

## NOTE

### WORK-FAMILY POLICY IN THE UNITED STATES

*Natasha Bhushan\**

*Work-family policy in the United States is deficient, and in need of reform. Recent studies suggest that deficiencies in United States policy, including the lack of generous, paid parental leave, cause undue financial and emotional stress for individuals and families, and have implications for gender inequality. As few families have a full-time caregiver, individuals with children must perform dual, often conflicting roles as caregivers and workers. Entrenched stereotypes of women as caregivers and men as breadwinners help legitimize policies and social expectations that are hostile to workers who perform both roles. These policies and expectations hinder women's advancement in the workplace and prevent men from spending more time with their families. Amending the Family Medical Leave Act of 1993, which encompasses most of United States work-family policy, is one way to address the deficiencies of United States work-family policy. The Family Medical Leave Act should be changed to allow for paid leave, broader coverage, and greater scheduling flexibility. Additionally, Congress should act to reduce the legislative work week. These policy changes will allow individuals to spend more time with their families, thus reducing work-family conflicts, easing the financial burden on individuals taking leave, and ultimately helping to close the gender gap.*

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\* The author is a J.D. candidate at Cornell Law School. She received her B.A. in Economics from the University of California, Irvine. The author is grateful for the guidance of Professor Cynthia Bowman, and the support of classmates and radical feminists Angela Hoffman and Sepedeh Tofigh.

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## INTRODUCTION

Historically, public policies and labor markets in America were structured around the assumption that men were regularly-employed breadwinners upon whose earnings and social contributions women depended.<sup>1</sup> Related to this assumption was the normative idea that women should stay home to take on all domestic responsibilities, including childcare.<sup>2</sup> Despite men's and women's relatively equal contributions of work to the family unit, women, as social and economic dependents, were fundamentally unequal to men. Though the breadwinner/home-maker model never reflected a universal reality,<sup>3</sup> it described most middle-class and some working-class families, especially in the post-war period.<sup>4</sup>

Since then, America has experienced fundamental changes in family structures and the gender composition of the workforce.<sup>5</sup> Dual-income and single-parent families now predominate over the once common two-parent, single-earner household.<sup>6</sup>

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<sup>1</sup> See Jane Lewis, *The Decline of the Male Breadwinner Model: Implications for Work and Care*, 8 SOC. POL. 152, 153 (2001).

<sup>2</sup> The Supreme Court endorsed a similar view in *Bradwell v. Illinois*, 83 U.S. 130 (1873). In that case, the Court upheld the refusal of the Illinois Supreme Court to permit a married woman to become an attorney. *Id.* at 131. The ruling was based partly on the rationale that the state had an interest in promoting women's maternal functions, which were thought to be incompatible with work outside the home. *Id.* at 141 (Bradley, J., concurring). See also *Muller v. Oregon*, 208 U.S. 412 (1908) (upholding a state law which limited the number of hours women could work outside the home).

<sup>3</sup> In recent years, women have been engaged in the workforce, at least to some degree, and their participation is rising. In 1950, less than 40% of American women were in the labor force, but this number jumped to approximately 50% in 1980. See U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, PERSPECTIVES ON WORKING WOMEN: A DATABOOK (1980), available at <http://www.eric.ed.gov/ERICWebPortal/contentdelivery/servlet/ERICServlet?accno=ED198299>.

<sup>4</sup> See Lewis, *supra* note 1, at 152–53.

<sup>5</sup> JERRY A. JACOBS & KATHLEEN GERSON, *THE TIME DIVIDE: WORK, FAMILY, AND GENDER INEQUALITY I* (2004).

<sup>6</sup> In 2000, dual-earner families represented 59.6% of married couples. *Id.* at 43. Nearly 22% of families are single-mother and just over 2% are single-father. *Id.* at 51. Only 13% of families fit the woman as caregiver/man as breadwinner dynamic. See Donna E. Young, *Working Across Borders: Global Restructuring and Women's Work*, 2001 UTAH L. REV. 1, 3 (2001) (citing U.S. DEP'T OF LABOR, WOMEN'S BUREAU, FACTS ON WORKING WOMEN: WORK AND ELDER CARE: FACTS FOR CAREGIVERS AND THEIR EMPLOYERS (1998), available at <http://www.eric.ed.gov/PDFS/ED418290.pdf>).

Unfortunately, social expectations and public policy have lagged behind these demographic changes. Women's entry into the workforce did not lead to an equitable redistribution of work in the home.<sup>7</sup> Rather, women have taken on wage labor in addition to their traditional domestic responsibilities, while men's commitments have remained relatively constant.<sup>8</sup> Because women continue to do most of the domestic work—research indicates that in many families, the woman generally does at least five times the household work of the man<sup>9</sup>—stereotypes labeling women as caregivers and men as providers continue.<sup>10</sup> These stereotypes help legitimize public policies and workplace structures that are hostile to families that do not fit the breadwinner/homemaker dynamic. The gap between what current policies provide and what individuals need gives rise to work-family conflicts—time and emotional conflicts that arise due to an individual's dual roles as both breadwinner and caregiver. The promise of work-family policy is that it can help individuals find a healthy balance between their work and family lives to overcome these conflicts. Policies that support individuals in this capacity result in stronger communities and a more equitable society.<sup>11</sup>

Discussion of work-family policy is important in the United States, given the inadequacy of our current system. A Human Rights Watch study released in February 2011 concluded that the United States has inadequate work-family supports, which places great financial and emotional burdens on individuals and families.<sup>12</sup> The study indicates that the most significant failure of the United States system is the lack of paid parental leave, a right guaranteed in almost every country in the world.<sup>13</sup> Only the United States, Swaziland, and Papua New Guinea clearly offer no guarantee of paid maternity leave.<sup>14</sup> Australia's enactment of the Paid Parental Leave scheme in January 2011<sup>15</sup> means that the United States is

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<sup>7</sup> See Nancy E. Dowd, *Work and Family: The Gender Paradox and the Limitations of Discrimination Analysis in Restructuring the Workplace*, in APPLICATIONS OF FEMINIST LEGAL THEORY TO WOMEN'S LIVES: SEX, VIOLENCE, WORK, AND REPRODUCTION 549, 550 (D. Kelly Weisberg ed., 1996) [hereinafter *Work and Family*].

<sup>8</sup> See *id.*

<sup>9</sup> See *id.*

<sup>10</sup> See *id.* at 551–52.

<sup>11</sup> See Nancy E. Dowd, *Race, Gender, and Work/Family Policy*, 15 WASH U. J. L. & POL'Y 219 (2004) [hereinafter *Race*].

<sup>12</sup> See HUMAN RIGHTS WATCH, *FAILING ITS FAMILIES: LACK OF PAID LEAVE AND WORK-FAMILY SUPPORTS IN THE U.S.* at 1–5 (2011), available at <http://www.hrw.org/node/96432>.

