to the employee involved by blood or affinity, whose close association with the employee is the equivalent of a family relationship.”296 This definition properly includes varied relationships not limited to a traditional nuclear family. Narrow family definitions disproportionately exclude employees of color, who are more likely to live in households with extended families, and LGBTQ+ individuals, who are more likely to rely on “chosen family” for care.297

293. S.F., Cal., Lab. & Emp. Code art. 32 § 32.3 (2023).
294. Id. § 32.3, 4(b).
295. Schedules That Work Act, H.R. 5563, 118th Cong. § 3(a) (2023) (limiting bill’s protection to requests concerning the hours, times, and the location that the employee is required to work); see supra Section III.A.3.
297. See Widiss, supra note 85, at 218–24 (reviewing census data and research on the variety of families and support networks in the United States and arguing that broader legal definitions of family are necessary to include people of color and the LGBTQ+ community).
5. **Reduce Minimum Employee Threshold and Time Worked Requirement**

FWA laws should reduce the minimum employee threshold as much as possible to protect those who work for small employers. While minimum employee thresholds aim to exempt small businesses with fewer resources from complying with the law, the undue hardship standard takes account of the cost of a requested FWA and an employer’s resources. Minimum employee thresholds perversely incentivize employees to work for large businesses where they will benefit from stronger employment protections rather than small employers who may be better for other reasons, such as job satisfaction, pay, health insurance, or location. Employees like Arthur should not be punished for working for a small employer by being completely exempt from flexibility rights. Rather, they should be entitled to their FWA unless it unduly burdens their employer.

FWA laws should reduce the minimum time worked requirement as much as possible. The San Francisco amended FFWO requires that workers have been with their employer for at least six months. For this reason, Arthur would not be entitled to his FWA for another three months. This creates odd incentives for people to remain at their job rather than find a job that may be a better fit because they will have to wait six months for flexibility benefits to kick in. The lower the time worked threshold, the more inclusive the law’s protections will be. The undue hardship standard would ensure that the employer’s capacity and resources are taken into account.

C. **Response to Criticisms of FWA Laws**

In this section, I respond to several main criticisms of FWA laws. Specifically, I address concerns that these laws will be too expensive for employers, that they stigmatize caregivers by singling them out for special treatment, that they unfairly prioritize caregivers’ needs over those of non-caregivers, and that the United States lacks political will to pass such legislation.

1. **Costs to Employers**

Employers may argue that expanding FWA laws will impose costs and administrative burdens on employers. If an employee requests to reduce or shift their work hours, employers must find (and compensate) replacement labor to fill the gaps. By establishing new dialogue and paperwork procedures employers must follow, the laws impose administrative costs associated with updates to human resources practices.  

298. See supra Section III.A.2.

299. For example, representatives from the California Retailers Association and the California Restaurant Association opposed passage of the San Francisco amended FFWO, citing the difficulty for small businesses to comply with new administrative and procedural requirements regarding employee scheduling requests. Youth, Young Adult & Fams. Comm., supra note 2, at 39:00 (testimony from Ryan Lane); Letter on Family Friendly Workplace Ordinance from Katie Hansen, Senior
While it is true that FWA laws may lead to additional costs and administrative procedures for employers, such fears likely overstate the extent of these costs. Employers have raised analogous fears in response to new protections for working women and caregivers over the past fifty years, yet such opposition has repeatedly led to outcomes that improve conditions for women and caregivers without resulting in dire economic consequences for employers. For example, employers raised similar concerns about the costs of providing family leave during the debate over the federal FMLA. However, studies following the law’s passage indicate that administrative costs were much lower than expected and most employers report that the law has had a positive or neutral effect on their business. Similar trends have been found in studies on the impact of paid sick time laws. Furthermore, the data suggest that the economic benefits of increased flexibility for workers may outweigh the costs by improving retention and reducing absenteeism. Employees who need flexible arrangements are more likely to remain at their job if they are permitted the flexibility to manage their lives, thereby saving employers the cost of recruiting, hiring, and training someone new. The White House Council of Economic Advisers estimates that broad implementation of flexible

Legis. Dir., Cal. Rest. Ass’n, to S.F. Bd. Supervisors (Jan. 13, 2022, 11:31 AM) (on file with the author) ("The proposal before you, while well intentioned, would create an elaborate system for restaurant employees and employers to follow when considering a scheduling change... Most restaurants are small businesses that do not have human resources professionals on staff. We believe that a one size fits all proposal like this does not take into account the unique operating nature of the restaurant community.").

