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## Social Care for Caregivers: How Washington Can Guarantee Unemployment Insurance for Working Caregivers

Victoria Kroeger

### I. INTRODUCTION

Caregivers are the backbone of society. Some formal caregivers make a living out of the work that they provide as employees of a day care or residential facility.<sup>1</sup> But, most caregivers work informally, providing labor that is usually unpaid to ensure that the necessary emotional and physical needs of their loved ones are met.<sup>2</sup> The people that caregivers assist are often assumed to be children and elderly adults, but caregivers also provide support to spouses, neighbors, and friends.<sup>3</sup> This type of caregiving is usually unpaid, which requires informal caregivers to earn incomes in formal jobs; working caregivers perform an average of 34.7 hours a week in traditional out-of-home employment.<sup>4</sup> However, the stress of laboring in the traditional workforce and in personal relationships causes immense strain; 70% of working caregivers reported suffering difficulties in their formal work due to juggling responsibilities.<sup>5</sup>

When the COVID-19 pandemic began in March 2020, many workers lost their jobs and applied for unemployment insurance.<sup>6</sup> As of 2022, the

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<sup>1</sup> *Caregiver Statistics: Work and Caregiving*, FAM. CAREGIVER ALL. (2016), <https://www.caregiver.org/resource/caregiver-statistics-work-and-caregiving/> [<https://perma.cc/G37J-A2NE>].

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

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

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

<sup>6</sup> Jeff Cox, *A Record 20.5 Million Jobs were Lost in April as Unemployment Rate Jumps to 14.7%*, CNBC (May 8, 2020, 11:27 AM), <https://www.cnbc.com/2020/05/08/jobs-report-april-2020.html> [<https://perma.cc/GNM5-8QXS>].

emergency policies that were introduced to strengthen the unemployment insurance system in response to the pandemic have expired, but workers are continuing to apply for unemployment insurance.<sup>7</sup> In Washington State, from January 2, 2022, through to March 26, 2022, 61,789 initial claims applications were filed with the state's Employment Security Department.<sup>8</sup>

Although the emergency responses to COVID-19 have ended, the threats of new viral pandemics still exist.<sup>9</sup> The next pandemic will undoubtedly have massive impacts on the labor market just as COVID-19 did. In the meantime, the unemployment insurance system should be strengthened to increase eligibility and keep workers from falling into poverty. Workers who voluntarily leave employment to provide caregiving responsibilities to loved ones should qualify for unemployment compensation. In Washington State, there is an effort to make the unemployment insurance system more accessible to working caregivers specifically, but current efforts do not go far enough to address the inequality that working caregivers face. This article will analyze that effort and discuss areas of improvement to ensure that working caregivers can access the benefits to which they are entitled.

## II. ROADMAP

Section III will discuss the impacts of COVID-19 on the unemployment insurance system, how unemployment insurance fails working caregivers, and the status of the federal and Washington State versions of the Family and

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<sup>7</sup> See generally Bureau of Labor Statistics, *State Employment and Unemployment—September 2022*, U.S. DEP'T OF LAB. (Oct. 21, 2022, 10:00 AM), <https://www.bls.gov/news.release/pdf/laus.pdf> [<https://perma.cc/TPE7-LTJS>].

<sup>8</sup> Employment Security Department, *Initial Claims Applications for Unemployment Insurance—WA*, TABLEAU, [https://public.tableau.com/app/profile/jeff.robinson/viz/InitialClaimsapplicationsforUnemploymentInsurance-WA\\_ETAS39-/Story1](https://public.tableau.com/app/profile/jeff.robinson/viz/InitialClaimsapplicationsforUnemploymentInsurance-WA_ETAS39-/Story1) [<https://perma.cc/S9SV-5VU2>].

<sup>9</sup> See Kamala Thiagarajan, *Why the World Should be More Than a Bit Worried About India's Nipah Virus Outbreak*, NPR (Sept. 12, 2021, 8:56 AM), <https://www.npr.org/sections/goatsandsoda/2021/09/12/1035571714/why-the-world-should-be-more-than-a-bit-worried-about-indias-nipah-virus-outbreak> [<https://perma.cc/AEF9-SYMM>].

Medical Leave Act the Families First Coronavirus Response Act. Section IV will discuss current limitations to unemployment insurance qualifications in Washington. Section V will introduce statutory solutions that the Washington legislature can implement to improve unemployment insurance accessibility. Section V, subsection A will discuss current legislative attempts to provide support for working caregivers and suggest amendments to the good cause reasons to quit list. Section V, subsection B will discuss the modern family structure and suggest amendments to the statutory definition of family members.

To develop a more accessible unemployment insurance system, the Washington State legislature should consider two solutions: First, the Washington legislature should amend the “exhaustive good cause reasons to quit” list to include caregiving needs as a valid reason to voluntarily leave work. Second, the Washington legislature should expand the definition of “family member” to include extended family and chosen family; this expansion will make unemployment insurance benefits more accessible to caregivers in nontraditional families.

### III. IMPACTS OF COVID-19 AND LIMITATIONS OF VOLUNTARY EMPLOYMENT SEPARATION

Unemployment insurance is part of the social safety net designed to keep workers from falling into poverty. When the COVID-19 pandemic raged in March 2020, businesses were shut down, workers were laid off, and the amount of people applying for unemployment insurance grew exponentially overnight.<sup>10</sup> Subsection A will discuss the impacts of COVID-19 on the unemployment insurance system and the emergency federal policies that were implemented to lessen states’ burdens in funding the unemployment insurance system. Subsection B will discuss the history of unemployment insurance and the accessibility of unemployment insurance for working

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<sup>10</sup> Cox, *supra* note 6.

caregivers. Subsection C will discuss the federal and Washington State versions of the Family and Medical Leave Act (“FMLA” and “PFML,” respectively) and the temporary Families First Coronavirus Response Act (“FFCRA”) which was implemented to supplement federal FMLA claims for leaves related to COVID-19.

#### *A. Impacts of COVID-19 on the Unemployment Insurance System*

In late March 2020, the COVID-19 pandemic ushered in a wave of workers who filed for unemployment benefits, some for the first time in their lives. Within one month, the national unemployment rate grew to 14.7%, the highest rate since post-World War II.<sup>11</sup> That percentage equates to a total of about 23.1 million workers who filed for unemployment due to the pandemic shutdowns.<sup>12</sup> However, the reported unemployment rate does not include all unemployed workers, only those who applied for unemployment insurance.<sup>13</sup> When all jobless people are included—those who were “marginally attached” to the labor force, underemployed with reduced hours, and did not search for new work—the actual number of unemployed workers rises to 43.2 million people in April 2020.<sup>14</sup> The workplace shutdowns and forced layoffs also impacted racial groups disparately, with Black and Latinx workers experiencing higher peaks in unemployment and steep declines in workforce participation as the pandemic stretched on.<sup>15</sup>

Congress passed the Coronavirus Aid, Relief, and Economic Security (“CARES”) Act on March 27, 2020, to enhance state unemployment

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

<sup>12</sup> *Id.*

<sup>13</sup> Annalyn Kurtz et al., *Jobs Report: 14.7% Unemployment is Tragic, and it Doesn’t Even Include Everyone Who’s Out of Work*, CNN (May 8, 2020), <https://www.cnn.com/interactive/2020/05/business/april-jobs-report-unemployment-rate/> [<https://perma.cc/K5ND-U2JH>].