<sup>13</sup> See *id.* at 1; see also REBECCA RAY ET AL., CTR. FOR ECON. & POL'Y RESEARCH, *PARENTAL LEAVE POLICIES IN 21 COUNTRIES: ASSESSING GENEROSITY AND GENDER EQUALITY* (revised 2009), available at <http://www.lisproject.org/publications/parentwork/parent-leave-report.pdf>. Parental leave is used as an umbrella term that includes leave for pregnancy, maternity, paternity, birth, adoption, and longer-term care of small children. *Id.*

<sup>14</sup> See HUMAN RIGHTS WATCH, *supra* note 12, at 1.

<sup>15</sup> Under the Paid Parental Leave scheme, eligible parents are entitled to eighteen weeks of leave paid at the National Minimum Wage. See AUSTRALIAN GOV'T DEP'T OF FAMILIES,

the only industrialized nation not to guarantee some form of paid parental leave.<sup>16</sup> A report by The Center for Economics and Policy Research focused on the relationship between parental leave policies and gender equality in twenty-one countries.<sup>17</sup> The report identified five parental leave practices highly correlated with gender equality: (1) generous, paid leave; (2) non-transferable quotas of leave for each parent; (3) universal coverage coupled with modest eligibility restrictions; (4) financing structures that pool risks among many employers; and (5) scheduling flexibility.<sup>18</sup> Of these five practices, the current United States system includes only one: non-transferability between parents.<sup>19</sup> This fact gains significance in the context of the World Economic Forum's 2009 Global Gender Gap report, which found that the United States ranks 31st in the world in gender equality, behind the vast majority of industrialized nations.<sup>20</sup>

The United States needs policy changes that address both the problems individuals face on a routine basis as well as overall gender inequality issues arising from the deficiencies of our work-family policy regime. State-level domestic policies, such as those in California, reveal possible avenues of reforming our current federal system. This Note will focus on the deficiencies of the current system, their effects, and ways in which our system can and should be reformed. Part I discusses the general need for work-family policy in the context of work-family conflicts. Part II explains the current work-family policy regime in the United States and its limitations. Part III suggests possible avenues of desirable policy change, and Part IV concludes.

## I. WORK-FAMILY CONFLICTS

A work-family conflict occurs when a worker's family demands interfere with that worker's participation in the workforce.<sup>21</sup> The major form of work-family conflict is the time conflict between career and caregiving responsibilities.<sup>22</sup> A time conflict implies both that a worker cannot physically be in two places at once and that the pressures from

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PAID PARENTAL LEAVE 1, available at [http://www.fahcsia.gov.au/sa/families/progserv/paid\\_parental/Pages/default.aspx](http://www.fahcsia.gov.au/sa/families/progserv/paid_parental/Pages/default.aspx); see also AUSTRALIAN GOV'T, AUSTRALIA'S PAID PARENTAL LEAVE SCHEME: SUPPORTING WORKING AUSTRALIAN FAMILIES (2009), available at <http://www.deewt.gov.au/Department/Publications/Documents/PPLBooklet.pdf>.

<sup>16</sup> See HUMAN RIGHTS WATCH, *supra* note 12, at 1.

<sup>17</sup> See RAY, *supra* note 13, at 1–2.

<sup>18</sup> See *id.* at 2.

<sup>19</sup> See *id.* at 2.

<sup>20</sup> See RICARDO HAUSMANN, LAURA D. TYSON & SAADIA ZAHIDI, THE GLOBAL GENDER GAP REPORT 2009 8, available at <https://members.weforum.org/pdf/gendergap/report2009.pdf>.

<sup>21</sup> See Patricia Voydanoff, *Work Demands and Work-to-Family and Family-to-Work Conflict: Direct and Indirect Relationships*, 26 J. FAM. ISSUES 707, 707–08 (2005).

<sup>22</sup> See Race, *supra* note 11, at 227–28.

one role can negatively affect one's performance of the other role.<sup>23</sup> One-third to one-half of working American parents report daily conflicts between work and family roles.<sup>24</sup> In a 2000 survey, thirty-percent of the total workforce reported that they had experienced at least one work-family conflict in the past week.<sup>25</sup> Work-family conflicts are not just limited to daily time conflicts; they can be long-term conflicts as well, arising out of the occupational cycles of particular jobs and the life cycles of individual family members and families.<sup>26</sup> To illustrate: success in many careers is a function of the level of work a worker puts in at the beginning of that career; but for many people, the early years of their careers coincide with years in which they start a family, which is often the time when their domestic duties are the most demanding.<sup>27</sup> Workers must engage in difficult balancing acts, sometimes at the expense of the healthy development of their children.<sup>28</sup> On a deeper level, there are also conflicts between the actual value of domestic care and the low value society places on that care as "women's work."<sup>29</sup>

American workers feel the strain of work-family conflicts more than workers in other developed countries.<sup>30</sup> This is due to a combination of two factors: (1) Americans work longer hours than workers in most other industrialized countries and (2) our policies provide inadequate support to families.<sup>31</sup> A major criticism of our current system is that it leaves the interface between work and family to private negotiation and workplace structures—structures that are still hostile to families without caregiver at home.<sup>32</sup> While policies in almost every European country and Japan have drastically reduced the average number of yearly work hours since 1979, the lack of public policies targeting work time in the United States means that American workers are working around the same amount of hours they did in 1979.<sup>33</sup> Our current system also results in workplace

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<sup>23</sup> Jeffrey H. Greenhaus & Nicholas J. Beutell, *Sources of Conflict Between Work and Family Roles*, 10 ACAD. OF MGMT REV. 76, 77–78 (1985).

<sup>24</sup> See *Work and Family*, *supra* note 7, at 549.

<sup>25</sup> See Debbie N. Kaminer, *The Work-Family Conflict: Developing a Model of Parental Accommodation in the Workplace*, 54 AM. U. L. REV. 305, 306 (2004).

<sup>26</sup> See *Race*, *supra* note 11, at 228.

<sup>27</sup> See *Work and Family*, *supra* note 7, at 550.

<sup>28</sup> See MARCIA K. MEYERS & JANET C. GORNICK, WORK/FAMILY RECONCILIATION POLICIES FOR THE UNITED STATES: LESSONS FROM ABROAD 2–3 (2004), available at [http://www.ssc.wisc.edu/~wright/Meyers\\_Gornick\\_Princeton\\_chapter1.pdf](http://www.ssc.wisc.edu/~wright/Meyers_Gornick_Princeton_chapter1.pdf).

<sup>29</sup> See *Race*, *supra* note 11, at 228.

<sup>30</sup> JOAN C. WILLIAMS & HEATHER BOUSHEY, THE THREE FACES OF WORK FAMILY CONFLICT: THE POOR, THE PROFESSIONALS, AND THE MISSING MIDDLE 1 (2010), available at [http://www.americanprogress.org/issues/2010/01/three\\_faces\\_report.html](http://www.americanprogress.org/issues/2010/01/three_faces_report.html).

<sup>31</sup> See *id.*

<sup>32</sup> See *Race*, *supra* note 11, at 227.

