



AMERICAN
CONSTITUTION
SOCIETY FOR
LAW AND POLICY



Issue Brief

**Free Riding on Families:
Why the American Workplace Needs to
Change and How to Do It**

By Phoebe Taubman

December 2009

All expressions of opinion are those of the author or authors.
The American Constitution Society (ACS) takes no position on specific legal or policy initiatives.

Free Riding on Families: Why the American Workplace Needs to Change and How to Do It

Phoebe Taubman*

I. Introduction

When we think about the resources required to power our 21st century, 24/7 economy, we may think of electricity to run our factories and office buildings, fuel to power delivery trucks and airplanes, and technology to speed our communications. We may even think about the human power it takes to produce the goods and services bought and sold each day. But how many of us also remember the often unpaid work of caring for families, upon which we all rely and without which our economy would founder?

Our economy is built on the invisible and free labor of millions who provide essential care to their families, whether it is the education and socialization of the next generation of workers or the comfort and care of the elderly. Unpaid family carework produces extensive benefits for society as a whole. Yet much like the natural resources of the earth, we have long relied on the resource of family care without fully recognizing its value, and we often go so far as to penalize those who provide it.

The vast majority of unpaid caregiving work is done by women, and the cost to them is staggering. In the United States, motherhood is the single biggest risk factor for poverty among women in old age.¹ For every two years a woman is out of the workforce, her earnings fall 11%, and this “mommy penalty” stays with her for the rest of her life.² One study measured the pay gap between prime-age working men and women over a 15-year period and found that the women earned only 38% of what the men did during that time – a 62% wage gap – in large part because of lost wages and pay penalties arising from time taken off for caregiving.³

Our society as a whole also incurs real costs from our failure to value and support the work of caring. Families, not just women, suffer from the motherhood pay gap as they rely on the earnings of mothers who bring home over one third of total family income in married-couple households.⁴ Employers suffer from the loss of highly-qualified women who have left the paying workforce to care for family, only to find it difficult to return and resume their careers.⁵ As a society, we suffer from the increased health costs associated with work/life conflict. One

* Phoebe Taubman is an Equal Justice Works Fellow with A Better Balance: The Work and Family Legal Center, based in New York City. This Issue Brief was first released by ACS in December 2009.

¹ ANN CRITTENDEN, *THE PRICE OF MOTHERHOOD: WHY THE MOST IMPORTANT JOB IN THE WORLD IS STILL THE LEAST VALUED* (Henry Holt & Co. 2001).

² Heather Boushey, Senior Economist, Center for Economic and Policy Research, Perspectives on Work/Family Balance and the Federal Equal Employment Opportunity Laws: Meeting of the EEOC (Apr. 17, 2007), available at <http://www.eeoc.gov/eeoc/meetings/archive/4-17-07/boushey.html>.

³ *Strengthening the Middle Class: Ensuring Equal Pay for Women: Hearing Before the H. Comm. on Educ. & Labor*, 110th Cong. (2007) (statement of Heather Boushey, Senior Economist, Center for Economic and Policy Research), available at <http://www.cepr.net/index.php/publications/testimony/middle-class-equal-pay/>.

⁴ *Id.*

⁵ SYLVIA ANN HEWLETT & CAROL BUCK LUCE, *OFF-RAMPS AND ON-RAMPS: KEEPING TALENTED WOMEN ON THE ROAD TO SUCCESS* (Harvard Business School Press 2005).

recent report pointed to a correlation between parental work-family conflict and childhood obesity, and highlighted increased rates of anxiety disorders and substance dependence among parents who reported work/family stress.⁶