300. Employers opposed EEOC guidance in the 1970s requiring them to provide maternity leave policies if they granted medical leave for other conditions, arguing that the costs would be detrimental to small businesses, and later opposed the FMLA in the 1980s and 1990s, arguing that its costs would discourage employers from hiring women. See Trina Jones, Single and Childfree! Reassessing Parental and Marital Status Discrimination, 46 Ariz. St. L.J. 1253, 1392 (2014); Cynthia L. Remmers, Pregnancy Discrimination and Parental Leave, 11 Indus. Rel. L.J. 377, 407 (1989).

301. See supra note 300 and accompanying text.

302. Brown, Herbst, Row & Kleiman, supra note 82, at v (finding that over ninety-five percent of worksites covered by the FMLA reported positive or neutral perceptions of its overall effect on their productivity and profitability and over ninety percent reported no difficulty in complying with FMLA requirements).


304. See Council of Econ. Advisers, supra note 45, at 16–22 (reviewing research on the impact of workplace flexibility on employee productivity, employee health, turnover, and absenteeism); supra notes 40–45 and accompanying text.
workplace schedules could result in $15 billion in savings for employers annually.\footnote{Council of Econ. Advisers, \textit{ supra} note 45, at 19. One study found that businesses experience a 0.39\% rise in stock prices when they announce new work-life balance initiatives, and a 0.48\% rise in stock prices after they implement the initiative. Michelle M. Arthur, \textit{Share Price Reactions to Work-Family Initiatives: An Institutional Perspective}, 46 \textit{Acad. Mgmt. J.} 497, 503 (2003).}

Regarding work-from-home policies, it is tough to make the argument today that remote work incurs costs for employers.\footnote{Paul Hallgren Jr. noted the potential costs associated with remote work of computer software and cameras for video chats in his 2018 article—equipment and technology that, particularly since the pandemic, are widespread among workers whose jobs can be done remotely. Hallgren, \textit{ supra} note 39, at 244–45.} Rather, the evidence indicates that employers reduce costs when employees work remotely through savings on office rent, utilities, maintenance, equipment, and security.\footnote{See, e.g., Baruch Silvermann, \textit{Does Working from Home Save Companies Money?}, Bus.com (Feb. 14, 2024), https://www.business.com/articles/working-from-home-save-money/ [https://perma.cc/3SAU-HEFV]; The Costs and Benefits of Hybrid Work, Global Workplace Analytics, https://globalworkplaceanalytics.com/resources/costs-benefits#toggle-id-30 [https://perma.cc/LZ5K-PHAT] (last visited Apr. 8, 2024) (reviewing over 7,000 studies and estimating that if all workers whose job could be done remotely did so for just half the time, employers would save on average $2,000 to $6,500 per employee per year).}

Employers may also worry that expanding FWA laws will lead to increased litigation and attendant costs. However, a report from the Center for WorkLife Law found that analogous fears about caregiver discrimination laws were not borne out by evidence.\footnote{See Liz Morris, Cynthia Thomas Calvert & Jessica Lee, \textit{Cfr. for WorkLife L., Litigation or Clarification? The Impact of Family Responsibilities Discrimination Laws} 3 (2021), https://worklifelaw.org/wp-content/uploads/2021/07/Litigation-or-Clarification-The-Impact-of-Family-Responsibilities-Discrimination-Laws.pdf [https://perma.cc/B2R3-D3RL] (finding that increases in caregiver and family responsibility discrimination statutes did not meaningfully increase litigation rates against employers and concluding that “[t]he annual likelihood a company will be sued under a family responsibilities discrimination law is essentially zero”).}

