
EQUALITY IN THE WORKPLACE: WHY FAMILY LEAVE DOES NOT WORK

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I. INTRODUCTION

In 2001, more than thirty years after the passage of Title VII of the Civil Rights Act, women still have not achieved equality in the workplace. Many statistics emphasize the divide: Last year, 95% of all venture capital went to men;¹ of the top 2,500 corporate executives in America, only sixty-three are women;² only three Fortune 500 companies are headed by women;³ and Congress is 90% male.⁴

While many factors undoubtedly contribute to this disparity, one factor in particular stands out: Women are more likely to take family leave after the birth or adoption of a child, and are far more likely to serve as the primary caregiver for children. The American Bar Association (“ABA”) commented in its 1998 study, *Facts About Women and the Law*, that, “in reality women bear the greater burden of balancing career and family.”⁵ The number of fathers staying home to raise children is relatively small, fluctuating between 2 and 5%.⁶

Powerful societal assumptions about gender roles are still alive and well today. Men are presumed to be the family’s main source of income, and women the primary child care providers. Scholars agree: “Women

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1. SUSAN ESTRICH, *SEX & POWER* 12 (2000).

2. *Id.* at 8.

3. *Id.*

4. *Id.* at 8–9.

5. DIVISION FOR MEDIA RELATIONS AND PUBLIC AFFAIRS, AMERICAN BAR ASSOCIATION, *FACTS ABOUT WOMEN AND THE LAW* (1998) [hereinafter *FACTS ABOUT WOMEN AND THE LAW*].

6. ESTRICH, *supra* note 1, at 95.

shoulder the primary responsibility for family,”⁷ whereas “[t]raditional culture mandates insist that men act as the primary breadwinner of the family.”⁸

Assumptions like these are damaging to both men and women. Most fathers today find themselves disadvantaged at home because gender stereotypes keep them from being active parents, and those who choose to take paternity leave often suffer harsher fallout than women who take maternity leave. In order to level the playing fields for men in the home and women in the workplace, “family leave must respond to the powerful social and cultural constructions of motherhood and fatherhood that stand in the way of men parenting and reinforce women’s parenting.”⁹ Unfortunately, despite protective legislation such as the Family and Medical Leave Act (“FMLA”), taking family leave is almost certain to damage one’s career.

This Note explores how current legislation on family leave,¹⁰ actually reinforces gender stereotypes, and attempts to explain why fathers are still uncomfortable taking family leave. This Note proposes amending existing legislation to encourage fathers to utilize their available family leave.

Part II addresses reasons why women continue to face disadvantages in the workplace because of their roles as mothers and child care providers, and why fewer fathers rely on family leave—in particular, the prevalence of workplace hostility toward fathers who take active parenting roles. This section also examines the failure of alternative parenting options, such as part-time and flex-time work, and how utilizing those alternatives often damages one’s career.

Part III discusses specific areas in which the FMLA is deficient, and suggests ways in which it might be amended. These suggestions include coverage for smaller businesses, more generous child care coverage, and allowing family leave time to be used intermittently. Finally, this Note discusses how providing paid leave is the single most important change that should be made.

7. Nancy E. Dowd, *Work and Family: The Gender Paradox and the Limitations of Discrimination Analysis in Restructuring the Workplace*, 24 HARV. C.R.-C.L. L. REV. 79, 79 (1989) [hereinafter Dowd, *Work and Family*].

8. Rebecca Korzec, *Working on the “Mommy-Track”: Motherhood and Women Lawyers*, 8 HASTINGS WOMEN’S L.J. 117, 130 (1997).

9. Nancy E. Dowd, *Family Values and Valuing Family: A Blueprint For Family Leave*, 30 HARV. J. ON LEGIS. 335, 349 (1993) [hereinafter Dowd, *Family Values and Valuing Family*].

10. 29 U.S.C. §§ 2601–54 (1994).

II. OBSTACLES TO PARENTS' INVOLVEMENT IN CHILD CARE

Balancing work and family is a major concern of many female professionals. Men share this concern as well, but "talk about work and family is women's talk."¹¹ Similarly, family-friendly employers are often accused of paying lip service to fatherhood while continuing to be casual, or even dismissive, about the bond between fathers and children.¹² In order to improve women's professional opportunities and men's family lives, the gender stereotypes that pervade our society must be altered or overcome.

A. STEREOTYPES ABOUT MOTHERS AND THEIR EFFECT ON WOMEN'S CAREERS

Childbirth and childrearing occur during a critical period in most people's careers. For example, most attorneys work towards partnership in their thirties, and few people make partner after the age of forty-five. If a woman takes one or two years off during this critical period, it is likely to damage her chances of making partner, assuming she returns to work at all. Similarly, many women in their thirties, forties, and fifties who are ready to go back to work full-time after raising children find that, even with the same credentials they had ten or twenty years ago, "certain tracks have been permanently closed, and there's no getting back in, no second chance at bat."¹³

A closer examination of the legal profession illustrates how parenting and gender stereotypes contribute to continued inequality in the workplace. A 1991 study has found that, of attorneys hired after 1967, 45% of the men became partners, as compared to only 18% of the women.¹⁴ A similar study of eight major law firms undertaken by the ABA reveals that, among lawyers hired between 1973 and 1981, 21% of men and 15% of women attained partnership. For post-1981 hires, 17% of the male associates and a mere 5% of the female associates were promoted to partner. These numbers indicate that fewer women than men get promoted to partner, and that the numbers are actually getting worse, despite the fact that women will comprise 40% of the legal profession by the year 2010.¹⁵

The ABA study has also found that younger women feel a choice must be made between success at work and family life, "and they are willing to make it, in favor of family. The problem is not that they are making the

11. Dowd, *Work and Family*, *supra* note 7, at 79.

12. See, e.g., Joan Ryan, *Recognizing the Value of Fatherhood*, S.F. CHRON., Apr. 4, 2000, at A25.

13. ESTRICH, *supra* note 1, at 11.

14. *Id.* at 75.