<sup>33</sup> See JANET C. GORNICK, ALEXANDRA HERON & ROSS EISENBREY, THE WORK-FAMILY BALANCE: AN ANALYSIS OF EUROPEAN, JAPANESE, AND U.S. WORK-TIME POLICIES 1 (2007),

discrimination and sex-segregated labor patterns,<sup>34</sup> which ultimately reinforce gender hierarchies and expectations. These social norms have impaired women's ability to combine waged work with domestic duties and prevented men from taking on a greater share of parenting responsibilities.<sup>35</sup> Women continue to define themselves in relation to their families, while men define themselves by their work.<sup>36</sup> This dichotomy will persist in the absence of policies targeted at changing workplace structures and gender equality in the home.

## II. CURRENT WORK-FAMILY POLICIES

Current federal work-family policies provide inadequate support to families because of their limited applicability, and when they do apply, they fail to account for individuals' dual identities as workers and caregivers.

### A. *Pregnancy Discrimination Act and Title VII*

The Pregnancy Discrimination Act of 1978 (PDA)<sup>37</sup> is an amendment to Title VII of the Civil Rights Act. The PDA provides that discrimination in hiring, firing, and providing fringe benefits on the basis of pregnancy, childbirth, or a related medical condition constitutes unlawful sex discrimination.<sup>38</sup> It applies to employers with more than fifteen employees, employment agencies, labor organizations, and the federal government.<sup>39</sup>

#### 1. History of the Pregnancy Discrimination Act

Congress enacted the PDA in response to the Supreme Court's decision in *General Electric Co. v. Gilbert*.<sup>40</sup> In *Gilbert*, the plaintiffs were female employees of General Electric who had been denied benefits for pregnancy under the company's disability plan.<sup>41</sup> The plan, which General Electric had voluntarily adopted, provided pay for disabilities arising from non-occupational sickness or accident.<sup>42</sup> The plaintiffs contended

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available at <http://www.sharedprosperity.org/bp189.html>. Average annual work hours have decreased by 300 in Japan since 1979. See *id.*

<sup>34</sup> See *Race*, *supra* note 11, at 230.

<sup>35</sup> See *id.*

<sup>36</sup> See *id.*

<sup>37</sup> Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076, 2076 (1978).

<sup>38</sup> 42 U.S.C. §§ 2000e(k), 2000e-2(a)-(c) (2006).

<sup>39</sup> 42 U.S.C. § 2000e(b).

<sup>40</sup> See 123 CONG. REC. 29641 (daily ed. Sept. 16, 1977) ("This legislation was made necessary by an unfortunate decision rendered by the Supreme Court in the case of *Gilbert v. General Electric*.").

<sup>41</sup> See *General Electric Co. v. Gilbert*, 429 U.S. 125, 128-129 (1976).

<sup>42</sup> See *id.* at 128.

that General Electric's exclusion of pregnancy from the scope of covered disabilities constituted sex-based discrimination under Title VII.<sup>43</sup> The District Court for the Eastern District of Virginia found for the plaintiffs and the Court of Appeals affirmed,<sup>44</sup> but the Supreme Court reversed.<sup>45</sup> The Supreme Court held that because pregnancy was significantly different from the typical sicknesses and disabilities covered under the plan, General Electric could permissibly exclude pregnancy from coverage.<sup>46</sup> Essentially, the Court was restating its position from *Geduldig v. Aiello*, decided earlier that term, which held that discrimination on the basis of pregnancy did not violate the Equal Protection Clause.<sup>47</sup>

Congress was clearly discontent with this outcome because less than two years later, it passed the PDA, which effectively created a cause of action for pregnancy discrimination under Title VII.<sup>48</sup> According to Senator Harrison Williams, the PDA's sponsor, its purpose was to "guarantee women the basic right to participate fully and equally in the workforce, without denying them the fundamental right to full participation in family life."<sup>49</sup>

## 2. Limitations of the Pregnancy Discrimination Act and Title VII

Despite its stated goal, the PDA has not proven very effective in promoting gender equality in the workplace. The PDA does not help female workers balance their home and family lives because it only prevents employers from taking adverse pregnancy-related employment actions; it does not provide rights to workers in the months and years following childbirth.<sup>50</sup> The PDA does not, and was never intended to, support workers in their caregiving responsibilities.<sup>51</sup> Employers are free to discriminate, and often do discriminate, against workers whose domestic duties make it difficult for them to work the same hours as their coworkers.<sup>52</sup> Because women still do the majority of caregiving, female workers feel the effects of this form of discrimination more acutely than men.<sup>53</sup>

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<sup>43</sup> See *id.* at 127–128.

<sup>44</sup> See *e.g., id.* at 132–133.

<sup>45</sup> *Id.* at 145–146.

<sup>46</sup> *Id.* at 142.

<sup>47</sup> *Geduldig v. Aiello*, 417 U.S. 484, 497 (1974).

<sup>48</sup> 42 U.S.C. §§ 2000e(k), 2000e-2(a)–(c) (2006).

<sup>49</sup> 123 CONG. REC. 29658 (daily ed. Sept. 16, 1977).

<sup>50</sup> Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076, 2076 (1978).

<sup>51</sup> See *id.*

<sup>52</sup> See Nicole Buonocore Porter, *Who Cares About Caregiving?: Using Communitarian Theory to Justify Protection of "Real Workers,"* 58 U. KAN. L. REV. 355, 361–62 (2010).

<sup>53</sup> See *id.*

The general prohibition on sex discrimination in Title VII provides slightly more protection than the PDA for female workers who are also caregivers.<sup>54</sup> A plaintiff bringing suit under Title VII must prove either that an employer treated her differently than similarly situated workers because of her sex or her sex plus another characteristic that places her in a subclass within her sex.<sup>55</sup> The first type of claim generally arises where a woman is passed over for a promotion in favor of a less-qualified man.<sup>56</sup> The second type arises where sex alone cannot account for discriminatory behavior.<sup>57</sup> Following the Equal Employment Opportunity Commission's 2007 guidance to employers regarding fair treatment of caregivers,<sup>58</sup> the First Circuit extended "sex-plus" claims to include caregiver discrimination.<sup>59</sup> In *Chadwick v. Wellpoint*, appellant was a woman with four school-age children who was passed over for a promotion in favor of a woman who was significantly less-qualified and had a lower job-performance rating.<sup>60</sup> The court held that a jury could reasonably find that a sex-based stereotype—a mother of young children could not handle the demands of work and home—was the reason appellant was not promoted.<sup>61</sup> Although this case represents a step towards recognition of caregivers' rights, it still frames the issue in terms of workers whose dual work and family roles do not, in fact, impair their work performance. The only worker-caregivers who can benefit under this framework are those whose dual roles do not affect their work performance. Even for those workers, however, protection from caregiver discrimination offers little support in their routine balancing of work and family duties.

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<sup>54</sup> See 42 U.S.C. § 2000e(2) (2006) (providing a cause of action for sex discrimination outside of the context of pregnancy).