Increasingly, policymakers and advocates are also emphasizing the environmental impact of increased flexibility in the form of less commuting time and reduced automobile pollution, which could yield long-term environmental and economic benefits.\footnote{See Council of Econ. Advisers, \textit{ supra} note 45, at 24 (noting one “social benefit” of increased flexibility is less traffic congestion); Siegel, \textit{ supra} note 138 (emphasizing the environmental benefit of workplace flexibility in allowing people to work less and therefore consume and pollute less). This is particularly salient for cities like San Francisco, where pre-pandemic commute times were especially long. See Michelle Robertson, \textit{Stunning Increase in Bay Area ‘Super Commuters’ in the Last Decade Amid Housing Crisis}, SFGate (Apr. 27, 2018, 2:02 PM), https://www.sfgate.com/traffic/article/Bay-Area-commute-San-Francisco-traffic-12861808.php [perma link unavailable].}
2. Special Treatment Stigma and Bias Toward Non-Caregivers

Another argument that has been articulated against FWA laws is that by singling out caregivers for special treatment, such laws will have the perverse consequence of increasing bias against caregivers and women.310 This argument is connected to the cost-related argument above because an employer’s perception that a particular type of employee will be more costly (such as by needing flexibility or other accommodations) may lead them to avoid hiring them.311 Similar arguments were levied against the FMLA in the 1980s and 1990s, when those opposed asserted that widespread social beliefs that women were primary caregivers would lead employers to assume women would take more leave and thus avoid hiring them.312

A related strain of argument cautions that providing protections to parents and caregivers at the expense of non-caregivers unfairly prioritizes the personal lives of caregivers over individuals without children or other care responsibilities.313 Workers have many other reasons for wanting flexibility and work-life balance, such as pursuing education, hobbies, travel, volunteering, exercise, and romance, not to mention relaxation and leisure.314 Why should family responsibilities take precedence over other ways an individual can spend their time and enjoy life? And why should non-caregivers shoulder the burden of extra work when caregivers request a different shift or a reduction in hours?315

310. See Mary Anne Case, How High the Apple Pie? A Few Troubling Questions About Where, Why, and How the Burden of Care for Children Should Be Shifted, 76 COLUM. L. REV. 1753, 1758–59 (2001) (noting that policies compelling employers to grant family leave may lead them to avoid hiring women because they perceive them as more expensive).

311. See, e.g., Nicole Buonocore Porter, Accommodating Everyone, 47 SETON HALL L. REV. 85, 93–101 (2016) (discussing the meaning and implications of “special treatment stigma”); see also Vicki Schultz, Feminism and Workplace Flexibility, 42 CONN. L. REV. 1203, 1215 (2010) (“To the extent that it is associated with women’s needs and with family caretaking, workplace flexibility will assume—indeed, already has assumed—a gendered character and meaning.”). For an articulation of this argument in the pregnancy context, see Bradley A. Areheart, Accommodating Pregnancy, 67 ALA. L. REV. 1125, 1130 (2016) (cautioning that characterizing pregnant women as a class in special need of accommodation poses a danger of expressive harm that could increase discrimination against all female employees).

312. See supra note 300 and accompanying text.

313. See Jones, supra note 300, at 1265–76 (discussing how family friendly work policies might unintentionally alienate and discriminate against workers without children).

314. See id. at 1329 (“Parenting is hard work and important. Yet, investing in one’s education and volunteering with civic organizations also involve hard work and are important.”).