15. FACTS ABOUT WOMEN AND THE LAW, *supra* note 5.

wrong choice, but that they see it as inevitable, and the provision of options like ‘of counsel’ makes it even easier to opt out of the rat race.”¹⁶ Indeed, countless articles have been written on the “mommy-track” and its effects on women’s careers.¹⁷ The legal profession is just one example of this trend. The consensus is clear: taking time off to have children jeopardizes women’s careers, even where such women intend to return to work fulltime.

Women who choose to have families often feel pressure to return to work as quickly as possible for fear that an extended absence will damage their careers. A 2000 study of first-time mothers’ child care options reveals that child care decisions often hinge on career-advancement requirements, and specifically on the belief that taking time off for family leave results in career derailment.¹⁸ Many women surveyed feel that it is not possible to take a lengthy employment leave following the birth of their children without damaging their careers.¹⁹ Furthermore, nearly 50% of the mothers who returned to work within three months of giving birth feel that career development was a significant factor in their decision to return to work.²⁰ Put simply, these mothers think they had to choose between staying home with their children and advancing their careers. Staying home *without* damaging their careers was not considered a viable option.

The idea that taking family leave jeopardizes a woman’s career is not new. Arlene Johnson of the Families and Work Institute has commented that there are several key points when women’s careers are imperiled: “when they get married, when they get pregnant, [and] when they take maternity leave . . . Often, to compete with males, women have to forgo, or camouflage, their family interest to show their commitment.”²¹ Susan Estrich has also discussed this phenomenon: “There are certain assumptions that almost everyone makes about women, particularly about women with children . . .”²² Our assumptions that women with children will be less devoted to their careers and more committed to their families are still as firmly rooted as they were thirty years ago when Title VII of the Civil Rights Act was first passed. Our assumptions that fathers will be the breadwinners, and that they will *not* be the primary caregivers for children, are just as firmly entrenched.

16. ESTRICH, *supra* note 1, at 75–76.

17. *E.g.*, Korzec, *supra* note 8, at 117.

18. Elizabeth Puhn Pungello & Beth Kurtz-Costes, *Working Women’s Selection of Care for Their Infants: A Prospective Study*, 49 FAM. REL. 245, 245 (2000).

19. *Id.*

20. *See id.* at 245–46.

21. ESTRICH, *supra* note 1, at 35.

22. *Id.* at 33.

B. GENDER STEREOTYPES AND THEIR EFFECT ON MEN'S ABILITY TO UTILIZE FAMILY LEAVE POLICIES

There is perhaps one advantage conferred on women by the gender stereotypes discussed above: Women more easily take advantage of family leave policies offered by employers. According to a 1998 Catalyst study, 74% of female employees have utilized their employer's family leave policy, and 86% would like to use the benefit.²³ Fathers, however, "are harmed and affected by the existing work-family structure"²⁴ in that available paternity leave is rarely utilized. In fact, only about 500,000 men take paternity leave each year, compared to the approximately 1.4 million women who take maternity leave.²⁵ A 1993 study by the Bureau of National Affairs has found that only 7% of male workers would take the full allotment—twelve weeks of unpaid leave following the birth or adoption of a child—whereas 43% of working women would do so.²⁶

Many fathers do not feel free to take full advantage of family leave policies, if they use them at all. For example, a Manhattan lawyer, following the birth of his son, stated, "[i]f I had said that I was planning to take more than two weeks off, people would have looked at me askance There's definitely a perception out there that child care is a burden that's still expected to fall on women."²⁷

One major reason for fathers' reluctance to take family leave is pervasive workplace hostility toward fathers who do so. In 1986, 63% of surveyed Fortune 500 CEOs and human resources directors felt it was not "reasonable" for a man to take *any* parental leave.²⁸ As recently as 1997, in a survey of over 2,000 professionals, one-fifth of respondents felt it was unacceptable for a man to use a part-time arrangement. Similarly, when high-level executives, human resources administrators, and CEOs were asked how much time they thought was reasonable for a man to take off after the birth of a child, 40% said "no time at all."²⁹ These statistics reemphasize that gender stereotypes are alive and well in the workplace, and that they prevent fathers from utilizing the leave available to them.

23. *Two Careers, One Marriage: Making It Work In the Workplace*, Catalyst, at http://www.catalystwomen.org/press_room/factsheets.htm (last visited Sept. 9, 2002).

24. Dowd, *Work and Family*, *supra* note 7, at 79.

25. Jerry Langdon, *Workplace Briefs*, GANNETT NEWS SERV., Nov. 22, 2000, available at 2000 WL 4408880.

26. Martin H. Malin, *Fathers and Parental Leave*, 72 TEX. L. REV. 1047, 1050 (1994).

27. Melinda Ligos, *Fear Keeps Men From Parental Leave*, ORANGE COUNTY REG., June 12, 2000, at E01.

28. *Father's Day*, Catalyst, at <http://www.catalystwomen.org/press/factsheets/factsfathers99.html> (1999).

29. Natalie Walker Whitlock, *Paternity Leave and the Family Medical Leave Act*, at <http://www.babycenter.com/refcap/8258.html> (last visited Feb. 19, 2001).

As one scholar puts it, “[e]ven if employers offer male employees parental leave, communicate its availability unambiguously, and allow fathers to fund leave following childbirth, many men will not take leave, even though they want to, because of pervasive workplace hostility.”³⁰ Martin Malin points out that “[m]any employers, including many who have progressive policies accommodating family responsibilities of working mothers, believe that working fathers should leave all family responsibilities to their wives.”³¹ A man who wants to take full advantage of family leave may face negative reactions, such as hostility and intolerance, from his coworkers and superiors. One scholar comments that “[o]n every front, a man who is trying to change the game runs up against ambivalence at best and hostility at worst.”³²

Some fathers decline to take paternity leave “for economic reasons, but for others, it is fear that keeps them in the workplace—fear of being ridiculed, fear of being discriminated against, even fear of losing their jobs.”³³ One scholar comments that “[m]en are terrified to take parental leave While their organizations may profess to be family-friendly, their bosses are giving them the message that men who take leave are not very manly, or are somehow letting down the team.”³⁴