<sup>55</sup> See, e.g., *Philipsen v. Univ. of Michigan Bd. of Regents*, No. 06-CV-11977-DT, 2007 WL 907822, at \*4 (E.D. Mich. Mar. 22, 2007) (defining "sex plus" discrimination as discrimination based on sex in conjunction with another characteristic).

<sup>56</sup> See, e.g., *Emmel v. Coca-Cola Bottling Co. of Chicago, Inc.*, 904 F. Supp. 723, 738–39 (N.D. Ill. 1995) (affirming the trial court's holding that the plaintiff was denied a promotion in favor of less-qualified men).

<sup>57</sup> See, e.g., *Philipsen*, 2007 WL 907822, at \*4.

<sup>58</sup> U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, *EMPLOYEE BEST PRACTICES FOR WORKERS WITH CAREGIVING RESPONSIBILITIES* (2009), available at <http://www.eeoc.gov/policy/docs/caregiver-best-practices.html>.

<sup>59</sup> See *Chadwick v. Wellpoint*, 561 F.3d 38, 46–47 (1st Cir. 2009).

<sup>60</sup> *Id.* at 41–42.

<sup>61</sup> See *id.* at 48 ("Given the common stereotype about the job performance of women with children and given the surrounding circumstantial evidence presented by *Chadwick*, we believe that a reasonable jury could find that WellPoint would not have denied a promotion to a similarly qualified man because he had 'too much on his plate' and would be 'overwhelmed' by the new job, given 'the kids' and his schooling." (internal citations omitted)).



### B. *The Family Medical Leave Act*

The Family Medical Leave Act of 1993 (FMLA)<sup>62</sup> was the first federal family-leave policy and encompasses most of the United States federal work-family policy.<sup>63</sup> The FMLA provides that an eligible employee<sup>64</sup> can take up to twelve weeks of unpaid leave due to a new child or serious illness, either one's own illness or the illness of an immediate family member.<sup>65</sup> Upon returning to work, the employee is entitled to restoration of the employee's previous position or, if the previous position is not available, an equivalent position.<sup>66</sup> The FMLA sets a floor of minimum requirements; states and employers are free to enact family and medical leave plans that are more generous.<sup>67</sup>

Congress defined several underlying purposes in its final draft of the FMLA.<sup>68</sup> These stated purposes include: (1) helping individuals balance their home and workplace demands in order to foster family stability and integrity; (2) minimizing the risk of sex-based employment discrimination by ensuring that leave is available for eligible medical reasons (including pregnancy) and for compelling family reasons on a gender-neutral basis; and (3) promoting equal employment opportunities for both men and women.<sup>69</sup> The FMLA's focus on gender-neutrality represents a victory for formal equality theorists<sup>70</sup> who argued, in the years prior to its passage, that employers should only be required to grant leave for pregnancy if employers would also be required to grant leave for other temporary disabilities.<sup>71</sup> Formal equality theorists were concerned

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<sup>62</sup> Pub. L. No. 103-3, 107 Stat. 6 (1993) (codified at 29 U.S.C. §§ 2601–2654 (2006)).

<sup>63</sup> See Kerry Anne Hoffman, Note, *The Work/Family Balance: New York's Struggle to Harmonize Domestic and Employment Spheres*, 16 *CARDOZO J.L. & GEND.* 93, 98 (2009); Pauline T. Kim, *The Family and Medical Leave Act of 1993: Ten Years of Experience*, 15 *WASH. U. J.L. & POL'Y* 1, 1 (2004).

<sup>64</sup> The FMLA defines an eligible employee as one who "has been employed for at least 12 months by the employer" and has worked "for at least 1,250 hours . . . during the previous 12 month period." 29 U.S.C. § 2611(2)(a).

<sup>65</sup> *Id.* § 2612.

<sup>66</sup> *Id.* § 2614(a)(1).

<sup>67</sup> See *id.* § 2651(b) ("Nothing in this Act or any amendment made by the Act shall be construed to supersede any provisions of any State or local law that provides greater family or medical leave rights than the rights established under this Act or any amendment made by this Act."); *id.* § 2653 ("Nothing in this Act or any amendment made by this Act shall be construed to discourage employers from adopting or retaining leave policies more generous than any policies that comply with the requirements under this Act or any amendment made by this Act.").

<sup>68</sup> See *id.* § 2601(b).

<sup>69</sup> See *id.*

<sup>70</sup> Formal equality theorists advocate sameness in treatment for men and women. See Martha Fineman, *Grappling with Equality: One Feminist Journey in TRANSCENDING THE BOUNDARIES OF LAW: GENERATIONS OF FEMINISM AND LEGAL THEORY* 50 (Martha Fineman ed., 2010).

<sup>71</sup> See, e.g., Amicus Brief of the American Civil Liberties Union et al. at 18–19, *Cal. Fed. Savings & Loan Ass'n v. Guerra*, 479 U.S. 272 (1987) (arguing that laws designed to

that mandating leave for pregnancy and childbirth alone would disincentivize employers from hiring women who would be perceived as being entitled to special (and costlier) treatment compared to men.<sup>72</sup> Despite its gender-neutral language and lofty goals, the FMLA has done little to advance gender equality or help individuals balance their work and family demands.<sup>73</sup>

### 1. History of the FMLA

The emergence of the widespread need for family leave policy in the United States was tied to the “increased importance of a second income to a household’s overall economic well-being.”<sup>74</sup> Stagnant men’s wages paired with high inflation rates starting in the 1970s and continuing into the early 1980s meant that both spouses had to participate in the workforce to maintain economic stability.<sup>75</sup> Mothers who left the workforce put their families at increasingly greater risk of sinking below the middle class.<sup>76</sup> Massachusetts was the first state to address this issue,<sup>77</sup> and in 1972, passed the nation’s first maternity leave policy.<sup>78</sup> Other states soon followed suit.<sup>79</sup> By the time President Clinton signed the FMLA into law in 1993, thirty-five states had some form of family leave policy in place.<sup>80</sup>

The FMLA was the result of a long and hard-fought battle between those who claimed that family-leave policy was an unnecessary government intrusion into families’ private lives and those who felt that family

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compensate women for the burdens of pregnancy reinforce stereotypes, deter employers from hiring women, and that providing gender-neutral benefits would serve the interests of women equally well).

<sup>72</sup> See *id.* at 34.

<sup>73</sup> See, e.g., Deborah J. Anthony, *The Hidden Harms of the Family and Medical Leave Act: Gender-Neutral Versus Gender-Equal*, 16 J. GEND. SOC. POL’Y & L. 459, 481 (“The FMLA is a gender-neutral policy, but it fails to consider the individual needs of women created by a social construct that places heavy burdens on them in the ‘private’ sphere of family life. As such, it tends to reinforce the disparity of those burdens while claiming to equalize them.”).