315. Id. Some social science research has called into question the assumption that employees resent coworkers who receive accommodations. See, e.g., Lisa Schur, Lisa Nishii, Meera Adya, Douglas Kruse, Susanne M. Bruyère & Peter Blanck, Accommodating Employees with and Without Disabilities, 53 HUM. RES. MGMT. 593, 593 (2014) (finding fears concerning coworkers reacting negatively to others receiving disability accommodations were not borne out by research).
Special treatment stigma is indeed a tricky problem for any legal framework that provides a benefit to some, but not all, members of society. Scholars have offered various recommendations to diminish stigma against caregivers and avoid marginalizing non-caregivers. For instance, Trina Jones has recommended that work-life balance laws incorporate guidelines regulating overtime and compensation for work that gets transferred to non-caregivers when parents receive FWAs.\footnote{316} Others have argued that given the ubiquity of caregiving, even those who are not currently caring for others stand to benefit from flexibility protections in the event they become caregivers or need care from others.\footnote{317}

Peggie Smith has argued that special treatment stigma can only be removed when we have achieved the “degenderization of caregiving.”\footnote{318} This requires men to participate equally in caregiving and that workplaces “be designed to encourage this mutual participation.”\footnote{319} Nicole Buonocore Porter and others have argued that the only way to eliminate special treatment stigma is to compel employers to provide FWAs to all workers and not just caregivers.\footnote{320}

I wholeheartedly support the project of “accommodating everyone,” as Porter urges.\footnote{321} Entrenched workplace norms that dictate when and where work is performed are harmful and restrictive to all workers who rightly value their non-work selves and lives. At the same time, our current system disproportionately harms caregivers in ways that are both discernible and urgent. Laws that target these immediate concerns can and should be the beginning of a national conversation and social movement toward more sustainable and flexible workplaces for all. Further, by compelling employers to change structural workplace norms for some, FWA laws have the potential to lead to a wider reckoning with and uprooting of such norms more broadly.\footnote{322} One intermediate way to

\footnote{316. Jones, supra note 300, at 1330–31.}
\footnote{317. See, e.g., Nicole Buonocore Porter, Mutual Marginalization: Individuals with Disabilities and Workers with Caregiving Responsibilities, 66 FLA. L. REV. 1099, 1148 (2014) (noting that “everyone could be forced into a caregiving role at any time”).}
\footnote{318. Smith, supra note 38, at 1486.}
\footnote{319. Id. Notably, all FWA laws discussed in this Article are gender-neutral, arguably encouraging workplaces (and society) to view caregiving as unrelated to a particular gender. See Arnow-Richman, supra note 38, at 359 (noting that “work/family initiatives steer the debate away from gender discrimination and toward the presumptively gender-neutral issues of family life and health”).}
\footnote{320. See Porter, supra note 311, at 108–28 (proposing universal accommodation mandate as a way to eliminate special treatment stigma); Jones, supra note 300, at 1330–31 (suggesting that employers design workplaces that produce greater work-life balance for all workers).}
\footnote{321. This is the title and project of Porter’s 2016 article. See supra note 311.}
\footnote{322. Nicole Buonocore Porter and Michelle Travis have pointed out that when employers must accommodate some workers, such as those with disabilities, they often implement changes or policies that benefit all workers, such as installing elevators or improving air quality. Requiring employers to provide flexible policies for caregivers may have spillover effects leading employers to implement flexible policies for all workers, if only to save themselves the administrative burden of administering each flexibility request separately. See Porter, supra note 311, at 111–13;
diminish special treatment stigma (without ameliorating it entirely) is to
draft FWA laws that extend flexibility rights to other groups of workers
in addition to caregivers, while refraining from a universal mandate.\textsuperscript{323}

3. Political Will

Some will likely argue that this line of advocacy and scholarship
is fruitless because the United States lacks the political will to enact a
national FWA law.\textsuperscript{324} They can point to the fact that currently only one
city requires broad flexible arrangements for caregivers, covering a frac-
tion of the nation’s workers.