Workplace hostility is not the only barrier fathers face. The ABA has proposed several reasons as to why family leave policies and alternatives to family leave are underutilized. For example, many employers offer part-time work following the birth of a child. Despite the availability of this option, it is rarely used, perhaps because of concerns that the part-time worker will not be seen as seriously committed, and that part-time work will lead to near-full-time work with part-time pay. Ross Parke, a professor at the University of California at Riverside, argues that while obstacles faced by fathers range from misinformation to financial constraints, the primary obstacle is the belief that taking leave “will harm their career.”³⁵ This may actually be a rational fear. While the FMLA prohibits employers from taking retaliatory action against employees who utilize their rights under the FMLA,³⁶ retaliatory actions are often subtle or difficult to prove. In order to make out a case of retaliation, employees must show that (1) they availed themselves of a protected right under the FMLA; (2) they were adversely affected by an employment decision; and

30. Malin, *supra* note 26, at 1089.

31. *Id.*

32. Dory Devlin, *For Some Dads, Change Isn't As Easy As it Seems*, STAR-LEDGER, Apr. 24, 2000, at 55.

33. Ligos, *supra* note 27, at E01.

34. *Id.*

35. Whitlock, *supra* note 29.

36. *See* 29 U.S.C. § 2615 (1994).

(3) there is a causal connection between their protected activity and the employer's adverse employment action.³⁷

An employer can then offer a "legitimate, nondiscriminatory reason"³⁸ for the decision, such as the employee's poor job performance. While the employer may use the legitimate, nondiscriminatory reason as a pretext to mask actual discrimination or retaliation, in court it is difficult for a plaintiff to prove that the proffered reason is pretextual.³⁹ Furthermore, employees who believe they have suffered discrimination or retaliation may be reluctant to sue. Anecdotal evidence suggests that employer retaliation is a real danger despite the FMLA prohibition. As Sara Mandelbaum, an attorney for the ACLU, comments, "I often hear from men on Wall Street, or from lawyers, who say their bosses have hinted that they wouldn't get promoted if they took an extended leave for nurturing purposes."⁴⁰ Similarly, Paula Rayman, director of the Radcliffe Public Policy Center, states that a Harvard professor "recently confided that his boss told him he would never get tenure if he took time out from work to care for a new baby."⁴¹ Even more troubling than these stories are statistics that suggest taking parental leave may affect future earnings. One study has found that "men with MBAs who worked just two fewer hours per week to share in child-rearing duties earned raises that were 20 percent lower than their colleagues."⁴²

Veiled employer retaliation threats and decreased earnings reflect the prevalent workplace attitude that parents are less committed employees: "[A]dmitting a life outside of work often calls commitment into question."⁴³ In order to avoid being perceived as less committed, men often take time off following the birth of a child by using accrued vacation time, personal days, or sick leave, rather than taking family leave.⁴⁴ This practice is often encouraged. As one scholar writes, "men who want to take time off for the birth of a child are urged sotto voice to take vacation or sick leave, not the still stigmatized paternity leave."⁴⁵

37. *Hodgens v. Gen. Dynamics Corp.*, 144 F.3d 151, 161 (1st Cir. 1998).

38. *Id.* at 166.

39. *See, e.g., Richmond v. ONEOK, Inc.*, 120 F.3d 205, 208–10 (10th Cir. 1997); *Williams v. Shenango, Inc.*, 986 F. Supp. 309, 321–22 (W.D. Pa. 1997); *Sidaris v. Runyon*, 967 F. Supp. 1260, 1271–72 (M.D. Ala. 1997).

40. Ligos, *supra* note 27, at E01.

41. *Id.*

42. Ryan, *supra* note 12, at A25.

43. Devlin, *supra* note 32.

44. *See Malin, supra* note 26, at 1071–72.

45. Wingate Packard, *Time for Fathers to Go Public About Their Workplace Needs*, SEATTLE TIMES, Apr. 13, 2000, at E2.

Men who choose to take full advantage of family leave policies make it clear that their families are priorities and so face misunderstanding, discouragement, and hostility. Meanwhile, society continues to assume that the mother will take on the primary parenting role. As Susan Estrich has explained: “[t]he assumption is that a man with children will work harder to support his family, while a woman with children will work less to be with her family.”⁴⁶ Women are not the only ones whose careers are jeopardized by this attitude; fathers who defy societal norms and take on the primary parenting role face harsh fallout as well.

There are indications that attitudes about fathers as primary caregivers are changing, albeit slowly. In *Knussman v. Maryland*, decided in February 1999, a jury awarded \$375,000 to a Maryland state trooper who, because he was male, was denied extended leave to care for his newborn daughter.⁴⁷ The court held that it was discriminatory for the state to require proof that the father was the primary caregiver to a newborn or adopted child before granting extended leave, when it did not require such proof from women.⁴⁸ This case illustrates just how pervasive gender stereotypes are, and the challenges faced by fathers who want to break out of the traditional breadwinner role and take on a more active role in parenting.

Clearly, attitudes about gender roles are still firmly in place. As long as these stereotypes persist, mothers will continue to be disadvantaged in the workplace, and fathers will continue to be disadvantaged in the home.

C. WHY FAMILY LEAVE POLICIES ARE UNDERUTILIZED: DECREASED WORKPLACE FLEXIBILITY AND THE FAILURE OF ALTERNATIVE WORK SCHEDULES

As discussed above, because women tend to be the primary child care providers, women face many professional roadblocks.⁴⁹ Furthermore, the societal stereotype that the mother stays home with the children prevents fathers from taking as active a role in parenting. Coupled with this subtle discrimination toward parents is a trend toward decreased flexibility by employers. Although it was originally believed that technology like the Internet, teleconferencing, and telecommuting would make the workplace more flexible, statistics actually indicate a trend in the other direction. A

46. ESTRICH, *supra* note 1, at 33.

47. 65 F. Supp. 2d 353, 355 (D. Md. 1999).

48. *See id.* at 360.

49. *See supra* Part II.A.

1999 *Wall Street Journal* article suggests that this decreased flexibility is due in large part to the pace at which technology changes.⁵⁰

New product cycles have shrunk to as little as six months, computer technology changes constantly, and mergers and acquisitions happen “almost overnight.”⁵¹ Accordingly, the repercussions are severe for a parent who takes extended leave to raise children: They may have missed major developments in their field or changes in their company. Going back to a job after a year or even six months may actually be impossible. As one woman has said of her old job at a Big Five accounting firm, “Nobody there would remember me.”⁵² This quite obviously presents a large problem for employees who want to take time off for the birth or adoption of a child.