<sup>74</sup> KRISTIN SMITH ET AL., U.S. CENSUS BUREAU, MATERNITY LEAVE & EMPLOYMENT PATTERNS: 1961–1995 3 (2001), available at <http://www.census.gov/prod/2001pubs/p70-79.pdf>.

<sup>75</sup> See *id.* (citing FRANK LEVY, DOLLARS & DREAMS: THE CHANGING AMERICAN INCOME DISTRIBUTION (1987)).

<sup>76</sup> See *id.*

<sup>77</sup> See JOHN R. STUTTS & FRANK HEILAND, DIVERSITY IN U.S. FAMILY AND MEDICAL LEAVE POLICY: A COMPARISON OF FEDERAL AND STATE LEGISLATION BETWEEN 1972 & 2005 tbl. 1(2006).

<sup>78</sup> MASS. GEN. LAWS ANN. ch. 149, § 105D (1972).

<sup>79</sup> See generally STUTTS & HEILAND, *supra* note 77, at 3.

<sup>80</sup> See Carol Daugherty Rasnic, *The United States’ 1993 Family and Medical Leave Act: How Does It Compare with Work Leave Laws in European Countries?* 10 CONN. J. INT’L L. 105, 106 (1994).

policy was essential to support families and maintain a healthy society.<sup>81</sup> Even among those who supported parental leave policy, there was division about the scope of coverage (including the gender-neutrality debate discussed above), the length of allowable leave, and the extent to which the FMLA should seek to emulate European policies.<sup>82</sup> The most vocal outright opponent of the FMLA was the business community, which contended that family leave would be unduly burdensome and costly for employers.<sup>83</sup> Opponents also claimed that worker productivity would decline because the FMLA would encourage workers to prioritize their families over their work commitments.<sup>84</sup> Empirical data collected since the FMLA's passage shows that the allowance of parental leave decreases the costs of worker turnover and engenders employee loyalty and commitment to the company<sup>85</sup>, thus increasing employee productivity.<sup>86</sup>

## 2. Deficiencies of the FMLA

The contentious nature of the parental leave debate means that the FMLA represents a series of compromises between those in favor of family leave policy and the powerful interests that militated against it. This aspect of the policy, along with its facial gender neutrality, goes a long way in explaining why the FMLA is deficient in several key areas.

The first major problem with the FMLA is how few workers it covers due to the stringency of its eligibility requirements. The FMLA only applies to employers who have more than fifty employees.<sup>87</sup> Stacked upon this restriction is the requirement that employees must have worked at least 1,250 hours for their current employer during the twelve-months preceding their leave requests.<sup>88</sup> The result of these coverage limitations is that, in 2005, only fifty-four percent of the entire workforce was eligible to take FMLA leave.<sup>89</sup> Of the 65.5 million ineligible workers, 47.3

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<sup>81</sup> See ROSS D. PARKE, *FATHERHOOD* 98–106 (1996).

<sup>82</sup> See Anthony, *supra* note 73, at 470.

<sup>83</sup> See STEVEN K. WISENSALE, *FAMILY LEAVE POLICY: THE POLITICAL ECONOMY OF WORK AND FAMILY IN AMERICA* 95 (2001).

<sup>84</sup> See Erin Gielow, Note, *Equality in the Workplace*, 75 S. CAL. L. REV. 1529, 1541 (2002).

<sup>85</sup> See *id.* at 1549.

<sup>86</sup> See *id.* at 1538–1541. A 1995 survey by the Department of Labor found that between 89.2% and 98.5% of firms reported that FMLA compliance imposed no costs at all or only small costs. See DEP'T OF LABOR, U.S. COMM'N ON FAMILY & MED. LEAVE, *A WORKABLE BALANCE: REPORT TO CONGRESS ON FAMILY AND MEDICAL LEAVE POLICIES* xvii (1996), available at [http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1002&context=key\\_workplace](http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1002&context=key_workplace) [hereinafter *WORKABLE BALANCE*].

<sup>87</sup> 29 U.S.C. § 2611(4).

<sup>88</sup> *Id.* § 2611(2).

<sup>89</sup> See Kevin Miller, *The FMLA: Old Enough to Vote, but with Room to Grow*, INST. FOR WOMEN'S POL'Y RESEARCH, Feb. 4, 2011, <http://www.iwpr.org/blog/2011/02/04/the-fmla-old-enough-to-vote-but-with-room-to-grow/>.

million were ineligible because their employer was too small to be covered by the FMLA, and the remaining 18.3 million were ineligible because they had not worked the required number of months or hours for their current employers.<sup>90</sup>

The eligibility requirements disproportionately affect the poor, who are more likely to work for small employers, part-time, and in positions offering little job security. In 1996, only fifty-seven percent of workers making between twenty-thousand and thirty-thousand per year were covered, and only forty-two percent of workers making less than twenty-thousand per year were covered.<sup>91</sup>

The second problem with the FMLA is its inflexibility arising from the nature of its leave allowance and failure to account for non-traditional family structures. The FMLA only provides three months of leave<sup>92</sup>, which may not be enough in some situations. For example, if a child is born with a disability or a family member has a serious illness with a long recovery period, the worker may not be able to take enough time off to provide adequate care. The FMLA does not provide protection for routine childcare obligations that most commonly conflict with work requirements. For example, the FMLA does not ensure a worker time off to attend a parent-teacher conference.<sup>93</sup> It does not allow a worker time off to care for a child who has the chicken pox because that is not considered a serious illness.<sup>94</sup>

The FMLA's inflexibility is further evidenced by its narrow conception of family. The leave provision that allows time off for a new child covers a biological, adopted, and foster child, as well as a stepchild and legal ward.<sup>95</sup> However, it does not guarantee time off to care for the child of a non-marital partner, a restriction that has negative implications for gay and cohabiting couples.<sup>96</sup> This provision also fails to cover families in which the legal parent of the child is not the child's primary caregiver.<sup>97</sup> This limitation disproportionately affects women of color, who are more likely than white women to share their care-giving responsibilities with female family members and close friends, also known as

<sup>90</sup> See *id.*

<sup>91</sup> See WORKABLE BALANCE, *supra* note 86

<sup>92</sup> 29 U.S.C. § 2612.

<sup>93</sup> See Jennifer Thompson, Note, *Family and Medical Leave for the 21st Century?: A First Glance at California's Paid Family Leave Legislation*, 12 U. MIAMI BUS. L. REV. 77, 90 (2004).

<sup>94</sup> See *id.*

<sup>95</sup> *Id.* at 86–87.

<sup>96</sup> *Id.* at 87.