<sup>14</sup> *Id.*

<sup>15</sup> Gene Falk et al., CONG. RSCH. SERV., R46554, UNEMPLOYMENT RATES DURING THE COVID-19 PANDEMIC, 17 (2021).

insurance programs nationwide among other relief programs for businesses.<sup>16</sup> Three temporary unemployment benefits programs were implemented to protect unemployed workers; most notably, the Pandemic Unemployment Assistance (“PUA”) program expanded unemployment insurance eligibility to workers who were “traditionally not eligible for unemployment benefits under state law,” such as independent contractors and self-employed workers.<sup>17</sup> Through PUA, these workers were eligible for thirty-nine weeks of unemployment insurance benefits as long as they were unemployed due to reasons related to COVID-19, such as needing to provide care for family members who could not attend school or work because of COVID-19 closures or quarantining as advised by a healthcare professional.<sup>18</sup> PUA eligibility was overseen by Washington’s Employment Security Department; workers could be eligible for PUA if they were the main caregiver to a household member needing constant and ongoing care whose regular care facility was shut down or if the household member had been diagnosed with COVID-19.<sup>19</sup>

### *B. How the Unemployment Insurance System Fails Caregivers*

Historically, the traditional worker who qualified for unemployment insurance was the “ideal worker,” typically the breadwinning husband who worked while the wife cared for the household.<sup>20</sup> The unemployment

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<sup>16</sup> CARES Act, Pub. L. No. 116-136, 134 Stat. 281 (2020).

<sup>17</sup> *Id.*

<sup>18</sup> Casey Berkovitz & Amanda Novello, *What American Workers Need to Know about Unemployment Insurance*, THE CENTURY FOUND. (Mar. 30, 2020), <https://tcf.org/content/commentary/american-workers-need-know-unemployment-insurance/> [<https://perma.cc/YKVV3-Q6EC>].

<sup>19</sup> Employment Security Department (WA), *Guidance for answering the Pandemic Unemployment Assistance (PUA) eligibility questions* (updated Sept. 7, 2021), <https://esd.wa.gov/unemployment/PUA-guidance-eligibility-questions/> [<https://perma.cc/V5R5-944W>].

<sup>20</sup> Rebecca Smith et al., *Between a Rock and a Hard Place: Confronting the Failure of State Unemployment Insurance Systems to Serve Women and Working Families*, NAT’L

insurance system was first established in the Social Security Act of 1935; since then, all fifty states have implemented their own unemployment insurance systems with great variances amongst the states.<sup>21</sup> Maximum weekly unemployment insurance benefits range from \$235 in Mississippi to \$844 in Washington.<sup>22</sup> The duration of benefits also ranges amongst the states from just twelve weeks in Florida to thirty weeks in Massachusetts.<sup>23</sup>

Unemployment insurance presumes that unemployed workers are seeking full-time work and do not need to set aside time for domestic responsibilities.<sup>24</sup> As women joined the workforce over the decades and domestic duties became more egalitarian, unemployment insurance rules failed to reflect the workforce's new composition.<sup>25</sup> With caregivers in the workforce, responsibilities of working caregivers were spread across the home and work; the lack of expansion in unemployment insurance systems to support caregivers has disadvantaged workers of all genders who provide domestic care for family members.<sup>26</sup> Despite this, as recently as 2015, two-thirds of all caregivers are women,<sup>27</sup> which means that the failure of unemployment insurance programs to support unemployed caregivers disproportionately impacts women. Women are more likely than men to

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EMP. L. PROJECT 2 (2003), <https://s27147.pcdn.co/wp-content/uploads/2015/03/Between-a-Rock-and-a-Hard-Place-070103.pdf> [<https://perma.cc/98KM-25YC>].

<sup>21</sup> Julia Fleming, *Washington's One-Size-Fits-All Unemployment Compensation Eligibility in Cases of Voluntary Separation*, 95 WASH. L. REV. ONLINE 277, 282–83 (2020), <https://digitalcommons.law.uw.edu/wlro/vol95/iss2/3>; Emily Kowalik, *Care in the Time of COVID: Addressing the state of Family and Medical Leave in Light of the COVID-19 Pandemic*, 47 J. LEGIS. 105, 116 (2021).

<sup>22</sup> *Coronavirus and Unemployment Benefits: 50-State Resources*, JUSTIA (last updated March 2022), <https://www.justia.com/covid-19/50-state-covid-19-resources/coronavirus-and-unemployment-benefits-50-state-resources/> [<https://perma.cc/A2RF-VYNW>].

<sup>23</sup> *Id.*

<sup>24</sup> Smith et al., *supra* note 20.

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

<sup>26</sup> *Id.*

<sup>27</sup> Liz Ben-Ishai et al., *Access to Unemployment Insurance Benefits for Family Caregivers: An Analysis of State Rules and Practices*, AARP PUB. POL'Y INST. 4 (Apr. 2015), <https://s27147.pcdn.co/wp-content/uploads/2015/04/Access-to-Unemployment-Insurance-Benefits-for-Family-Caregivers.pdf> [<https://perma.cc/X3SZ-9SK7>].

adjust their work schedules in order to provide unpaid caregiving to family members and are more likely to “experience substantial career interruptions while caring for their family’s needs.”<sup>28</sup> Because of these career interruptions, women participate in the labor force differently than the unemployment insurance’s “ideal worker,” which has resulted in women being 15% less likely to receive benefits than men, even though they have consistently higher unemployment rates.<sup>29</sup> The discrepancy in unemployment collection can be attributed to the disproportionate number of women who cannot qualify for unemployment insurance, such as those who experience intermittent work, low wages, and the need for employment compatible with their family responsibilities.<sup>30</sup>

Gender is not the only disparity among working caregivers. There are also racial disparities; 69% of Black caregivers are in the workforce, followed by 62% of white caregivers, 60% of Latinx caregivers, and 59% of Asian American caregivers.<sup>31</sup> Combined with the racial inequality among receivers of unemployment insurance, working caregivers of color are disproportionately unsupported during periods of separation from the traditional workforce.<sup>32</sup>

By 2010, 16% of full-time workers provided “care for an elderly or disabled family member, relative, or friend,” and reported lower well-being

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<sup>28</sup> Kowalik, *supra* note 21, at 110.

<sup>29</sup> Karen Syma Czapanskiy, *Unemployment Insurance Reform for Moms*, 44 SANTA CLARA L. REV. 1093, 1098 (2004); *see also* Nancy E. Dowd, *Work and Family: Restructuring the Workplace*, 32 ARIZ. L. REV. 431, 474 (1990).

<sup>30</sup> Heather Boushey & Jeffrey B. Wenger, CTR. FOR ECON. & POL’Y RSCH., *UI IS NOT A SAFETY NET FOR UNEMPLOYED FORMER WELFARE RECIPIENTS* 5–6 (2003).

<sup>31</sup> 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. MIAMI RACE & SOC. JUST. L. REV. 159, 164 (2021).