Not all companies write off their employees who take extended absences to raise children. Some, such as Eli Lilly and IBM, actually guarantee a job after a three-year leave.⁵³ Unfortunately, those companies are very much in the minority. In 1999, only 1% of large employers offered leaves of a year or more, down from 2% in 1997.⁵⁴ In effect, technology seems to have made things more difficult for parents to take leave for the birth or adoption of a child. Even if companies were to offer more generous leave plans, it seems unlikely that many workers would actually utilize them.

Alternative workplace solutions designed to level the playing field, such as part-time or flex-time work schedules, have proved less successful than originally anticipated. Returning to a closer examination of the legal profession, a survey conducted by the National Association for Law Placement reveals that while flexible workplace policies may exist on paper, “few lawyers—women or men—are actually using them.”⁵⁵ In fact, only 2.7% of lawyers surveyed said they worked on a part-time basis.⁵⁶

Employees may choose not to take advantage of flexible work schedules because of possible negative repercussions later in their careers. According to a study done in 1993 on graduates of the University of Michigan Law School, the period of part-time work was the single largest factor explaining the wage gap between women and men.⁵⁷ In a survey of

50. See Sue Shellenbarger, *The New Pace of Work Makes Taking a Break for Child Care Scariest*, WALL ST. J., May 19, 1999, at B1.

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. FACTS ABOUT WOMEN AND THE LAW, *supra* note 5.

56. *Id.*

57. See Robert G. Wood, Mary E. Corcoran & Paul N. Courant, *Pay Differences Among the Highly Paid: The Male-Female Earnings Gap in Lawyers' Salaries*, 11 J. LAB. ECON. 417, 417 (1993).

3,000 women in the nation's largest law firms, "sixty-seven percent of respondents reported that part-time work results in lesser opportunities."⁵⁸ Because child care continues to be viewed primarily as the mother's job, "even if 'mother' happens to be a lawyer"⁵⁹ or other professional, collectively women are being left behind in the workforce.

III. LEGISLATION: DEFICIENCIES IN THE FAMILY AND MEDICAL LEAVE ACT AND PROPOSED SOLUTIONS

The Family and Medical Leave Act of 1993 requires as a matter of federal law that employers provide leaves of absence for childbirth or the care of children or other family members.⁶⁰ Employers of fifty or more employees must permit eligible workers to take up to twelve weeks of leave in any twelve month period for the birth or adoption of a child. The Act defines "eligible employee" as those employees who have worked for the employer for at least twelve months, and who have worked at least 1,250 hours during the previous twelve months.⁶¹

Critics of the FMLA argue that there are several shortcomings with the Act. During Senate hearings, Dr. Ed Zigler, director of the Yale Bush Center on Child Development and Social Policy, testified before the Subcommittee on Children, Family, Drugs, and Alcoholism, "While I do not feel this bill goes far enough, it is an absolutely necessary first step."⁶² As discussed in more detail below, coverage should be extended to businesses employing twenty-five or more employees, rather than the fifty or more employees currently provided for. Also, the FMLA should allow for family leave to be taken for a greater variety of child care situations. Intermittent leave should be guaranteed under the act; currently it allows leave to be taken on an intermittent basis only if the employee obtains the employer's permission. Finally, the FMLA should be amended to provide for paid leave rather than unpaid leave.

A. EXTENDING COVERAGE TO BUSINESSES EMPLOYING TWENTY-FIVE OR MORE

The first major deficiency with the FMLA is its breadth of coverage. Because the FMLA only covers employers with fifty or more employees (unlike the Civil Rights Act of 1964, which requires only fifteen

58. Korzec, *supra* note 8, at 127.

59. *Id.* at 117.

60. *See* 29 U.S.C. § 2612 (1994).

61. *See id.* § 2611.

62. S. REP. NO. 103-3, at 9 (1993), *reprinted in* 1993 U.S.C.C.A.N. 3, 11.

employees⁶³), in effect, only one-tenth of private-sector worksites and half of all private-sector employees are covered.⁶⁴ Over 40% of private-sector employees lack even the basic protection provided by the FMLA, and may have no family leave benefits at all. While over 90% of worksites governed by the FMLA provide up to twelve weeks of leave for family and medical reasons, only 32.3% of noncovered worksites offer parental leave.⁶⁵ The arguments against extending family leave to noncovered worksites resemble arguments against the passage of the FMLA in 1993.

1. Arguments Against Passage of the FMLA: Increased Costs

One major argument against the FMLA before its passage was the cost it would impose on small businesses (fewer than 250 employees) and business owners. After its passage, surveys revealed that, by and large, these fears were not actualized. In fact, according to the Department of Labor's 1995 survey, between 89.2% and 98.5% of firms reported that compliance with the FMLA entailed only small costs or no costs whatsoever.⁶⁶ Indeed, the report stated that, "[f]or most employers, compliance is easy, the costs are non-existent or small and the effects are minimal."⁶⁷

Also contrary to expectations, *large* businesses (250 employees or more) were more likely to experience increased costs, not small businesses.⁶⁸ Only 1.3% of employers reported a reduction in benefits to offset the increased costs of the FMLA, a statistic providing further evidence that the overall costs have been minimal.⁶⁹ Some employers actually reported cost *savings*, generated from reduced employee turnover, enhanced productivity, and goodwill.⁷⁰ During Senate hearings, proponents of the Act gave several reasons why the FMLA would be cost-effective. Lawrence Perlman, president and CEO of Control Data Corporation, spoke about his company's positive experience with family leave, stating it had the effect of "reducing turnover among experienced, trained employees and above all foster[ing] an environment among corporate and community leaders that nurtures children and family

63. See 42 U.S.C. § 2000(e) (1994).

64. COMM'N ON FAMILY & MED. LEAVE, DEP'T OF LABOR, A WORKABLE BALANCE: REPORT TO CONGRESS ON FAMILY AND MEDICAL LEAVE POLICIES, at <http://www.dol.gov/esa/regs/compliance/whd/fmla/summary.htm> (last visited Sept. 9, 2002) [hereinafter WORKABLE BALANCE].