For a country whose politicians tout family values, the United States has done little to confront these costs and support the critical work that families provide. Compare our public policies to those of our peers around the world. One hundred and seventy-seven nations guarantee leave with income to women in connection with childbirth.⁷ Seventy-four countries ensure paid paternity leave or the right to paid parental leave for fathers.⁸ The United States guarantees no paid leave for mothers in any segment of the work force – putting it in the company of Liberia, Papua New Guinea, Samoa, Sierra Leone, and Swaziland – and no paid paternity or parental leave for fathers.⁹ Today, 163 countries guarantee a minimum number of paid sick days for short- or long-term illness, with 155 providing a week or more per year.¹⁰ In the United States, we have no guarantee of paid sick days, and even among workers who do have sick leave, only 30% can use that time to care for sick children.¹¹ In 1997, the European Union issued a directive to its member states seeking to eliminate discrimination against part-time workers, the majority of whom are women, and improve the quality of part-time work.¹² In the United States, part-time workers are routinely excluded from labor and employment laws and courts have generally rejected their claims of discrimination based on part-time status.

Our workplace norms and laws were developed over 50 years ago when a different workforce model and a different family model prevailed. In 1960, 70% of families had at least one parent at home full time,¹³ but today 70% of children are growing up in families headed by either a single working parent or two working parents.¹⁴ In 1975, 47% of mothers with children under 18 years of age were in the workforce; today 71% of them are working outside the home.¹⁵ Today, one in five Americans provides care to another adult, and the number will only grow as baby boomers age.¹⁶ Despite these tectonic shifts in our workforce demographics, and the

⁶ KELLEEN KAY & DAVID GRAY, NEW AMERICAN FOUNDATION, *THE STRESS OF BALANCING WORK AND FAMILY: THE IMPACT ON PARENTS AND CHILD HEALTH AND THE NEED FOR WORKPLACE FLEXIBILITY* (Oct. 2007), available at http://www.newamerica.net/publications/policy/stress_balancing_work_and_family.

⁷ Jody Heymann & Alison Earle, *Raising the Global Floor: Dismantling the Myth that We Can't Afford Good Working Conditions for Everyone*, Capitol Hill Briefing, Nov. 17, 2009 (on file with author). Additional statistics and information can be found at <http://raisingtheglobalfloor.org/>.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ VICKY LOVELL, INSTITUTE FOR WOMEN'S POLICY RESEARCH, *NO TIME TO BE SICK: WHY EVERYONE SUFFERS WHEN WORKERS DON'T HAVE PAID SICK LEAVE* 9, Table 3 (2004), available at <http://www.iwpr.org/pdf/B242.pdf>.

¹² Council Directive 97/81 1998 O.J. (L 14) 9-14, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:1998:014:0009:0014:EN:PDF>.

¹³ MULTISTATE WORKING FAMILIES CONSORTIUM, *FAMILY VALUES AT WORK: IT'S ABOUT TIME* 5 (2008), available at <http://www.kidscount.org/news/May2008/PDFs/FV@workSummary1.pdf>.

¹⁴ HEATHER BOUSHEY, CENTER FOR AMERICAN PROGRESS, *EQUAL PAY FOR BREADWINNERS* 8 (Jan. 2009), available at http://www.americanprogress.org/issues/2009/01/gender_economy_report.html.

¹⁵ *WOMEN IN THE LABOR FORCE: A DATABOOK (2009 EDITION), TABLE 7: EMPLOYMENT STATUS OF WOMEN BY PRESENCE AND AGE OF YOUNGEST CHILD, MARCH 1975-2008*, Bureau of Labor Statistics, available at <http://stats.bls.gov/cps/wlftable7.htm>.

¹⁶ NATIONAL ALLIANCE FOR CAREGIVING & AARP, *CAREGIVING IN THE U.S.* iv (2005), available at <http://www.caregiving.org/data/04execsumm.pdf>.

altered reality for most American families, our laws and policies retain an embedded bias against working families that is harming a majority of workers today and preventing them from realizing their full potential both at work and at home. It is time to adapt our laws to reflect and support the way Americans live and work today.

Each section of this Issue Brief discusses a potential change in law or policy that would recognize families' contributions to our economy and begin to value that work. Some of these ideas are already being considered and/or implemented in a variety of U.S. cities and states, as well as overseas, and all of them should be pursued more broadly at the local, state, and federal level. Such reforms would provide meaningful, immediate support to families who are struggling to provide and care for their loved ones, and would set us on a path toward a more family-friendly workplace culture for the future.