<sup>32</sup> *See* Elira Kuka & Bryan A. Stuart, *Racial Inequality in Unemployment Insurance Receipt and Take-Up* 8–14 (Nat’l Bureau of Econ. Rsch., Working Paper No. 29595, Dec. 2021) (finding that only 28% of Black workers receive unemployment insurance after job separation, compared to 36% of white workers. Additionally, Black workers see lower potential weekly benefit amounts due to lower earnings and overall wages compared to white workers.).



than their full-time, non-caregiving counterparts.<sup>33</sup> Caregiving responsibilities involve emotional and physical demands that lead to poor emotional and physical health.<sup>34</sup> Working caregivers experience more stress due to their responsibilities and are more likely to be diagnosed with depression; these negative mental conditions become exacerbated by immense financial burden when a working caregiver becomes unemployed.<sup>35</sup> Additionally, working caregivers are more likely to belong to lower-income households that cannot afford to pay for outside care.<sup>36</sup> As a consequence, these workers must pay more out-of-pocket costs for care and risk missing work in order to provide necessary care to their family members.<sup>37</sup> About 66% of working caregivers described caregiving duties as the cause for arriving late to work, leaving work early, or needing to take a day off from work.<sup>38</sup> Absenteeism of caregivers impacts employers, with an “estimated cost in lost productivity in the tens of billions of dollars each year.”<sup>39</sup> For 9% of working caregivers, leaving employment is the only option they can take in order to devote themselves to unpaid caregiving for their loved ones.<sup>40</sup>

### *C. The Family and Medical Leave Act and Families First Coronavirus Response Act*

To prevent working caregivers from leaving their jobs, Congress passed the FMLA in 1993, which provided federal unpaid protections for workers

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<sup>33</sup> Dan Witters, *In U.S., Working Caregivers Face Well-Being Challenges*, GALLUP (Feb. 4, 2011), <https://news.gallup.com/poll/145115/Working-Caregivers-Face-Wellbeing-Challenges.aspx> [<https://perma.cc/BLA9-B49X>].

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> Dan Witters & Diana Liu, *Poor Financial Well-Being for Working Caregivers*, GALLUP (Sept. 17, 2018), <https://news.gallup.com/poll/238961/poor-financial-working-caregivers.aspx> [<https://perma.cc/CSU3-SDUX>].

<sup>37</sup> *Id.*

<sup>38</sup> Ben-Ishai et al., *supra* note 27.

<sup>39</sup> Witters & Liu, *supra* note 36.

<sup>40</sup> Ben-Ishai et al., *supra* note 27.

experiencing limited caregiving situations.<sup>41</sup> The FMLA requires employers to protect an employee's position during periods of qualified leave; employers may not fire the employee or hire a new employee to take over the position of the employee on leave.<sup>42</sup> Employees are qualified to take up to twelve weeks of unpaid leave in a calendar year to care for a new baby or adopted child, to care for a family member with a serious health condition, to care for the employee's own serious health condition, or to spend time with a military family member who is about to be deployed overseas or is returning from overseas deployment.<sup>43</sup>

However, employers are not required to keep an employee's job open if the company employs fewer than 50 people, the employee has worked for the company for less than a year, or the employee worked less than 1,250 hours for the company in the year before they took leave.<sup>44</sup> This means that approximately 40% of American workers are excluded from FMLA protections because they work for a small business, work less than full-time, or have not worked for their employer for long enough to qualify for leave.<sup>45</sup> Additionally, workers who qualify for the FMLA often avoid taking it because it is unpaid—this primarily affects workers of color who cannot afford to go for weeks without pay.<sup>46</sup> Across the United States, from 2014 to 2017, “61% of Black adults, 67% of American Indian and Alaska Native adults, and 71% of Latinx adults were either ineligible or could not afford to take unpaid FMLA leave, compared to 59% of white adults.”<sup>47</sup> During this same time period, the discrepancies in ineligibility and unaffordability of

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<sup>41</sup> Family and Medical Leave Act, 29 C.F.R. § 825.100 (2013).

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> Kowalik, *supra* note 21, at 114.

<sup>46</sup> *Id.*

<sup>47</sup> Sharon Terman, *Protecting Workers' Jobs and Income During COVID-19*, BOSTON: PUBLIC HEALTH WATCH, ASSESSING LEGAL RESPONSES TO COVID-19 2020 (S. Burris et al. eds., 2020), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3675811](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3675811) [<https://perma.cc/535T-SW76>].

federal FMLA in Washington state amounted to 65.3% of Black adults, 69.8% of American Indian and Alaska Native adults, and 75.3% of Latinx adults, compared to 59.1% of white adults.<sup>48</sup>

Individual states have implemented their own variations of FMLA, with some states like Washington including greater financial protections. Washington's Paid Family and Medical Leave ("PFML") provides financial compensation to workers who need to take medical leave to care for a personal serious health condition that prevents them from working; workers may also take family leave to provide care for a family member with a serious health condition, to bond with a new baby or adopted child, or to spend time with a family member who is about to be deployed or is returning from overseas military service.<sup>49</sup> Additionally, Washington requires less hours worked within the previous year in order to qualify for PFML; workers only need to have worked 820 hours within the previous year, which opens PFML to part-time workers who work an average of sixteen hours per week.<sup>50</sup> These hours accumulate for as long as the worker is employed in the state, even if the worker is employed with multiple employers or switches jobs within the year.<sup>51</sup>

However, although Washington provides expanded FMLA coverage compared to the federal counterpart, not all workers are eligible to receive PFML. Those ineligible workers are: federal employees, employees of businesses located on tribal land, self-employed workers, workers covered by collective bargaining agreements, and workers covered by an employer's

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<sup>48</sup> Pamela Joshi, Maura Baldiga & Rebecca Huber, *Unequal Access to FMLA Leave Persists*, DIVERSITYDATAKIDS.ORG (Jan. 16, 2020), <https://www.diversitydatakids.org/research-library/data-visualization/unequal-access-fmla-leave-persists> [<https://perma.cc/CW47-WJBZ>].

<sup>49</sup> WASH. PAID FAM. & MED. LEAVE, *Find Out How Paid Leave Works*, <https://paidleave.wa.gov/find-out-how-paid-leave-works/> [<https://perma.cc/T4BQ-8A9M>]; see WASH. REV. CODE § 50A.05.010.

<sup>50</sup> WASH. PAID FAM. & MED. LEAVE, *supra* note 49; see WASH. REV. CODE § 50A.15.010.

<sup>51</sup> WASH. PAID FAM. & MED. LEAVE, *supra* note 49.

voluntary leave plan.<sup>52</sup> Secondly, Washington explicitly limits the definition of “family members” as it applies to PFML; family leave may only be used to care for: spouses or domestic partners; biological, adopted, foster, or stepchildren; parents or legal guardians; siblings; grandchildren; grandparents; and sons-in-law and daughters-in-law.<sup>53</sup> Extended family or chosen family are not automatically qualified for Washington PFML, but workers may be able to provide documentation of their relationship with a person who “has an expectation to rely on [them] for care.”<sup>54</sup> Washington also maintains the job protection limitation found in the federal FMLA, where employers are not required to save a worker’s position while they are on leave if the company employs fewer than 50 people, the worker was with the company for less than a year, or the worker worked less than 1,250 hours in the prior year with the employer.<sup>55</sup> Ultimately, a worker eligible for Washington PFML may choose not to take it out of fear that they will not have a job to return to at the end of their leave.

In response to the unprecedented public health emergency brought on by the COVID-19 pandemic, Congress passed the Families First Coronavirus Response Act (“FFCRA”) which went into effect on April 2, 2020.<sup>56</sup> The FFCRA expanded FMLA for employers with fewer than 500 employees to provide paid leave for employees who left work for reasons related to COVID-19, such as caring for an individual as advised by a health care provider and caring for children whose school or childcare services were unavailable.<sup>57</sup> With the expansion covering all employers with fewer than 500 employees, employees of small employers who were not normally covered by FMLA (due to the 50-employee minimum requirement) had access to protected unpaid federal leave. However, these increased benefits

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

<sup>53</sup> *Id.*

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

<sup>55</sup> *Id.*

<sup>56</sup> Families First Coronavirus Response Act, PUB. L. NO. 116-127, 134 Stat. 178 (2020).

<sup>57</sup> *Id.*

were temporary and expired on December 31, 2020.<sup>58</sup> Now, the issues that prevented workers from accessing FMLA prior to the start of the pandemic have returned, leaving some workers to make the difficult decision to leave employment so that they can provide for their families.