65. *Id.*

66. *See id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

members.”⁷¹ Echoing that sentiment was Jeanne Kardos, director of employee benefits for Southern New England Telephone Company, who stated:

[W]omen with small children are in our workforce to stay. These women are very highly trained. They have a tremendous amount of job experience, and we do not want to lose them. . . . We regard these people as assets to the corporation . . . [and w]e think it is cost-effective rather than costly [because] it serves productivity.⁷²

Kardos also indicated that when employees return from family leave, “they are very grateful to the company that cares for them, and they stay with [the company].”⁷³ The idea that providing family leave had increased employee loyalty and productivity appeared several times throughout testimony before Congress.

Furthermore, family leave is often cost-effective because it saves employers the costs associated with replacing and training employees. A study done in 1990 has found that “the costs of permanently replacing an employee are significantly greater than those of granting a worker’s request for leave.”⁷⁴ The study indicates that terminations because of illness, disability, pregnancy, and childbirth cost employers from \$1,131 to \$3,152 per termination. Granting workers’ requests for leave cost substantially less: between \$.97 and \$97.78 per week, depending on the size of the employer and the managerial status of the employee.⁷⁵ The study conclusions suggest that the FMLA would cost employers only \$6.70 per covered employee per year.⁷⁶

A similar study conducted by the Families and Work Institute also concludes that providing family leave is more cost-effective than permanently replacing an employee. It finds that the cost of accommodating an employee’s unpaid leave request averages 20% of the employee’s annual salary, whereas permanently replacing the employee costs between 75 and 150% of the employee’s annual salary.⁷⁷ Aetna Life and Casualty Company serves as a case study. The company reported that its family leave policy saves the company millions each year. It estimated that the cost of permanently replacing an employee was approximately 93% of the replacement’s first-year salary. Furthermore, the estimates indicated that implementing a family leave policy in 1988 saved the

71. S. REP. NO. 103-3, at 13 (1993), *reprinted in* 1993 U.S.C.C.A.N. 3, 15.

72. *Id.* at 14.

73. *Id.*

74. *Id.* at 17.

75. *Id.*

76. *Id.*

77. *Id.*

company more than \$2 million in the first year by reducing employee turnover.⁷⁸ Because, on the whole, large and mid-sized businesses have not suffered from greatly increased costs, extending FMLA coverage to businesses employing twenty-five or more employees rather than the current threshold of fifty or more employees may be feasible.

2. Arguments Against Passage of the FMLA: Decreased Productivity

Another concern expressed by opponents of the FMLA is that parents, both mothers and fathers, would become less productive employees once family became their first priority. Again, this fear has not proven true in the workplace. In fact, one study shows that 52% of parents feel that having children has made them *more* productive at work, not less.⁷⁹ A report by the President's Counsel of Economic Advisors has found that most parents have less time to spend with their children than ever before.⁸⁰ As a result, parents work more efficiently to find time to be with their children.⁸¹ Furthermore, the responsibility of raising a family means that parents tend to take their jobs more seriously than their childless coworkers.⁸²

Most employers agree that the FMLA has had no negative effect on business performance. In fact, a 1990 study by the Families and Work Institute has found that 75% of supervisors felt "parental leave had a positive overall effect on the company's business."⁸³ According to a report prepared by the Department of Labor's Commission on Leave, to the extent that employers do report an effect on productivity, profitability, and growth, "it is as likely to be positive as negative."⁸⁴ The report also indicates that "[t]here are significant positive effects in . . . employee productivity."⁸⁵ These statistics suggest that the FMLA has not resulted in decreased productivity as initially feared, and that it may actually have an overall positive effect on worker productivity.

In summary, cost and productivity considerations suggest that expanding the coverage of the FMLA to employers with twenty-five employees or less may be feasible.

B. EXTENDING COVERAGE FOR MORE CHILD CARE SITUATIONS

78. *Id.* at 18.

79. Stephanie Armour, *On the Clock: Working Parents Take Issue—Some Say They're More Productive Because of Kids*, USA TODAY, May 27, 1999, at 1B.

80. *See id.*

81. *See id.*

82. *See id.*

83. S. REP. NO. 103-3, at 17 (1993), *reprinted in* 1993 U.S.C.C.A.N. 3, 19.

84. WORKABLE BALANCE, *supra* note 64.

85. *Id.*

Not only should FMLA coverage be extended to smaller businesses, it should also cover a larger array of child-care situations. Current coverage includes leave only for a "serious health condition," defined as "an illness, injury, impairment, or physical or mental condition that involves inpatient care or continuing treatment by a health care provider."⁸⁶ Extending protection would enable both mothers and fathers to be active parents without worrying about negative repercussions.

During Senate hearings on the FMLA, a supporter of the bill commented, "I don't think that parents should be forced to choose between caring for their children or keeping their jobs."⁸⁷ Unfortunately, even with the passage of the FMLA, parents are still forced to make this terrible choice. The dilemma is illustrated by *Seidle v. Provident Mutual Life Insurance Co.*, a case interpreting the "serious health condition" provision of the FMLA.⁸⁸ In this case, the plaintiff was fired from her job after missing work for five days to care for her ill son.⁸⁹ She claimed that her son had a serious health condition, and thus her absence was protected under FMLA section 825.114(a)(2).⁹⁰ In order to fall under that section, however, her son must have undergone "a period of incapacity requiring absence from his day care center for *more than* three days and be under the continuing treatment of a physician."⁹¹ The court found that the plaintiff had failed to establish either prong of the two-part test.⁹²

First, although the child was absent from day care for four days, his initial medical problem (an ear infection) required him to be absent only three days. On the fourth day, his mother kept him home because he had a "runny nose" and was "'listless' and without a good appetite."⁹³ The day care center had a policy of prohibiting children with a runny nose from attending.⁹⁴ The court then emphasized that even if the child had been absent for more than three days because of an incapacity, "the evidence [did] not show that the period of incapacity involved 'continuing treatment by (or under the supervision of) a health care provider.'"⁹⁵ Although the child was required to take an antibiotic for ten days, the doctor only treated him once.⁹⁶ This, held the court, did not constitute continuing treatment by

86. MARK A. ROTHSTEIN & LANCE LIEBMAN, EMPLOYMENT LAW 515 (4th ed. 1998).

87. S. REP. NO. 103-3, at 10 (1993), *reprinted in* 1993 U.S.C.C.A.N. 3, 12.

88. 871 F. Supp. 238 (E.D. Pa. 1994).