However, FWA laws are relatively recent statutory developments and
there has been significant forward progress over the past decade. The
first state to pass a RTR law did so only eleven years ago.\textsuperscript{325} Today, several
states and a handful of cities have passed such laws, and some cities go
further to grant certain substantive rights to FWAs.\textsuperscript{326} This indicates a
promising forward trajectory. And while passing a robust federal FWA law
may feel out of reach now, states and localities are increasingly on the fore-
front of progressive change and can serve as incubators and examples for
what is possible—both for other states and for the federal government.\textsuperscript{327}

Michelle A. Travis, \textit{Lashing Back at the ADA Backlash: How the Americans with Disabilities
Act Benefits Americans Without Disabilities}, 76 TENN. L. REV. 311, 349 (2009) (calling this
phenomenon “remedy spillover”).

\textsuperscript{323} Several laws and bills discussed in this Article do just this. See N.Y.C., N.Y.,
ADMIN. CODE § 20-1261 (2024) (extending FWA rights to workers attending certain
legal proceedings and for any reason covered under N.Y.C.’s sick time law); SEATTLE,
WASH., MUN. CODE § 14.22.010 (2024) (extending FWA rights to employees experienc-
ing major issues connected to transportation or housing, a serious health condition,
enrollment in a career-related training program, or other job(s)); Schedules That
Work Act, H.R. 5563, 118th Cong. § 3(c) (2023) (extending FWA rights to employ-
ees whose request is due to their own serious health condition, their enrollment in a
career-related educational or training program, or because of a second job).

\textsuperscript{324} Neither federal bill that has been introduced on this front has progressed
to a vote. See supra Sections II.A.2., C.2. Skeptics can also point to Congress’s recent
failure to pass a national paid family leave package via the Build Back Better Act.
Chabeli Carrazana, \textit{The U.S. Was Close to Universal Paid Leave. With the Collapse of Build
news.org/2021/12/us-universal-paid-leave-build-back-better/ [https://perma.cc/2ZYW-MX43].

\textsuperscript{325} VT. STAT. ANN. tit. 21, § 309 (2023); see supra Section II.A.

\textsuperscript{326} See supra Section II.B.

\textsuperscript{327} See, e.g., Ann C. McGinley, \textit{Laboratories of Democracy: State Law as a Partial
(2022) (advocating enhanced state protections from workplace harassment given
the limitations of federal civil rights law); Widiss, supra note 71, at 1152–56 (high-
lighting the success of state pregnancy accommodation laws to spur national move-
ment); Manoj Mate, \textit{Felony Disenfranchisement and Voting Rights Restoration in the States},
22 NEV. L.J. 967 (2022) (analyzing state efforts to restore felon voting rights amid
federal inaction).
Indeed, this is precisely what happened with pregnancy accommodation laws.\textsuperscript{328} In addition, jurisdictions that may not currently have the political buy-in for a robust FWA law may nonetheless be able to pass a Good or Better law that can later be expanded. This is what happened in San Francisco.\textsuperscript{329} Finally, cities themselves have the potential to directly impact huge swathes of the nation by passing FWA laws. A majority of Americans live in cities and these numbers are expected to keep rising.\textsuperscript{330}

**Conclusion**

Giving and receiving care is ubiquitous in American life. Working caregivers who need FWAs to help balance work and care responsibilities should be entitled to their request absent undue hardship to their employer. Flexible workplace policies benefit both employees and employers in the form of improved employee health, greater employee productivity, higher retention rates, and reduced turnover. Yet rigid workplace norms designed around sexist and outdated understandings of the typical American worker continue to force caregivers to choose between their job and caring for a loved one. Policymakers and employers should retain the lessons learned from the COVID-19 pandemic that employees are more than capable of doing their jobs when granted flexibility in their hours, schedule, and location. Legislative intervention is needed to ensure that access to flexibility does not concentrate among high-income earners with the most bargaining power but rather is accessible regardless of income, education, race, and gender. A more flexible workplace will be a more just, inclusive, and humane workplace for all workers and their families.

\textsuperscript{328} See supra Section I.E; Widiss, supra note 71, at 1156 (“Passing new legislation is incredibly arduous—yet, in less than a decade, half of the states enacted new laws making it possible for pregnant employees to work safely through a pregnancy.”).

\textsuperscript{329} See supra Section II.C.1.