#### IV. CURRENT UNEMPLOYMENT INSURANCE QUALIFICATIONS IN WASHINGTON STATE

Washington State's unemployment insurance system is robust and offers one of the highest average weekly benefits compared to other states. In 2021, the average unemployment benefit in Washington was \$447 per week.<sup>59</sup> However, unemployment insurance is not universal; there are still limitations as to who and what type of separation qualifies for unemployment benefits. This section will discuss unemployment insurance qualifications in Washington, the limitations of those qualifications, and a new administrative rule that will reduce disqualifications of working caregivers in the unemployment application process.

In Washington, workers who voluntarily leave their employment may be eligible to receive unemployment insurance benefits under eleven specific circumstances.<sup>60</sup> These eleven "good cause reasons to quit" are: (1) leaving work to accept a bona fide offer of bona fide work; (2) leaving work out of necessity to care for the illness or disability of the worker or death, illness, or disability of the worker's immediate family; (3) leaving work to relocate for the employment of a spouse or domestic partner; (4) leaving work out of necessity to protect the worker or the worker's immediate family members from domestic violence; (5) the worker's usual compensation was reduced by 25% or more; (6) the worker's usual hours were reduced by 25% or more; (7) the worker's place of employment changed and caused a material increase

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<sup>58</sup> Kowalik, *supra* note 21, at 119.

<sup>59</sup> Lisa Rowan, *The State With The Best And Worst Unemployment Benefits—And Why They're So Different*, FORBES (Mar. 17, 2021), <https://www.forbes.com/advisor/personal-finance/best-and-worst-states-for-unemployment/> [<https://perma.cc/U96B-LDZ8>].

<sup>60</sup> WASH. REV. CODE § 50.20.050(2)(b).

in commuting; (8) the worksite safety of the place of employment deteriorated; (9) illegal activities were conducted at the worksite; (10) the worker's usual work was changed and violates the worker's religious convictions or sincere moral beliefs; or (11) the worker entered a state-approved apprenticeship program.<sup>61</sup> Additionally, the Washington code defines "family member" to be "persons who are members of a family by blood or marriage as parents, stepparents, grandparents, spouses, children, brothers, sisters, stepchildren, adopted children, or grandchildren."<sup>62</sup> For many workers, unemployment insurance benefits "can be a crucial safety net while they search for a new job."<sup>63</sup>

However, meeting the "good cause" qualifications listed above does not automatically qualify workers for unemployment insurance. Workers must also meet "availability" requirements that are established in each state, which may conflict with hours dedicated to caregiving responsibilities.<sup>64</sup> Within Washington state, an unemployed worker is considered available for work if: they are willing to work full-time, part-time, or temporarily during the usual hours of their occupation; they are capable of accepting and reporting for suitable work; they are not self-imposing conditions that substantially reduce or limit their ability to return to work; they are available for work during the customary hours of their trade; and they are physically present in their normal labor market area.<sup>65</sup> The requirement to be available for work during the customary hours of trade has often disqualified workers who cannot be available to work twenty-four hours a day, seven days a week.<sup>66</sup> For example,

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

<sup>62</sup> WASH. REV. CODE § 50.04.310(2)(b); *see infra* Section V(B) for further discussion on the family member qualification.

<sup>63</sup> Ben-Ishai et al., *supra* note 27, at 5.

<sup>64</sup> *See generally* Smith et al., *supra* note 20; *see also* Ben-Ishai et al., *supra* note 27, at 15–18.

<sup>65</sup> WASH. ADMIN. CODE § 192-170-010 (2022).

<sup>66</sup> Maggie Humphreys, *Family Caregivers Left Out of Washington's Unemployment Benefits*, MOMSRISING (Oct. 3, 2018), <https://www.momsrising.org/blog/family->

if an unemployed worker's customary occupation could have a scheduled shift at any time of day, such as restaurant and healthcare positions, the unemployed worker must report being available to work all hours, each day of the week.<sup>67</sup> If an unemployed worker is unavailable to work certain hours because of caregiving responsibilities, then no exception will be granted, and the worker will be disqualified from receiving unemployment insurance.<sup>68</sup>

Washington has made changes to accommodate caregivers who cannot meet the availability requirement, but these changes fall short of improving unemployment insurance access. On January 2, 2022, a new administrative rule went into effect that adjusted the hours of availability requirement to be less strict.<sup>69</sup> The new rule requires workers who are collecting unemployment benefits to be available to work for forty hours each week that they are unemployed during the hours that are customary to their prior position, as opposed to needing to be available twenty-four hours a day, seven days a week.<sup>70</sup> This new rule greatly benefits caregivers who need to devote certain hours in their days to routine activities such as dropping off and picking up children from school and daycare, taking family members to routine doctors' appointments, and making sure that elderly adults are cared for.

While the new availability provision is a step in the right direction, caregivers will not benefit from the new law unless they already qualify for unemployment insurance. Workers who voluntarily leave employment for reasons outside of the "good cause reasons to quit"—or, for reasons that disqualify them from accessing unemployment insurance—should still be qualified to receive unemployment compensation; the needs of their family leave the worker with no choice but to temporarily end employment out of no fault of their own. To accomplish this outcome, the Washington state

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<sup>67</sup> *Id.*

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

<sup>69</sup> WASH. ADMIN. CODE § 192-170-020 (2022).

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

legislature should consider two solutions: first, the Washington legislature should amend the exhaustive list of “good cause reasons to quit” to provide more financial protections to working caregivers, and second, the Washington legislature should expand the definition of “family member” to include not only immediate family by blood, marriage, and adoption but also extended family and chosen family as well to provide unemployment protections to caregivers in nontraditional families.

One predictable problem that may arise in implementing an amended good cause reason to quit and a new definition of “family member” is a potential increased tax on employers; however, employers may be in favor of voluntary quits due to compelling family circumstances if they are not taxed for their employees’ use of unemployment insurance. This is a better outcome for employers compared to increased contributory tax rates for firing workers due to issues caused by family circumstances, such as frequent tardiness or callouts.<sup>71</sup> Additionally, providing financial assistance to unemployed workers who take on caregiving responsibilities would allow those workers to continue to participate in the economy and would prevent the need to apply for additional social welfare services that are typically funded by taxpayers.<sup>72</sup>

## V. STATUTORY SOLUTIONS TO INCREASE UNEMPLOYMENT INSURANCE ACCESSIBILITY FOR WORKING CAREGIVERS

Washington’s current unemployment insurance system fails to provide financial support to working caregivers who have no choice but to leave work when forced to choose between the responsibilities of formal employment and the responsibilities of assisting loved ones. However, this failure can be remedied in a way that will benefit not only working caregivers but also all other workers in the labor market. Subsection A will begin with a bill that was introduced in the Washington 2021–2022 legislative session. Subsection

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<sup>71</sup> See Ben-Ishai et al., *supra* note 27, at 2.

<sup>72</sup> Czapanskiy, *supra* note 29, at 1096.



A, part 1 will introduce new language to the Washington code section 50.20.050(2)(b)(ii) based on that bill which the Washington legislature should consider adopting and analyze comparable statutory language in New York and Arkansas. Subsection A, part 2 will discuss the criticism of this suggestion and offer a rebuttal. Subsection B will begin with a brief history of the nuclear family structure and discuss the modern concept of a chosen family structure. Subsection B, part 1 will introduce new language to the Washington code section 50.04.310(2)(b), which the Washington legislature should consider adopting, and analyze similar statutory language in Arizona, Oregon, and Rhode Island. Subsection B, part 2 will discuss the criticism to this suggestion and offer a rebuttal.