89. *See id.* at 240.

90. *See id.* at 243.

91. *Id.*

92. *Id.*

93. *Id.* at 244.

94. *Id.* at 244.

95. *Id.*

96. *Id.*

a health care provider.⁹⁷ The court concluded by stating, “No matter where our sympathies may lie . . . plaintiff is not entitled to the protection of the FMLA and her termination by the defendant did not violate the FMLA.”⁹⁸

This case illustrates a frightening choice for parents: find alternative child care (or let your sick child stay home alone) and keep your job, or stay home with your ailing child and risk losing your job. Furthermore, finding alternative child care is more difficult than it seems at first glance. Many child care providers refuse to accept sick children, and many day care programs do not allow ill children to attend. *Seidle* is illustrative: Ms. Seidle was forced to stay home on the fourth day of her son’s illness because his day care center would not accept children with runny noses.⁹⁹ The difficulty is compounded by the fact that these situations almost always occur on short notice; by definition, the problem is an *unexpected* illness.

Especially for poorer parents, alternative child care may be no alternative at all. In a survey by the National Partnership for Women and Families, 54.4% of low-income women surveyed said that “employer unwillingness to accommodate family and medical needs . . . ‘often’ makes it difficult for non-welfare clients to find or keep a job.”¹⁰⁰ One respondent stated that many people “miss work because either they are sick or their children are sick, [. . . and] regular child care won’t take care of a sick child.”¹⁰¹

Similarly, a job trainer in Arizona commented that her clients “miss work when one of their children gets sick and back-up child care is unavailable.”¹⁰² Furthermore, the job trainer noted that “these parents often rely on informal child care arrangements because they do not earn enough to afford formal child care.”¹⁰³ According to one survey, “one in four Americans have needed to take family or medical leave but were unable to do so, with nearly half of single moms and non-college-educated women falling into this category.”¹⁰⁴

It is perhaps these lower-income families who would most benefit from the expansion of the FMLA to cover more child-care emergencies. Although the FMLA is a good beginning, it is simply not enough. The

97. *See id.*

98. *Id.* at 246.

99. *Id.* at 241.

100. NATIONAL PARTNERSHIP FOR WOMEN & FAMILIES, DETOURS ON THE ROAD TO EMPLOYMENT: OBSTACLES FACING LOW-INCOME WOMEN 5 (1998).

101. *Id.*

102. *Id.*

103. *Id.*

104. Kathleen Reagan, *The ‘Illusion’ of Family Leave in New York*, at http://family.go.com/yourtime/money/features/family_1999_12 (last visited Feb. 5, 2001).

legislation should be amended to include protection for lesser emergencies, including illnesses that do not fall under the statutory definition of "serious health condition," and nonemergencies, such as parent-teacher conferences and doctor's appointments.

Expanding the FMLA might allow fathers to assume more responsibility for emergency child care. A 1997 study by psychologists at the University of Tulsa reveals that fathers are more likely to be involved in child care activities that are scheduled, such as parent-teacher conferences and doctor's appointments.¹⁰⁵ Emergencies, such as illnesses and babysitter cancellations, are more likely to be handled by the mother.¹⁰⁶ The study indicates that while 39% of fathers surveyed had attended a child's school programs and 38% had taken their child to the doctor, only 8% had changed their work schedules to care for a child.¹⁰⁷

If the FMLA were expanded to cover more unscheduled emergencies and childhood illnesses, more fathers might step into the primary parenting role when such an emergency arises. This would be another step toward balancing opportunities for women in the workplace and reinforcing the legitimacy of fathers in the home, and might lead to more balanced parenting responsibilities. Allowing leave for a wider variety of child care situations is also closely tied to allowing intermittent leave, an option discussed below.

C. EXTENDING COVERAGE FOR INTERMITTENT LEAVE

Nancy E. Dowd has written that "[t]he lack of flexibility in the workplace creates particularly difficult problems when family emergencies . . . occur during working hours. Nonemergency situations are no less a problem, since the scheduling of routine appointments, or attendance at significant events, is never guaranteed."¹⁰⁸ If the FMLA were amended to allow parents to use their twelve weeks of leave intermittently, the leave provided could be used for scheduled, nonemergency events such as PTA meetings or doctor's appointments. This would be a major step forward for working parents, and a major step towards getting fathers more involved with parenting activities.

According to section 102(b) of the FMLA, leave for the birth or adoption of a child "shall not be taken by an employee intermittently or on a reduced leave schedule unless the employee and the employer of the

105. See Karen S. Peterson, *Dads Less Flexible in Child-Care Crises*, USA TODAY, July 8, 1997, at 4D.

106. *Id.*

107. *Id.*

108. Dowd, *Work and Family*, *supra* note 7, at 87.

employee agree otherwise.”¹⁰⁹ This is in contrast to leave for caring for a family member’s serious medical condition, or the employee’s own serious health condition, for which intermittent leave is permitted without the need for employer consent.¹¹⁰ For family leave, employees must work out the option of intermittent leave with their employer, and “if he or she agrees, [] 12 total weeks of leave can be taken in days or even hours at a time, and stretched out over a much longer period.”¹¹¹

Intermittent leave provides tremendous flexibility for new parents, and allows fathers to play a much more active role in the early development of their children. One couple who has chosen this option emphasized how beneficial it has been for them and their newborn daughter, saying it has given the father “an opportunity to witness firsthand the significant changes that take place during the first six weeks.”¹¹²

Scholars have hypothesized that one reason fathers continue to take a less active role in parenting is that, “when fathers do not take parental leave following the birth of their children, they rapidly fall behind their wives in gaining experience with the child and are perceived to be less competent. . . . This results in marginalizing the father’s role in child care.”¹¹³ Intermittent leave would allow them to be present for more of the significant events in the child’s early life, and thus to gain parenting experience. Theoretically, this would lead to continued greater involvement later in the child’s life as well.