II. Paid Family Leave

The Family and Medical Leave Act (FMLA), passed in 1993, is the only federal law designed to address the issue of work/family integration. It guarantees eligible employees up to 12 weeks of job-protected unpaid leave to recover from their own serious illness, to care for and bond with a newborn or newly adopted child, or to care for a relative with a serious illness. As such, it is a major first step in the effort to recognize and support the work of caring for families in public policy. Still, the legislative compromises necessary to pass the bill left gaping holes, through which millions of individuals and families fall. The statute's exclusion of employers with fewer than 50 employees excludes 53% of the private workforce from its protections.¹⁷ Furthermore, because leave guaranteed by the FMLA is unpaid, many workers who are eligible to take time off cannot afford to do so. According to one study, more than three out of four employees did not take FMLA leave because they could not afford it.¹⁸ In addition, the FMLA's requirement that eligible employees work at least 1,250 hours in the year before they take leave excludes a significant share of part-time workers, including many mothers and workers balancing multiple part-time jobs. By some estimates, only 20% of new mothers are covered and eligible for FMLA leave.¹⁹

Although there has been movement in Congress to amend the FMLA to provide paid leave and cover more workers, most of the activity on this front has been at the state level. Multiple states have passed laws to extend the protections of family and medical leave to more employees by lowering the threshold number of employees an employer must have to be covered and reducing the number of hours an employee must work before taking leave.²⁰ In Maine, for example, all private employers with 15 or more employees are covered and employees are eligible for ten weeks of family medical leave every two years if they have worked for the same

¹⁷ BETTY HOLCOMB, NATIONAL PARTNERSHIP FOR WOMEN AND FAMILIES, WHY AMERICANS NEED FAMILY LEAVE BENEFITS AND HOW THEY CAN GET THEM 1 *available at* <http://www.nationalpartnership.org/site/DocServer/WhyAmericansNeedFamilyLeaveBenefits.pdf?docID=1058>.

¹⁸ *Id.*

¹⁹ ELIZABETH RUDD, SLOAN WORK AND FAMILY RESEARCH NETWORK, FAMILY LEAVE: A POLICY CONCEPT MADE IN AMERICA (2004).

²⁰ *See* NATIONAL CONFERENCE OF STATE LEGISLATURES, STATE FAMILY AND MEDICAL LEAVE LAWS THAT DIFFER FROM THE FEDERAL FMLA (Sept. 2008).

employer for 12 consecutive months.²¹ The Maine statute also expands on the FMLA by allowing leave for the birth of the employee's domestic partner's child and for care of a domestic partner, sibling, or domestic partner's child with a serious health condition.²² Laws such as Maine's can make a significant impact by guaranteeing more workers, including part-time workers and those working for smaller employers – many of whom are low-wage workers – the protections of the FMLA, including the right to return to the same or similar position after taking leave. This will become even more critical as states pass paid family leave laws, which provide some wage replacement for family caregivers, but generally do not guarantee job protection.

States are also at the forefront of providing paid family leave insurance. Five states and Puerto Rico already have temporary disability insurance (TDI) programs that provide benefits to workers unable to work because of a temporary disability developed off the job. These benefits have been available to pregnant women since the passage of the Pregnancy Discrimination Act, for use during the period of disability relating to pregnancy and childbirth. In 2004 and 2009, respectively, California and New Jersey extended their TDI programs to offer paid leave for workers who need to care for a seriously ill family member or bond with a new child. A similar proposal has been introduced and considered every year since 1999 in New York, which also has a TDI program. In addition, states that do not have established TDI programs are working to provide paid family leave. Washington passed a law in 2006 that will guarantee workers up to five weeks a year of paid leave to care for a newborn or newly adopted child.²³ The law will apply to all employers and all employees who have been employed for at least 680 hours during their qualifying year. The law also provides job protection to employees working for employers with more than 25 employees and who have been employed for at least 12 months, working at least 1,250 hours during the previous year. Unfortunately, without a clear funding route, and in the face of state budget shortfalls, implementation of the Washington program has been delayed until October 2012. Similar challenges may confront other states, such as Oregon and New Hampshire, which are considering paid family leave legislation.²⁴