#### *A. Broadening Qualifications for Good Cause Voluntary Quits*

In the 2021–2022 legislative session, members of the Washington House introduced House Bill 1486 (“H.B. 1486”), which would amend unemployment insurance qualifications for individuals who voluntarily leave work.<sup>73</sup> Most notably, H.B. 1486 would add language to the relevant unemployment statutes that increase the accessibility of unemployment insurance to workers who provide care for children and vulnerable adults.<sup>74</sup> The term “vulnerable adult” would include persons over sixty years of age who have “functional, mental, or physical” disabilities to care for themselves, persons found to be incapacitated, persons with a developmental disability, persons admitted into any facility, persons receiving hospice or home care from a licensed agency or individual provider, and persons who receive services from a personal aide.<sup>75</sup>

H.B. 1486’s most relevant amendments to unemployment insurance qualifications are:

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<sup>73</sup> H.B. 1486, 67th Leg., 2021 Reg. Sess. (Wash. 2021).

<sup>74</sup> *Id.*

<sup>75</sup> WASH. REV. CODE § 74.34.020(21).

50.20.050(2)(b)(ii) The separation was necessary because of the illness or disability of the claimant or the death, illness, or disability of a family member, or because care for a child or a vulnerable adult in the claimant's care is inaccessible, so long as:

(A) The claimant made reasonable efforts to preserve the claimant's employment status by requesting a leave of absence or changes in working conditions or work schedule that would accommodate the death, illness, disability, or caregiving inaccessibility. . . .

(2)(b)(xii) The claimant's usual work shifts were altered so as to make care for a child or vulnerable adult in the claimant's care inaccessible; or

(2)(b)(xiii) The claimant left work to relocate outside the existing labor market because of the geographical location of, proximity to, or the separation from a minor child.<sup>76</sup>

Additionally, the bill would authorize the Employment Security Department commissioner to consider the worker's "responsibilities to provide care for a child or vulnerable adult in" their care when determining if available work is suitable to the worker.<sup>77</sup> H.B. 1486 also declares that benefits qualified under relocating for purposes of distance to a minor child will not be charged to employers who pay contributions into the unemployment insurance system, tying the qualified caregiving reason with qualified leaves to seek protections against domestic violence and leaves to start state-approved apprenticeships.<sup>78</sup>

While the proposed language in H.B. 1486 is a step in the right direction, it still limits qualified caregiving to that given to children under eighteen years of age or statutorily defined vulnerable adults over the age of sixty. First, persons between the ages of eighteen to sixty years of age would not provide a qualifying reason for a caregiving worker's voluntary separation

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<sup>76</sup> H.B. 1486, 67th Leg., 2021 Reg. Sess. (Wash. 2021) (emphasis in original).

<sup>77</sup> *Id.*

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

unless the person falls into the statutory definition of a “vulnerable adult.”<sup>79</sup> This limitation will predictably impact people who come from lower-income households, who are uninsured or underinsured and are unable to receive or simply cannot afford to receive an official medical diagnosis nor be admitted to a facility to meet the legal definition of a “vulnerable adult.”<sup>80</sup>

Second, the bill requires that claimants make “reasonable efforts” to maintain their employment by requesting temporary leave or changes to their work schedule. While providing a “reasonable efforts” qualification may sound neutral, it will result in many caregivers not qualifying for a good cause quit. The recommended requests suggested in the bill, such as changing work conditions or work schedules, may not allow the working caregiver enough flexibility to provide caregiving duties. Additionally, working caregivers may not request a leave of absence if they know that they will not qualify for PFML or know that their leave will be unpaid. Workers on unpaid leave cannot receive unemployment insurance and requiring workers to go through the effort of requesting leave before choosing to quit in order to qualify for unemployment insurance prolongs the amount of time that a caregiver in a vulnerable position will go without financial support. Including “reasonable efforts” places another limitation that will prevent working caregivers from accessing unemployment insurance in times of crisis.

Lastly, the bill proposes adding two exceptions to the good cause reasons to quit list, bringing the total to thirteen exhaustive reasons.<sup>81</sup> Extending the list may provide more opportunities for caregivers to qualify for unemployment insurance, but it may result in excluding caregivers who leave

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<sup>79</sup> See WASH. REV. CODE § 74.34.020(21).

<sup>80</sup> See Jennifer Tolbert et al., *Key Facts About the Uninsured Population*, KAISER FAMILY FOUND. (Dec. 19, 2022), <https://www.kff.org/uninsured/issue-brief/key-facts-about-the-uninsured-population/> [<https://perma.cc/9T5T-FR6W>]; see also Sara R. Collins et al., *The State of U.S. Health Insurance in 2022*, THE COMMONWEALTH FUND (Sept. 29, 2022) <https://www.commonwealthfund.org/publications/issue-briefs/2022/sep/state-us-health-insurance-2022-biennial-survey> [<https://perma.cc/NZB6-JT5Q>].

<sup>81</sup> H.B. 1486, 67th Leg., 2021 Reg. Sess. (Wash. 2021).

work for purposes that do not explicitly align with the exceptions found in the list. Instead of adding more exceptions, I propose that the Washington legislature modify the language of Washington code section 50.20.050(2)(b)(ii) to be more inclusive of all persons who may receive support from a working caregiver.

## 1. Implementation

The Washington State legislature should amend the Washington code section 50.20.050(2)(b)(ii) to broaden the qualification for good cause voluntary quits due to family circumstances. I propose this good cause reason be reworded to:

(b) An individual has good cause and is not disqualified from benefits under (a) of this subsection only under the following circumstances: . . .

(ii) The separation was necessary because of the illness or disability of the claimant or the death, illness, disability, *or caregiving needs of a member of the claimant's family* if: . . .

Most notably, “caregiving needs” should be explicitly listed in the statute so that workers, employers, and Employment Security Department adjudicators are aware that necessary caregiving does not disqualify a worker from receiving unemployment insurance. Additionally, the current language of the statute qualifies family to only “the claimant’s immediate family.”<sup>82</sup> I suggest removing this qualifier and instead using the more general “the claimant’s family,” so that the good cause reason will also broaden in relation to which family members may receive caregiving assistance.

If the Washington legislature includes “caregiving” as an explicit good cause exception instead of a more general “family needs” exception, the state will avoid confusion and potential need for judicial review of the statute to determine if caregivers qualify under various circumstances. For example, in

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<sup>82</sup> WASH. REV. CODE § 50.20.050(2)(b)(ii).

New York and Arkansas, workers qualify for unemployment insurance with a good cause reason if they have a compelling family circumstance or personal emergency that makes leaving work necessary.<sup>83</sup>

Under New York law, “a claimant shall not be disqualified from receiving benefits for separation from employment due to any compelling family reason.”<sup>84</sup> The law currently lists five family circumstances that are protected from unemployment insurance disqualification and the law explicitly states that the list is non-exhaustive.<sup>85</sup> One of the qualifying family circumstances was put into effect by the New York legislature on December 22, 2021: to provide child care to the worker’s child when no reasonable alternative child care exists.<sup>86</sup>

This new family circumstance was developed as a result of several New York courts finding that quitting work due to inability to find childcare was not a good cause reason to quit.<sup>87</sup> In special cases, workers who quit to provide caregiving duties were found to have good cause if the worker established a diligent effort to maintain their position before termination, such as requesting a leave of absence, making diligent efforts to obtain alternative caregiving, and maintaining communication with their employer.<sup>88</sup> If a doctor established that a worker’s caregiving duties were medically necessary for the ill family member, the courts found the medical

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<sup>83</sup> See N.Y. LAB. LAW § 593(1)(b); see ARK. CODE ANN. § 11-10-513(b)(1).