<sup>97</sup> See *id.*

“fictive kin.”<sup>98</sup> The FMLA does not cover aunts, grandmothers, or fictive kin.<sup>99</sup>

Another problem with the FMLA is that it does not provide for any paid leave time. This means that many workers, who are otherwise eligible to take leave, chose not to do so because they cannot afford it.<sup>100</sup> A 2000 study by the Department of Labor found that, among workers who reported that they needed FMLA leave but did not use it, seventy-eight percent said it was because they could not afford to take unpaid leave time.<sup>101</sup>

As with other deficiencies of the FMLA, the lack of paid leave has disproportionate effects on low-income workers. Almost three out of four low-income employees who take family and medical leave are unpaid during that time, compared to one in three middle-income workers.<sup>102</sup> This reflects the fact the employers are more likely to voluntarily offer paid leave to middle-income workers, over and above the minimum FMLA requirements. Twenty-nine percent of all workers who receive less than their full salary while on leave borrow money, thirty-eight percent postpone paying bills, and nine percent start receiving public assistance.<sup>103</sup> Taking time off to attend to pressing family or medical needs should not require employed individuals to resort to desperate measures to meet their basic needs.

Despite the FMLA’s stated gender-equality goals and facial gender-neutrality, its eligibility restrictions and the lack of paid leave reinforce gender inequality. Specifically, the FMLA has not significantly affected leave taking patterns in relation to gender, thus perpetuating stereotypes of women and caregivers and restricting their employment opportunities and advancement.<sup>104</sup> Data collected prior to the passage of the FMLA indicates that female workers almost always took time off for new children, even if they were not guaranteed job restoration, and male workers almost never took time off for new children even if they were guaranteed job restoration.<sup>105</sup> After the FMLA, college-educated women were ten

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<sup>98</sup> See generally Naomi Gerstel & Natalia Sarkisian, *Sociological Perspective on Families and Work: The Import of Gender, Class, and Race*, in THE WORK AND FAMILY HANDBOOK: MULTI-DISCIPLINARY PERSPECTIVES, METHODS, AND APPROACHES 237, 255 (Marcie Pitt-Catsouphes, Ellen Ernst Kossek & Stephen Sweet eds., 2006).

<sup>99</sup> See Thompson, *supra* note 93 at 86–87.

<sup>100</sup> Jane Waldfogel, *Family and Medical Leave: Evidence from the 2000 Surveys*, 124 MONTHLY LABOR REV. 17, 18 (2001).

<sup>101</sup> *Id.* at 20.

<sup>102</sup> See DEP’T OF LABOR, THE 2000 SURVEY REPORT ch. 4, <http://www.dol.gov/whd/fmla/chapter4.htm> [hereinafter 2000 SURVEY REPORT].

<sup>103</sup> See *id.*

<sup>104</sup> Joanna L. Grossman, *Job Security Without Equality: The Family Medical Leave Act of 1993*, 15 WASH. U. J. L. & POL’Y 17, 56–57 (2004).

<sup>105</sup> *Id.* at 29.

percent more likely to take maternity leave, while the FMLA had no measurable effect on leave-rates among women without college degrees.<sup>106</sup> There is little evidence to suggest that the FMLA has had any effect on men's parental leave taking or leave lengths.<sup>107</sup>

Although both men and women are equally likely to work for an FMLA-eligible employer, a woman with young children is ten percent less likely to meet the employee-eligibility requirements than a man with young children.<sup>108</sup> Among these workers with young children, however, women are thirty percent more likely than men to take leave.<sup>109</sup> Given the fact that the average full-time female worker earns only seventy-seven cents on the dollar compared to the average full-time male worker,<sup>110</sup> these leave-taking patterns make sense. Families deciding which partner should take leave (or leave the workforce entirely) to take on domestic responsibilities naturally choose the partner with the lower salary.<sup>111</sup> However, this seemingly rational choice perpetuates the cycle of fewer job opportunities and lower wages for women.<sup>112</sup>

### III. POLICY REFORM

The United States is in need of comprehensive policy reform in order to remedy the inadequacies of its current work-family laws. Family-leave and work-time reform can work together to alleviate many of the hardships individuals face on a routine basis. However, given the mas-

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<sup>106</sup> Wen-Jui Han, Christopher Ruhm & Jane Waldfogel, *Parental Leave Policies and Parents' Employment and Leave-Taking*, 28 J. POL'Y ANALYSIS & MGMT. 29, 47 (2009).

<sup>107</sup> See Wen-Jui Han & Jane Waldfogel, *Parental Leave: The Impact of Recent Legislation on Parents' Leave Taking*, 40 DEMOGRAPHY 191, 197-98 (2003); see also Michael Selmi, *Is Something Better than Nothing? Critical Reflections on Ten Years of the FMLA*, 15 WASH. U. J.L. & POL'Y 65, 74-75 (2004) (examining the FMLA commission's statistics regarding the frequency and type of usage of FMLA leave by males). The FMLA has marginally increased the length of men's leave during the month of a child's birth but has not resulted in a greater percentage of men taking leave during the birth month. Furthermore, the FMLA has had no effect on men's leave-taking or leave length before or after the birth month. See Han & Waldfogel, 40 DEMOGRAPHY at 197, Table 2.

<sup>108</sup> See Waldfogel, *supra* note 100 at 21.

<sup>109</sup> See *id.*

<sup>110</sup> See ROBERT DRAGO & CLAUDIA WILLIAMS, INST. FOR WOMEN'S POL'Y RESEARCH, *THE GENDER WAGE GAP: 2009*, at 1 (2010) ("The ratio of women's and men's median annual earnings, was 77.0 for full-time, year-round workers in 2009"), <http://www.iwpr.org/publications/pubs/the-gender-wage-gap-2009>.

<sup>111</sup> See STEPHEN J. ROSE & HEIDI I. HARTMAN, INST. FOR WOMEN'S POL'Y RESEARCH, *STILL A MAN'S LABOR MARKET: THE LONG-TERM EARNINGS GAP 5* (2004) ("[S]ince the husband usually earns more than his wife, less income is lost if the lower earner cuts back on her labor force participation.").

<sup>112</sup> *Id.* "[A] major reason for the gender gap in cumulative earnings is the self-reinforcing gendered division of labor in the family and its implications for women's labor market time . . . an ideology develops that . . . [results] in many more men in men's jobs with higher pay and long work hours and many more women working in women's jobs with lower pay and spending considerable time on family care." *Id.*

sive political opposition that even small changes in work-family policy are likely to encounter,<sup>113</sup> the generous leave policies of high-performing countries, such as Sweden and the Iceland,<sup>114</sup> are almost entirely off the table. Nevertheless, small changes, such as those adopted by a minority of states, that conform to the basic principles behind internationally successful policies can address some of the deficiencies of our current federal system. These basic principles that our system needs to and can feasibly address are: flexible, paid leave that minimizes the financial risk for individual employers; reduced work hours; and broad employee coverage.

These changes can help minimize work-family conflicts and the associated stress they impose on American workers. They can also encourage greater male participation in care-giving responsibilities, thus reducing gender inequality in the home and the workplace.