Some have suggested that the federal government is best positioned to provide paid family leave insurance, advocating for use of the Social Security system to allow workers access to income during time off for caring activities or to recover from their own serious illness.²⁵ But even without passing paid family leave at the federal level, Congress can play a larger role in making paid family leave a reality for many Americans. In May 2009, Representative Lynn Woolsey (D-CA) introduced a bill that would support state efforts to provide partial wage replacement to new parents and other employees who need to care for family members. The Family Income to Respond to Significant Transitions Act would provide monetary grants to states to help them establish, implement, and cover the costs of providing partial or full wage replacement to eligible workers.²⁶ For states that already have a paid family leave program, federal funds could be used to conduct outreach and education, to cover the cost of wage replacement, to cover the cost of administering the program, or to provide incentives to

²¹ ME. REV. STAT. ANN. Tit. 26 §§ 843-848.

²² *Id.* at § 843(4).

²³ WASH. REV. STAT. § 49.86.

²⁴ Oregon SB 966 and HB 3160, NH HB 661-FN.

²⁵ HEATHER BOUSHEY, CENTER FOR AMERICAN PROGRESS, HELPING BREADWINNERS WHEN IT CAN'T WAIT: A PROGRESSIVE PROGRAM FOR FAMILY LEAVE INSURANCE (May 2009).

²⁶ H.R. 2339, 111th Cong. (2009).

employers that are not covered under the FMLA to provide the benefits and protections of that law. For states that do not yet have a program, funds would be available to help develop and implement a program, to pay for administrative costs, and to cover the costs of providing wage replacement for the first six months of the program.

The United States lags far behind the rest of the world when it comes to providing a financial safety net for families to cover their expenses while caring for their loved ones. Providing paid family leave would not only restore the United States to the ranks of developed nations, but would also go a long way toward valuing the work of American families.

III. Paid Sick Days

Although the FMLA guarantees unpaid time off to a segment of the workforce for their own or a family member's serious illness, federal law does not guarantee time off for short-term illness or to accommodate preventative care.²⁷ Once again, this absence of policy puts the United States in the global minority. As of 2009, 163 countries guarantee a minimum number of paid sick days for short- or long-term illness, with 155 providing a week or more per year.²⁸ Among the 15 most competitive economies in the world, the United States is the only one not to require even a single day of sick leave.²⁹ Workers in the United States must rely on employer-provided time off and, as a result, nearly half of private sector workers – 47% – do not have a single paid sick day to recover from illness or care for a sick family member.³⁰ Even among workers who do have sick leave, only 30% can use that time to care for a sick child.³¹

Without paid sick time, workers, especially low-wage workers, are faced with an impossible choice – do they send a sick child to school or daycare or do they risk losing a day of pay, or perhaps even worse, to stay home and care for the child? Forcing families to make such decisions harms not just the individuals themselves but has broader implications as well. The lack of paid sick days is a public health problem. More than three in four food service and hotel workers do not have a single paid sick day,³² and workers in childcare centers also overwhelmingly lack paid sick days.³³ With the recent spread of the H1N1 virus, the Centers for Disease Control and Prevention have recommended that workers stay home from work when sick and keep sick children home from school. But without paid sick days, many workers have no choice but to disregard this advice.

In 2006, San Francisco became the first city in the United States to pass a paid sick days law. Workers in the city earn one hour of paid sick time for every 30 hours worked, and can

²⁷ Several states have included in their family and medical leave laws provisions to allow leave to accompany a child, spouse, or elderly relative to routine medical, dental, or other professional medical appointments. *See* MASS. GEN. LAWS ch. 149 § 52D; VT. STAT. ANN. tit. 21 §§ 470-474.

²⁸ Heymann & Earle, *supra* note 7.

²⁹ *Id.*

³⁰ LOVELL, *supra* note 11 at 1.

³¹ *Id.* at 9, Table 3.