Indeed, this theory has proven true in Sweden, which provides extensive parental leave. A study of couples has found that fathers who take parental leave are significantly more likely to take part in child care responsibilities, which in turn results in them being seen as more competent caregivers.¹¹⁴ In fact, some states have already enacted legislation allowing intermittent leave for a variety of situations, such as visits to school or day care facilities. California, for example, allows parent to take off up to forty hours each year to “participate in activities of the school or licensed child day care facility of any of his or her children.”¹¹⁵

A survey conducted by the National Center for Fathering has found that 57.6% of all Americans believe employers do not recognize the strain

109. 29 U.S.C. § 2612 (b) (1994).

110. *See id.*

111. Whitlock, *supra* note 29.

112. *Id.*

113. Malin, *supra* note 26, at 1057.

114. *See* LINDA HAAS, EQUAL PARENTHOOD AND SOCIAL POLICY: A STUDY OF PARENTAL LEAVE IN SWEDEN 14–15 (1992).

115. CAL. LAB. CODE § 230.8 (Deering 2001).

fathers face when trying to balance the demands of family and work.¹¹⁶ These findings suggest that if they could take intermittent leave and, in effect, stretch out the allotted twelve weeks guaranteed under the FMLA, a more equal long-term division of parenting responsibilities between mothers and fathers would result.

Because, as discussed above, fathers are more likely to participate in scheduled parenting events,¹¹⁷ amending the FMLA to allow for intermittent leave would encourage them to be more active parents in a wider variety of situations. This would help to break down the gender assumptions that still exist in the workplace today, allowing them to take a more active role in the home and mothers to gain advantage in the workplace.

D. EXTENDING COVERAGE FOR PAID LEAVE

One major reason family leave is underutilized, especially by fathers, is that the FMLA mandates only *unpaid* leave.¹¹⁸ An employee may, however, substitute accrued paid vacation, personal, or medical or sick leave for the unpaid leave provided by the FMLA.¹¹⁹ The fact that leave is unpaid severely limits the benefits of the FMLA. According to one study, two-thirds of workers covered by the FMLA who need family leave do not take it because they cannot afford the lost wages.¹²⁰ An article published by the Institute for Women's Policy Research indicates that 64% of workers who need, but do not take, leave cannot afford the time without pay, and 21% of low-income workers who do take leave have to turn to welfare for support.¹²¹

In addition, companies that offer paid family leave often provide the benefit only to those workers on salary—generally higher-income workers who might actually be able to afford unpaid leave.¹²² A study completed by the Department of Labor reveals that salaried employees, more highly educated employees, unionized employees, and those employees with higher levels of household income are the most likely to receive paid leave.¹²³ The youngest and oldest employees, nonsalaried employees, and

116. Langdon, *supra* note 25.

117. Peterson, *supra* note 106.

118. See 29 U.S.C. § 102 (c) (1994).

119. See *id.* § 102 (d)(2)(a).

120. Reagan, *supra* note 104.

121. VICKY LOVELL & HEDIEH RAHMANOU, INST. FOR WOMEN'S POL'Y RES., PUB. NO. A124, PAID FAMILY AND MEDICAL LEAVE: ESSENTIAL SUPPORT FOR WORKING WOMEN AND MEN (2000).

122. See *id.*

123. WORKABLE BALANCE, *supra* note 64.

employees who have never been married are the least likely to receive paid leave.¹²⁴

For women who take maternity leave, the effects are even worse than the temporary income loss endured while they are on leave. Studies have indicated that women suffer “permanent, non-recoverable losses in lifetime earnings which have been estimated to average one-and-a-half percent for each year of absence.”¹²⁵ The FMLA does nothing to address this problem. Interestingly, a study done by researchers at the University of Washington has found that “[w]omen with access to paid leave . . . to work later into pregnancy . . . and . . . start work sooner once the infant [is] at least 2 months old.”¹²⁶ These findings indicate that providing paid leave would actually lead to women taking *less* time off, therefore minimizing the nonrecoverable income loss discussed above.

The FMLA also fails to address the problems faced by nontraditional families. According to legal scholars, “Most leave discussions have implicitly presumed a two-parent, heterosexual couple.”¹²⁷ The lack of paid leave makes the FMLA an almost meaningless right for single parents, who cannot take the unpaid leave provided for by the Act because they cannot do without their income for twelve weeks. As one parent comments, “If I had not been paid, I couldn’t have taken time off My husband and I both work, but it takes both our salaries to live. I don’t know how single parents manage.”¹²⁸ Some European countries have targeted benefits specifically for single-parent families. Additional benefits for single parents have included supplemental income, housing allowances, and child care subsidies, all benefits that make single parents far better off in Europe than in the United States.¹²⁹

The lack of paid leave has a profound effect across class, gender, and race lines. First, low-income families simply cannot afford the lost income at a time when family expenses increase because of the addition of a new family member.¹³⁰ Second, 30% of American families are single-parent families, and this is the dominant family form among African-Americans.¹³¹ Furthermore, women typically are heads of the household in

124. *Id.*

125. Korzec, *supra* note 8, at 129.

126. Jutta M. Joesch, *Paid Leave and the Timing of Women’s Employment Before and After Birth*, 59 J. MARRIAGE & FAM. 1008, 1008 (1997).

127. Dowd, *Family Values and Valuing Family*, *supra* note 9, at 353.

128. Reagan, *supra* note 104.

129. Dowd, *Family Values and Valuing Family*, *supra* note 9, at 362.

130. *Id.* at 341.

131. *Id.* at 342.

most single-parent families.¹³² Therefore, “the most disadvantaged group is currently composed of low-income single-parent black women.”¹³³

Not only does the lack of paid leave affect lower-income and single-parent families, it also reinforces existing gender stereotypes. Simply stated, pay is also a gender issue. “Unfortunately for men, their role as breadwinners interferes with their involvement with their children.”¹³⁴ Many fathers often respond to childbirth, and the increased expenses that go along with it, by working more hours to enable the family “to make ends meet. . . . The father’s primary role in providing economic security functions as a barrier to increased paternal involvement in the family.”¹³⁵ Other scholars hypothesize that taking leave is “not very manly.”¹³⁶ The temporary inability to provide an income, combined with the implication that they are less manly for wanting to take time with their families, may intimidate many fathers into not taking leave.