<sup>84</sup> N.Y. LAB. LAW § 593(1)(b).

<sup>85</sup> See *id.*

<sup>86</sup> S. 2623, 244th Leg., 2021 N.Y. Sess. Laws.

<sup>87</sup> See *In re Howe*, 817 N.Y.S.2d 714, 715 (2006) (Claimant quit due to concerns of childcare expenses and the court found Claimant quit without good cause); see also *In re Erno*, 782 N.Y.S.2d 143, 144 (2004) (Claimant was denied unemployment insurance benefits because she rejected a new job offer that conflicted with childcare responsibilities); see also *In re McCaffery*, 696 N.Y.S.2d 245, 246 (1999) (Claimant’s childcare problems were not a good cause reason to quit when the claimant had not first requested a leave of absence).

<sup>88</sup> See *Claim of Goldstein*, 674 N.Y.S.2d 804, 805 (1998) (Claimant was entitled to receive unemployment insurance benefits when her employer terminated her position after she made diligent efforts to obtain childcare but could not return to work after a leave of absence).

necessity to be a compelling family reason to quit with good cause.<sup>89</sup> With the amended language added to New York's list of qualified family circumstances, working caregivers will no longer be forced to engage judicial remedies to challenge disqualifications for voluntarily leaving work to care for children.

Arkansas unemployment rules also provide protections for working caregivers. Under Arkansas law, people who voluntarily leave work shall not be disqualified "due to a personal emergency of such nature and compelling urgency that it would be contrary to good conscience to impose a disqualification."<sup>90</sup> The language is vague but has resulted in some working caregivers qualifying for unemployment insurance.

Arkansas courts have not recently grappled with the unemployment insurance disqualification of workers who leave work to provide domestic caregiving duties; however, several cases within the last century granted unemployment insurance benefits to workers whose family members developed illnesses or needed emergency care.<sup>91</sup> In one case, the claimant was unsure whether her two ill parents would recover to a point where she could reasonably return to work at the end of a thirty-day leave of absence.<sup>92</sup> The court found that her reason for separation was "of such nature and compelling urgency that it would be contrary to good conscience to impose a disqualification."<sup>93</sup> In another case, the claimant's pregnant wife fell and feared that her baby may have been injured; the claimant asked his employer for an immediate leave of absence but was denied because the leave "could

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<sup>89</sup> See Claim of Miller, 672 N.Y.S.2d 532, 533 (1998) (Claimant had good cause reason to quit when her assistance to her ill mother was medically necessary).

<sup>90</sup> ARK. CODE ANN. § 11-10-513(b)(1).

<sup>91</sup> See Timms v. Everett, 6 Ark. App. 163, 165 (1982) (Claimant quit his job to care for his pregnant wife who had fallen and was concerned for the baby's health); see also Morse v. Daniels, 271 Ark. 402, 403 (1980) (Claimant quit her job to care for her two ill parents); see also Wade v. Thornbrough, 231 Ark. 454, 457 (1959) (Claimant quit her job to care for her five children when they all contracted measles).

<sup>92</sup> Morse, 271 Ark. at 403.

<sup>93</sup> *Id.*

not be granted in less than two weeks.”<sup>94</sup> The claimant voluntarily quit and filed for unemployment insurance, stating that “there was no one to take care of his wife.”<sup>95</sup> The court held that the claimant faced “a personal emergency of such nature and compelling urgency that it would be contrary to good conscience to impose a disqualification.”<sup>96</sup>

The statutory protection in New York and judicially interpreted statutory protection in Arkansas provide hope for unemployed working caregivers, but they do not provide guaranteed protections for all working caregivers. The New York law explicitly guarantees unemployment insurance to workers who quit to provide childcare when no alternative exists and is also non-exhaustive, leaving room for judicial interpretation. However, the nature of the New York law means that unemployment insurance is not guaranteed to workers who must leave work to care for family members other than children. The Arkansas law’s vague requirement of a personal emergency that would go against good conscience to disqualify may have been interpreted by courts in the mid- to late-twentieth century, but there is no guarantee that an adjudicator or administrative law judge will find caregiving as a qualifier for unemployment insurance today. Washington could be the first state to explicitly qualify necessary caregiving for any family member as a good cause reason to quit. In doing so, Washington would expand unemployment insurance benefits to many qualified unemployed workers and will become a model for other states to amend their unemployment insurance restrictions.

## 2. Criticism and Rebuttal

One frequent criticism of potentially increasing the number of people who qualify for unemployment insurance is that employers would have to pay more in taxes to cover the costs of the benefits.<sup>97</sup> Employers’ concerns about

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<sup>94</sup> *Timms*, 6 Ark. App. at 164–65.

<sup>95</sup> *Id.* at 165.

<sup>96</sup> *Id.*

<sup>97</sup> Czapanskiy, *supra* note 29, at 1096.

increased taxes may influence lawmakers to forgo increasing unemployment insurance eligibility, out of lawmakers' concerns of appearing "unfriendly to business."<sup>98</sup> However, increasing the amount of taxes employers will need to pay to provide temporary relief to unemployed caregivers and their families is not equal to the amount of money all taxpayers give to social welfare programs.<sup>99</sup> It is unreasonable that employers are not expected to make significant contributions to unemployment insurance when employees collectively pay more in individual taxes to support social services.<sup>100</sup>

In Washington, employers pay unemployment taxes through an "experience-based system."<sup>101</sup> The amount of taxes that an employer pays is determined by the number of former employees who were terminated due to layoffs, fired, or quit with good cause, and the current number of workers employed by the employer.<sup>102</sup> Between 2010 and 2021, the average tax rate was 1.60% with the lowest tax rate in 2020 at 1.03% and the highest tax rate in 2011 at 2.48%.<sup>103</sup> For the 2022 tax year, the average state unemployment tax rate for employers in Washington was 1.30%.<sup>104</sup> In general, these employer tax rates are based on former employees' use of unemployment insurance.<sup>105</sup> Based on the amount of former employees who filed for unemployment insurance, employers are "assigned to one of forty rate classes."<sup>106</sup> From the rate class, the Employment Security Department assigns a flat tax rate which ranges from 0.00–5.40%.<sup>107</sup> This means that if

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<sup>98</sup> *Id.* at 1097–98.

<sup>99</sup> *Id.* at 1098.

<sup>100</sup> *Id.*

<sup>101</sup> *Determining Your Tax Rates*, EMPLOYMENT SECURITY DEPARTMENT WASHINGTON STATE, <https://esd.wa.gov/employer-taxes/determining-rates> [<https://perma.cc/SN22-WU2X>].

<sup>102</sup> *Id.*

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

<sup>104</sup> *Id.*

<sup>105</sup> WASH. REV. CODE § 50.29.025(1)(a)(ii).

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

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



more former employees file for unemployment insurance, the employer is moved to a higher rate class with an increased tax rate.

Unfortunately, although more workers would qualify for unemployment insurance because of the proposed changes, not all workers would take advantage of the available benefits. For example, in April 2020, several millions of unemployed workers did not try to apply for benefits because the application process was too difficult, and an even greater number of workers tried to apply but could not complete the application.<sup>108</sup> The Economic Policy Institute estimated that an additional 7.8 to 12.2 million workers would have filed for unemployment insurance at that time, but the process was too difficult to do so.<sup>109</sup> Unless the unemployment application system in Washington becomes more accessible before the expansion of qualifications to caregivers,<sup>110</sup> the low participation rate of unemployed workers in the unemployment insurance benefits system is expected to continue and taxes may not increase drastically for employers.