#### A. *Paid Leave*

The paid parental leave scheme in California can serve as a model for FMLA paid leave reform. In 2002, California enacted the Paid Family Leave program (PFL) to provide workers with up to six weeks of leave per year to bond with a new child or care for a seriously ill family member.<sup>115</sup> During those six weeks, employees receive approximately fifty-five percent of their wages from the state's temporary disability insurance program,<sup>116</sup> which itself is entirely funded by a 1.2 percent employee payroll tax.<sup>117</sup> Employees entitled to FMLA protections must take both PFL and FMLA leaves concurrently.<sup>118</sup> Both New Jersey and Washington have adopted schemes similar to California's.<sup>119</sup> Several other states, including Arizona, Illinois, Maine, Massachusetts, Missouri, New Hampshire, New York, Oregon, and Pennsylvania, are considering establishing paid leave programs.<sup>120</sup>

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<sup>113</sup> See generally WILLIAMS & BOUSHEY, *supra* note 30 (discussing the political impasse associated with work-family policy in the United States and its causes).

<sup>114</sup> See HUMAN RIGHTS WATCH, *supra* note 12, at 34. Sweden gives fathers a year or more of paid leave. Iceland gives parents nine months of leave divided into thirds: the mother and father each get one-third, and the remaining third is divided as the parents desire.

<sup>115</sup> See CAL. UNEMP. INS. CODE § 2601 (West 2011).

<sup>116</sup> See CAL. UNEMP. INS. CODE § 3301(b) (West 2011).

<sup>117</sup> See EILEEN APPELBAUM & RUTH MILKMAN, CTR. FOR ECON. & POL'Y RESEARCH, LEAVES THAT PAY: EMPLOYER AND WORKER EXPERIENCES WITH PAID FAMILY LEAVE IN CALIFORNIA 7 (2011).

<sup>118</sup> See CAL. UNEMP. INS. CODE § 3303(f) (West 2011).

<sup>119</sup> See Adrienne Lu, *Paid Family Leave Law Now in N.J.*, PHILA. INQUIRER, May 3, 2008, available at [http://articles.philly.com/2008-05-03/news/24989936\\_1\\_philip-kirschner-paid-family-leave-weeks-of-unpaid-family](http://articles.philly.com/2008-05-03/news/24989936_1_philip-kirschner-paid-family-leave-weeks-of-unpaid-family).

<sup>120</sup> APPELBAUM & MILKMAN, *supra* note 117, at 3.

Though the current Congress may feel otherwise,<sup>121</sup> amending the FMLA to establish an employee-funded paid leave program is both desirable and palatable. Paid leave can help low-income and single-family households better cope with necessary family and medical leave. It can also induce more fathers to take parental leave; one estimate suggests that twenty percent more fathers would take parental leave if the FMLA provided six weeks of paid leave.<sup>122</sup> Paid leave has the potential to alter the existing gender norms of parenting and address the prevailing social and cultural constructions of motherhood and fatherhood, which prevent women from achieving workplace equality and men from fulfilling their desire to spend more time with their children.<sup>123</sup>

Because these types of paid leave schemes are funded by an employee payroll tax,<sup>124</sup> they impose no direct monetary costs on employers and relatively low costs overall. The Institute for Women's Policy Research estimates that the annual cost of providing paid leave would be only thirteen dollars per worker.<sup>125</sup> Some evidence suggests that paid leave programs can actually have a positive effect on businesses.<sup>126</sup>

### B. Broad Coverage

The FMLA's current eligibility requirements leave many workers uncovered,<sup>127</sup> and without any recourse when they need to take family or medical leave. Some states have responded by covering employers with less than fifty employees.<sup>128</sup> Vermont has the most generous employer eligibility policy: employers with ten or more employees must provide FMLA parental leave<sup>129</sup> and employers with fifteen or more employees

<sup>121</sup> Political opponents obstructed the Obama administration's efforts to allocate funds in the 2011 federal budget for state-level paid family leave programs. *See id.*

<sup>122</sup> Michael Selmi, *Family Leave and the Gender Wage Gap*, 78 N.C. L. REV. 707, 771 (2000).

<sup>123</sup> *See* Nancy E. Dowd, *Family Values and Valuing Family: A Blueprint for Family Leave*, 30 HARV. J. ON LEGIS. 335, 349 (1993). *See also* Selmi, *supra* note 122, at 711 n.12 ("Nearly every poll suggests that men would like to take more family leave and would be willing to trade some income for more time with their families.").

<sup>124</sup> APPELBAUM & MILKMAN, *supra* note 117, at 2.

<sup>125</sup> MICHELE I. NAPLES, INST. FOR WOMEN'S POL'Y RESEARCH, FAMILY LEAVE FOR LOW-INCOME WORKING WOMEN: PROVIDING PAID LEAVE THROUGH TEMPORARY DISABILITY INSURANCE, THE NEW JERSEY CASE 4 (2001).

<sup>126</sup> An employer survey found California's PFL had "no noticeable effect" or "positive effect" on productivity (88.5%), profitability (91%), turnover (92.8%), and morale (98.6%). *See* APPELBAUM & MILKMAN, *supra* note 117, at 8.

<sup>127</sup> *See* COMM'N ON FAMILY & MED. LEAVE, *supra* note 86 (suggesting that only slightly more than half of American workers meet the eligibility requirements).

<sup>128</sup> *See, e.g.*, ME. REV. STAT. ANN. tit. 26, § 843.3.B (1987) (covering private employers with 15 or more employees); MINN. STAT. ANN. § 181.940 subdiv. 3 (West 2006) (requiring employers with more than 21 employees to provide FMLA parental leave); OR. REV. STAT. § 659A.153(1) (2009) (covering employers with 25 or more employees).

<sup>129</sup> VT. STAT. ANN. tit. 21, § 471(4).



must provide FMLA family and medical leave.<sup>130</sup> California's PFL applies to almost all workers<sup>131</sup> with no significant negative effects on businesses.<sup>132</sup> The arguments against broadening the applicability of the FMLA have been recycled from the arguments against enacting the FMLA.<sup>133</sup> These arguments are: (1) small businesses will face increased costs and (2) worker productivity will decline.<sup>134</sup> However, the data that has emerged in the eighteen years since the FMLA's passage directly contradict these points.<sup>135</sup> Almost all businesses, including small businesses, either feel no difference or benefit from providing family and medical leave.<sup>136</sup>

Another mechanism to broaden coverage would be to expand the definition of family member under the FMLA. Under the California system, the definition of child includes the child of a domestic partner.<sup>137</sup> The Hawaii version of the FMLA covers grandparents.<sup>138</sup> The federal FMLA's definition could be expanded in a similar way, and also to provide coverage for the siblings of a parent. This would benefit families where aunts and uncles share caregiving responsibilities. Figuring out how to provide coverage for fictive kin might be more difficult, given the difficulty for an employee to prove the existence of that type of relationship, which is based on an emotional rather than biological connection. One way around this problem would be for employers to grant leave for fictive kin on a discretionary basis. The current FMLA relies on employer discretion for other issues, such as whether to grant leave without proper notice,<sup>139</sup> so this type of provision would not be unprecedented. It is not a perfect solution because it may prevent some fictive kin from taking necessary leave, but it is better than the current system, under which fictive kin have no grounds at all for taking leave.