While the mother is expected to take time off, the father faces increased pressure to work more hours in order to make up for the potential loss of income due to his wife’s leave and the added expense of a new baby. Paid leave, therefore, may be the single most important amendment that could be made to existing family leave policy. It may also do away with some of the implication that a man who takes time off is a “wimp,”¹³⁷ because his ability to provide for his family is no longer at issue. For family leave to be a real benefit, and to encourage fathers to take a more active role in parenting, income replacement is probably a necessity. Nancy Dowd comments that it “encourages men, who generally earn more than women, to take leave.”¹³⁸

The question of how to finance paid leave is certainly a difficult one. Scholars have suggested that systems analogous to unemployment insurance or temporary disability insurance be put into place.¹³⁹ The models developed by other countries, such as Sweden, might provide some insight into potential solutions. Although cost concerns are definitely a factor, some studies indicate that implementing mandatory paid leave is financially feasible. The Institute for Women’s Policy Research has found that “[e]stimates of the cost of expanding [unemployment insurance] to cover birth and adoption leave range from \$11 to \$28 per worker per

132. *Id.*

133. *Id.*

134. Malin, *supra* note 26, at 1066.

135. *Id.*

136. Ligos, *supra* note 27.

137. *Id.*

138. Dowd, *Family Values and Valuing Family*, *supra* note 9, at 347.

139. See LOVELL & RAHMANOU, *supra* note 121.

year—a dollar or two a month.”¹⁴⁰ The California Employment Development Department estimates that “FMLA circumstances could be added to the state’s [temporary disability insurance] program for about \$22 per worker per year.”¹⁴¹ While implementing mandatory paid leave would entail a significant cost, perhaps the cost would not be prohibitive.

As Nancy Dowd explains: “Wage replacement is critical to make family leave a real benefit, to present a real opportunity for family formation, and to provide real support through serious family crisis.”¹⁴² It must be sufficient to allow the primary breadwinner to take time off for the birth or adoption of a child. If we cannot allow parents, and especially fathers, to be both providers and parents, the gender stereotypes that have remained so firmly entrenched may never be altered.

IV. CONCLUSION

Despite the passage of legislation such as the Family and Medical Leave Act, gender stereotypes about work and parenting have not changed substantially in the past thirty years. Women are still responsible for the majority of child care responsibilities, especially during emergencies. Men are still the primary breadwinners. Because of women’s role as primary caregivers, most find their career opportunities are limited. Furthermore, those fathers who would stay home and make family their first priority find that their careers suffer as a result. Workplace trends towards decreased flexibility and the decreasing availability of extended leave augment the problems faced by parents.

Although existing legislation has improved the situation, it has not gone far enough. In fact, to some degree, the FMLA has reinforced gender stereotypes. In order to allow women greater professional opportunity and to encourage men to accept greater involvement in home and family life, changes are needed. The FMLA should be amended to provide broader protection: It should be expanded to include smaller employers, and a broader variety of parenting responsibilities, including childhood illness and nonemergencies. Parents should be allowed to take the allotted twelve weeks of leave intermittently without having to make special arrangements with their employers. Finally, the Act should be amended to provide for paid leave.

These suggested amendments undoubtedly pose difficulties and new problems. Only with significant changes, however, can true gender equality be achieved.

140. *Id.*

141. *Id.*

142. Dowd, *Family Values and Valuing Family*, *supra* note 9, at 346.

Addendum

On September 23, 2002, California Governor Gray Davis signed into law Senate Bill 1661, making California the first state to enact a comprehensive paid family leave program.¹⁴³

Under the new law, a family temporary disability insurance program will provide up to six weeks of paid leave to employees who take time off “to care for a seriously ill child, spouse, parent, domestic partner, or to bond with a new child.”¹⁴⁴ The program will pay employees approximately 55% of their salary tax-free,¹⁴⁵ capping the amount at \$728 per week.¹⁴⁶ The benefit will be financed through payroll deductions for eligible workers,¹⁴⁷ ranging up to \$70 per year for people earning more than \$72,000 per year.¹⁴⁸ About thirteen million of California’s sixteen million workers will be eligible for this program.¹⁴⁹

Supporters of the bill hail it as a “model for the nation,”¹⁵⁰ and claim that paid leave will result in “happier, more focused workers who might otherwise be forced to quit their jobs because of family emergencies.”¹⁵¹ The bill itself states that the intent of the Legislature is to “help reconcile the demands of work and family.”¹⁵² Indeed, during the bill signing, Davis commented, “I don’t want parents in California to have to choose between being a good parent and a good employee.”¹⁵³

The California bill marks the first major victory for the growing national campaign for paid leave. Measures similar to the California bill have been introduced in nearly 30 states over the last two years, but none has been signed into law.¹⁵⁴ If the bill proves to be workable and successful in California, it may well pave the way for paid leave bills in other states,

143. Gregg Jones, *Davis to Sign Bill Allowing Paid Family Leave Benefits: Measure Grants Most Workers Time Off to Care for a New Child or Sick Family Members*, L.A. TIMES, Sept. 23, 2002, at A1.

144. 2002 Cal. Stat. 901.

145. *See id.*

146. Lisa Girion & Megan Garvey, *Davis OKs Paid Family Leave Bill Benefits: Governor Wins Praise from Advocates and Strong Criticism from Business Groups*, L.A. TIMES, Sept. 24, 2002, at B1.

147. *See* 2002 Cal. Stat. 901.

148. Jones, *supra* note 143.

149. *Id.*

150. *Id.*

151. *Id.*

152. 2002 Cal. Stat. 901.

153. Girion & Garvey, *supra* note 146.

154. Jones, *supra* note 143.

and possibly for federal legislation as well. As discussed in Part III of this Note, paid leave is perhaps the most important change that can be made in the effort to level the professional playing field for men and women. The California bill takes an important first step towards reducing gender discrimination at home and in the workplace.