Additionally, the concern of raising tax rates due to the increase of employees claiming unemployment insurance for having to leave work to provide caregiving can be avoided if the Washington legislature implements some suggested language from H.B. 1486. The legislature could tie voluntary resignations due to caregiving needs to resignations to seek protections against domestic violence or to start state-approved apprenticeships, just as H.B. 1486 does with resignations to relocate for a minor child, which do not contribute to employers' tax rates.<sup>111</sup> By waiving employers' responsibility

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<sup>108</sup> Ben Zipperer & Elise Gould, *Unemployment Filing Failures: New Survey Confirms That Millions of Jobless Were Unable to File an Unemployment Insurance Claim*, ECON. POL'Y INST.: WORKING ECON. BLOG (Apr. 28, 2020, 7:00 AM), <https://www.epi.org/blog/unemployment-filing-failures-new-survey-confirms-that-millions-of-jobless-were-unable-to-file-an-unemployment-insurance-claim/> [<https://perma.cc/KDC5-4Y3N>].

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

<sup>110</sup> This argument is beyond the scope of this article. However, I encourage future articles suggesting how to make the unemployment insurance application system more accessible.

<sup>111</sup> H.B. 1486, 67th Leg., 2021 Reg. Sess. (Wash.).

to pay contributions for these separations, the increase of working caregivers who apply for unemployment insurance will not burden their former employers.

### *B. Broadening The Definition of Family*

The term “nuclear family” is often used to describe the so-called traditional Western family structure: one father, one mother, and non-adult children from birth or adoption.<sup>112</sup> The nuclear family structure is strikingly different from family structures of collectivist societies; in countries like India and China, “the multigenerational family and kin groups remain important throughout an individual’s life span.”<sup>113</sup> The industrialization of western countries forced families and individuals to uproot, often permanently, in search of new work.<sup>114</sup> Industrialization also introduced social services that replaced traditional family responsibilities, such as education, job training, health care, and religious teachings.<sup>115</sup> However, although families were geographically separated, extended family members still maintained relationships with the nuclear family by providing financial, emotional, and physical support during times of crisis and assisted care.<sup>116</sup>

Today, only one-third of Americans live in nuclear family structures.<sup>117</sup> There is also a class divide in family structures: higher-income households can buy what were once extended-family-services, like childcare, therapy, tutoring, and after-school programs, while lower-income households without access to extended family experience greater stress to supply these

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<sup>112</sup> Azubike Felix Uzoka, *The Myth of the Nuclear Family*, 34 AM. PSYCH. 1095, 1096 (1979).

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at 1100.

<sup>115</sup> *Id.* at 1096.

<sup>116</sup> *Id.* at 1097.

<sup>117</sup> David Brooks, *The Nuclear Family Was a Mistake*, THE ATLANTIC (Mar. 2020), <https://www.theatlantic.com/magazine/archive/2020/03/the-nuclear-family-was-a-mistake/605536/> [<https://perma.cc/ZWV4-U48N>].

services.<sup>118</sup> In 2005, upper-middle-class families saw 85% of children living with both biological parents; for working-class families, that number was 30%.<sup>119</sup> Invigorated by the 2008 financial crisis, the number of Americans living in multigenerational homes rose from 12% in 1980 to 20% in 2020.<sup>120</sup> Additionally, the amount of people living in multigenerational homes differs across race: 20% of Asian Americans, Latinx Americans, and Black Americans live in multigenerational and extended-family households, while only 16% of white American households do.<sup>121</sup> These numbers reflect the historical prevalence of the nuclear family structure in white American culture and the discrepancies in affording paid family-care services across economic class. Multigenerational households do not need to pay for family-care services when a grandma, uncle, or cousin can help in childrearing and caring for elderly adults.

The nuclear family structure of the mid-twentieth century does not reflect family structures in our modern society. “Chosen family” is a concept most commonly found in lesbian, gay, bisexual, and transgender (LGBT) communities and is formed of “nonbiological kinship bonds, whether legally recognized or not, deliberately chosen for the purpose of mutual support and love.”<sup>122</sup> Many people rely on their chosen family for financial, emotional, and household support.<sup>123</sup> This practice has historically been popular amongst the LGBT community and continues to hold prominence today as safe escapes from hostile or abusive biological families.<sup>124</sup> Caring for the health of chosen family members was crucial during the HIV/AIDS pandemic of the 1980s.<sup>125</sup> In a recent study, 66% of LGBT Minnesotans

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

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

<sup>120</sup> *Id.*

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

<sup>122</sup> Trevor G. Gates, *The SAGE Encyclopedia of Marriage, Family, and Couples Counseling: Chosen Families*, SAGE Reference 2 (2017).

<sup>123</sup> *Id.*

<sup>124</sup> *See id.* at Reference 2–3.

<sup>125</sup> *Id.* at Reference 3.

identified “roommates, co-workers, and children of friends” as family members.<sup>126</sup> In a national survey, about a third of all LGBT respondents “reported taking time off work to care for a friend or chosen family member.”<sup>127</sup> Under current federal and Washington state FMLA qualifications, workers cannot take family-medical leave to care for a non-related person.<sup>128</sup> With FMLA unavailable to chosen family caregivers, working caregivers may have no choice but to quit their formal employment to provide necessary assistance.

The Washington legislature already recognizes families as greater than just parents and nonadult children; grandparents and grandchildren also fall under the definition of “family member.”<sup>129</sup> However, this definition does not go far enough to recognize modern family and household structures. It is evident that chosen family should be included in an expanded definition of “family” to extend financial support to workers who must voluntarily separate from their jobs to care for their chosen family members.

## 1. Implementation

The Washington State legislature should amend the Washington code section 50.04.310(2)(b) to broaden the definition of “family member.” I propose the definition of “family member” be reworded to:

(b) As used in this subsection (2), “family member” means persons who are members of a family by blood, marriage, *or choice* as parents, stepparents, grandparents, spouses, partners, siblings, children, stepchildren, adopted children, grandchildren, *or extended family*.

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<sup>126</sup> Frank J. Bewkes, *Expanding Definitions of Family in Federal Laws*, CTR. FOR AM. PROGRESS 1 (May 2020), <https://cf.americanprogress.org/wp-content/uploads/2020/05/Definitions-of-Family-4.pdf> [https://perma.cc/8KEH-3VW7].

<sup>127</sup> *Id.*

<sup>128</sup> See Family and Medical Leave Act, 29 C.F.R. § 825.100 (2013); see also WASH. PAID FAM. & MED. LEAVE, *supra* note 49.

<sup>129</sup> WASH. REV. CODE § 50.04.310(2)(b).

By including the phrases “or choice” and “or extended family” in the definition of family, people living in households including chosen and extended family members will be able to qualify for unemployment insurance benefits when they leave employment to care for them.

Some states already recognize nonbiological and nonmarital relationships in definitions of “family.” For example, Arizona, Oregon, and Rhode Island have statutory definitions of family that include more than just the immediate kin. First, under Arizona’s domestic violence law, a “family or household member” may be a biologically or maritally related person or “another adult person related by consanguinity or affinity who is residing or has resided or has a child or children in common with the person committing the domestic violence and dependents of such persons.”<sup>130</sup> Second, under Oregon’s Family Leave law, a “family member” can be an employee’s spouse, parent, child, grandparent, grandchild, or a person with whom the employee had “a relationship of in loco parentis” (parental-like relationship with).<sup>131</sup> Finally, under Rhode Island’s Healthy and Safe Families and Workplaces Act, “family member” is defined as any “child, parent, spouse, mother-in-law, father-in-law, grandparents, grandchildren, or domestic partner, sibling, care recipient, or member of the employee’s household.”<sup>132</sup>

In the three example statutes above, the terms “consanguinity or affinity,” “in loco parentis,” and “care recipient” greatly expand the statutory definition of family beyond the immediate family. Although the laws referenced above do not act as qualifications for unemployment insurance in those states, the Washington legislature can view these terms as examples of how extended family definitions have been implemented in other areas of the law. Including clear language that explicitly describes chosen and extended family into the unemployment qualifications definitions will reduce the need for judicial

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<sup>130</sup> ARIZ. REV. STAT. § 36-3001(4).