### C. *Scheduling Flexibility*

The FMLA should also be amended to allow for scheduling flexibility, which can take different forms. One form is "flextime," in which an individual can arrive at work during a given time window and then work

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<sup>130</sup> *Id.* § 471(3).

<sup>131</sup> See 2002 Cal. Legis. Serv. 4369 (West); see also Gregg Jones, *Davis to Sign Bill Allowing Paid Family Leave*, L.A. TIMES, Sept. 23, 2002, at A1 (predicting that 13 million of California's 16 million workers would be PFL-eligible).

<sup>132</sup> See APPELBAUM & MILKMAN, *supra* note 117, at 8.

<sup>133</sup> See Erin Gielow, *supra* note 85, at 1539.

<sup>134</sup> See *id.* at 1539–41.

<sup>135</sup> See *id.*

<sup>136</sup> See APPELBAUM & MILKMAN, *supra* note 117, at 8.

<sup>137</sup> See 2002 Cal. Legis. Serv. 4370 (West).

<sup>138</sup> HAW. CODE R. § 12-27-1 (Weil 2011).

<sup>139</sup> See 29 C.F.R. § 825.302 (2011).

a full day after that.<sup>140</sup> A 1998 survey found that more than eighty-percent of workers were in favor of a flextime benefit.<sup>141</sup> A second form of scheduling flexibility is “comp time,” in which a worker can trade overtime work for time off instead of extra pay.<sup>142</sup> The advantages of these options are that they allow parents to better adapt their schedules to their specific child-care needs and would encourage more men to participate in childcare.<sup>143</sup> The disadvantage is that parents would still have to put in the same number of hours into their work duties.

The final way the FMLA should be amended is to entitle workers to intermittent leave, in which the total allowable leave time could be taken in days or hours at a time. The FMLA currently allows an intermittent leave schedule only when the employer agrees to it.<sup>144</sup> Besides providing parents with the maximum amount of leave and work-time flexibility, this scheme would also encourage fathers to take more active parenting roles.<sup>145</sup> Additionally, this would allow a parent to stay home with his or her child when the child is sick, but does not have a serious illness.<sup>146</sup>

While a system that incorporated one or all of these scheduling flexibilities would increase an individual’s ability to meet family responsibilities<sup>147</sup>, such a system would only remedy part of the problem giving rise to the high-level of work-family strain American workers face. The utility of amending the FMLA to allow for scheduling flexibility would only be maximized in conjunction with policies that reduce the number of hours employees must work overall.<sup>148</sup>

#### D. *Reduced Work-Time*

The United States is the only high-income nation where the average worker’s weekly hours have increased since 1979.<sup>149</sup> This increase is especially problematic given the growing percentage of dual-earner

<sup>140</sup> Chuck Halverson, Note, *From Here to Paternity: Why Men are Not Taking Paternity Leave Under the Family and Medical Leave Act*, 18 WIS. WOMEN’S L.J. 257, 274 (2003).

<sup>141</sup> *Id.* at 274–75.

<sup>142</sup> *Id.* at 275.

<sup>143</sup> *See id.*

<sup>144</sup> 29 U.S.C. § 2612(b)(1) (2006) (“Leave . . . shall not be taken by an employee intermittently or on a reduced leave schedule unless the employee and the employer of the employee agree otherwise”).

<sup>145</sup> See Gielow, *supra* note 84, at 1545.

<sup>146</sup> *See generally* Seidle v. Provident Mut. Life Ins. Co., 871 F. Supp. 238 (E.D. Pa 1994) (interpreting the “serious health condition” provision of the FMLA); *see also* Gielow, *supra* note 84, at 1542–43 (discussing *Seidle*).

<sup>147</sup> *See* Halverson, *supra* note 140, at 277.

<sup>148</sup> *See generally* WILLIAMS & BOUSHEY, *supra* note 30, at 1.

<sup>149</sup> For example, American workers worked an average of eleven hours more each week in 2006 than they did in 1979. *See id.*

couples, who have less time and energy to spend in their family role.<sup>150</sup> Evidence from the European Union and Japan suggests that decreasing work-time can have positive effects for both workers and employers.<sup>151</sup> American workers can benefit from having more time to spend with their families, and employers can benefit from higher employee morale, greater employee retention,<sup>152</sup> and increased worker efficiency.<sup>153</sup>

There are three basic mechanisms by which to reduce overall work-time. They are: (1) reducing the legislatively approved full-time work week; (2) guaranteeing workers an adequate, yearly allowance of paid days away from the workplace; and (3) making part-time work more accessible and desirable.<sup>154</sup> Scholars have used these general mechanisms to formulate specific policy recommendations for the United States.<sup>155</sup> First, legislators should set the full-time workweek within the range of thirty-five to thirty-nine hours.<sup>156</sup> This would give individuals more time to spend with their families on a daily basis and would increase the likelihood that men would participate more in caregiving.<sup>157</sup> Second, the work-year should be shortened to forty-eight weeks.<sup>158</sup> One month of paid leave per year could alleviate some of the strain associated with parents having to find childcare over summer breaks and would give workers the opportunity to have uninterrupted family time.<sup>159</sup> Third, part-time workers should receive benefits and per-hour pay on par with full-time workers performing similar tasks in the same workplace.<sup>160</sup> This would help ensure economic security for part-time workers' families and would incentivize more workers to take on part-time work.<sup>161</sup>

## CONCLUSION

Work-family policies in the United States have not kept pace with our changing demographics. Increased female workforce participation means that most families do not have a full-time caregiver at home. Current policies aimed at helping these types of families are among the least

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<sup>150</sup> See Phyllis Moen, Erin L. Kelly & Rachele Hill, *Does Enhancing Work-Time Control and Flexibility Reduce Turnover? A Naturally Occurring Experiment*, 58 SOC. PROBLEMS 69, 69–70 (2011).

<sup>151</sup> See, e.g., GORNICK ET AL., *supra* note 33 at 7–8.

<sup>152</sup> See Moen et al., *supra* note 150, at 82.

<sup>153</sup> See Gielow, *supra* note 84, at 1539–41.

<sup>154</sup> See GORNICK ET AL., *supra* note 33.

<sup>155</sup> *Id.*

<sup>156</sup> See *id.* at 8.

<sup>157</sup> See *id.*

<sup>158</sup> See *id.* at 8–9.

<sup>159</sup> See *id.* at 9.

<sup>160</sup> See *id.* at 5.

<sup>161</sup> See *id.* This policy would also encourage mothers to seek part-time work, who may choose non-employment because part-time work is not available. See *id.*

generous in the world and ultimately perpetuate gender norms and expectations. Individuals are finding it increasingly difficult to meet their own and their families' economic, emotional, and developmental needs while women continue to face workplace inequality. Comprehensive policy reform can help individuals meet their needs by supporting them in their dual roles as workers and caregivers. Policy reform can also induce men to take more active roles in caregiving, thus changing workplace ideology regarding gender, and allowing women greater wage and opportunity parity.