<sup>131</sup> OR. REV. STAT. § 659A.150.

<sup>132</sup> R.I. GEN. LAWS § 28-57-3 (2018).

review to determine if certain recipients of care are part of the claimant's family structure.

A broader definition also reflects the evolving understanding of family structures in society. The traditional image of a nuclear family "is no longer the social norm in the United States" with "an unknown number of children [living] either temporarily or permanently with other people within their communities, bound by informal bonds of kinship based on cultural identity, shared faith, or other factors."<sup>133</sup> For example, a third of LGBT people identify as people of color and are more likely than their white counterparts to live with or have originated from households with extended family members; these extended family households are common within communities of color and immigrant communities.<sup>134</sup> An expanded definition of "family" will not only benefit LGBT workers seeking unemployment insurance, but also workers of other marginalized communities in Washington State.

## 2. Criticism and Rebuttal

As with expanding unemployment insurance eligibility, employers may be concerned that expanding the definition of "family" will grant unemployment insurance benefits to more former employees than previously allowed. Most notably, employers in Rhode Island were concerned that the inclusion of household members in the statutory definition of family would leave the law open to employee abuse.<sup>135</sup> The Rhode Island Business Coalition stated that the inclusion of household members "will allow employees to take paid sick and safe leave to care for roommates and transient guests."<sup>136</sup> However, the state legislature did not remove the broader definition of family in an effort

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<sup>133</sup> Gates, *supra* note 122, at Reference 4.

<sup>134</sup> Bewkes, *supra* note 126.

<sup>135</sup> Aaron Nicodemus, *RI Regs Keep Household Member Definition in Paid Sick Leave Law*, BLOOMBERG LAW (May 31, 2018, 11:47 AM), <https://www.psh.com/ri-regs-keep-household-member-definition-in-paid-sick-leave-law> [<https://perma.cc/XG7J-G88V>].

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

to “[provide] a greater opportunity for people to be able to provide care for the people closest to them . . .”<sup>137</sup>

It is true that amending the definition of family for unemployment purposes will impact multiple good cause reasons for voluntary quits, such as separating from work to seek care for “the death, illness, or disability of a member of the claimant’s . . . family” and to protect the claimant’s family from situations of domestic violence.<sup>138</sup>

Additionally, the suggestion to tie voluntary resignations due to caregiving needs to protective leaves against domestic violence and apprenticeship leaves for purposes of determining an employer’s unemployment tax rate can apply to the concerns raised under the changing definition of family. The suggestion, discussed in full in section V, subsection A, part 2, includes only two good cause reasons impacted by the expanded definition of family. If employers are guaranteed to not have to front the cost in unemployment contribution taxes, they will not have to worry about their tax rates increasing.

Although employers may not have to worry about increased taxes, Washington employers may have the same concern as the Rhode Island employers about employee abuse of the family member definition. This concern is not unheard of, as the return to work after the peak of the COVID-19 pandemic resulted in certain industries seeing shortages in labor and workplaces shutting down due to too many employees calling out sick.<sup>139</sup> However, this abuse is unlikely to happen en masse, particularly because, as mentioned previously, many workers who otherwise qualify for unemployment insurance do not apply. Additionally, social stigma exists around people who receive unemployment insurance, even after the increase

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

<sup>138</sup> See WASH. REV. CODE § 50.20.050(2)(b)(ii), (iv).

<sup>139</sup> See generally Stephanie Ferguson, *Understanding America’s Labor Shortage: The Most Impacted Industries*, U.S. CHAMBER OF COM. (Feb. 8, 2022), <https://www.uschamber.com/workforce/understanding-americas-labor-shortage-the-most-impacted-industries> [https://perma.cc/3B2T-NYNP].

of unemployment beneficiaries during the COVID-19 pandemic; people returning to work after a long period of unemployment are assumed to have lost skills and struggle to be hired.<sup>140</sup> Many people simply choose to not apply for unemployment insurance because they do not want the stigma of receiving unemployment benefits attached to them or find the application process too difficult to complete.<sup>141</sup> To suggest that individual employees would abuse greater accessibility to unemployment insurance is unfounded when the majority of people who defrauded the unemployment benefits system during the COVID-19 pandemic were organized by national and international scam forums, not individuals who needed financial support to survive.<sup>142</sup> The Washington legislature could combat this concern by taking a similar stance to the Rhode Island legislature: they could strongly advocate for the amendment because it would benefit all Washington employees, and most importantly LGBT employees and employees of color.

## VI. CONCLUSION

Caregivers support all people in our society. As former first lady Rosalynn Carter once said, “There are four kinds of people in the world: those who are currently caregivers, those who have been caregivers, those who will be

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<sup>140</sup> Paul Davidson, *As COVID-19 Persists, More Americans Are Unemployed Beyond 6 Months. Does That Carry a Stigma Even in a Pandemic?*, USA TODAY (Dec. 4, 2020, 12:03 AM), <https://www.usatoday.com/story/money/2020/12/04/jobs-near-me-chronic-unemployment-stigma-even-during-pandemic/3804962001/> [<https://perma.cc/NF5E-FQKX>].

<sup>141</sup> Ryan Haar, *Why Millions of Unemployed Workers Never Claim the Benefits They’re Owed*, NEXTADVISOR (Aug. 30, 2021), <https://time.com/nextadvisor/in-the-news/unemployment-survey-benefits/> [<https://perma.cc/3VCC-56RX>].

<sup>142</sup> See Cezary Podkul, *How Unemployment Insurance Fraud Exploded During the Pandemic*, PROPUBLICA (July 26, 2021, 5:00 AM), <https://www.propublica.org/article/how-unemployment-insurance-fraud-exploded-during-the-pandemic> [<https://perma.cc/YF75-7XY4>] (“In 2020, consumers filed nearly 400,000 complaints claiming their identities were stolen and used to claim government benefits.”).



caregivers, and those who will need caregivers.”<sup>143</sup> Although some of us may not currently be caregivers, it is very likely that we all will become caregivers during our lives. Policies that are enacted to support caregivers will impact all of us.

Guaranteed unemployment insurance is not a long-term solution for working caregivers, but it can lay the foundation for guaranteed unemployment insurance for all workers and, later on, set in place the systems to support universal income for all. It is imperative that Washington state lead the way in providing protections and opportunities for caregivers to retain some form of financial security when they leave their traditional occupations to temporarily care for loved ones. Some states have started to adopt more comprehensive protections for working caregivers. By improving on the policies in those states, Washington can continue to support this fragile yet critical role in society. With success in Washington, other states will follow suit and one day, no caregiver will go into poverty through no fault of their own.

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<sup>143</sup> *Rosalynn Carter: Caregivers Should Tailor How They Help*, WASH. POST (Mar. 5, 2014), <https://www.washingtonpost.com/blogs/post-live/wp/2014/03/05/rosalynn-carter-caregivers-should-tailor-how-they-help/> [<https://perma.cc/2G4G-H4Z6>].