³² *The Healthy Families Act: Safeguarding Families' Livelihood, Families and Health with Paid Sick Days: Hearing Before the S. Comm. on Health, Educ., Labor & Pensions*, 110th Cong. (2007) (statement of Heidi Hartmann, Institute for Women's Policy Research).

³³ GET THE PRESCRIPTION: CHILD CARE WORKERS NEED PAID SICK DAYS, CENTER FOR LAW AND SOCIAL POLICY (July 2006), available at http://www.clasp.org/admin/site/publications_archive/files/0204.pdf.

accrue up to 40 hours a year if they work for an employer with fewer than ten employees, or up to 72 hours a year if they work for a larger employer. The San Francisco experience has served as a model for what is now a nationwide movement to secure paid sick days at the city and state level. In early 2008, the District of Columbia passed paid sick days legislation and later that fall, voters in Milwaukee, Wisconsin, voted overwhelming to pass a ballot initiative modeled on the San Francisco law. A paid sick days bill was introduced in the New York City council in August 2009, and 13 states are considering bills to guarantee paid sick days in the current legislative session. Congress is also considering The Healthy Families Act, which would create a federal standard for paid sick time and would apply to employers with 15 or more employees.

Paid sick days are an essential protection that all workers need. Everyone gets sick, and everyone needs time off to recover. Although some of us are fortunate enough to work for employers who guarantee time off for sickness, can we say the same for the person next to us on the subway or the waitperson serving us lunch? It serves none of our interests to force workers to make impossible choices between their jobs and their own or their family's well being. Paid sick days are not only crucial to the dignity of all employees but also essential to our collective public health.

IV. Workplace Flexibility

Today's workers juggle childcare, eldercare, and other family responsibilities while also holding down jobs that offer little or no flexibility in work hours. In 2004, just over a quarter of the workforce worked on a flexible schedule,³⁴ even though survey results from the same year showed that nearly 80% of workers would like to have more flexible work options and would use them if there were no negative career consequences.³⁵ Despite ample evidence that flexible work options are good business, many workplaces – especially those employing lower-skilled workers – have not embraced the concept.

To compound the problem, certain laws on the books may actually dissuade employers from adopting flexible work policies or discourage employees from taking advantage of them. For example, the tax laws of New York and New Jersey combine to discourage telecommuting between the two states. Under New Jersey law, if a New York-based employer, who otherwise does not do business in New Jersey, allows a New Jersey-based employee to work from home even one day a month, the employer may create a nexus for triggering corporate taxation and the potential for other liability in New Jersey. This is true despite the fact that New Jersey has separately recognized the benefits of telecommuting by passing a law promising corporate tax credits to companies that provide alternative commuting options to their employees.

In addition, under existing law, New York has aggressively taxed non-resident telecommuters even if some or most of the work they conduct is outside the state. These workers may even be double taxed if their home state also taxes income earned while working at home. The Telecommuter Tax Fairness Act of 2009 has been introduced in Congress to address this

³⁴ U.S. DEP'T OF LABOR, WORKERS ON FLEXIBLE AND SHIFT SCHEDULES, 2004 SUMMARY (2005).

³⁵ ELLEN GALINSKY, JAMES T. BOND & E. JEFFREY HILL, FAMILIES AND WORK INSTITUTE, WHEN WORK WORKS: A STATUS REPORT ON WORKPLACE FLEXIBILITY. WHO HAS IT? WHO WANTS IT? WHAT DIFFERENCE DOES IT MAKE? 5-6 (2004), available at <http://familiesandwork.org/3w/research/downloads/status.pdf>.

problem.³⁶ The bill would prohibit a state from imposing an income tax on the compensation of a nonresident for any period in which the individual is not physically present in or working in the state or from deeming the individual to be present in or working in the state because he or she is working at home for convenience.

Another barrier to flexible work is the fear of negative consequences for workers who request or adopt flexible work schedules. In a 2002 study by the Families and Work Institute, 78% of employees feared that they would be perceived as less committed to their job if they utilized flexible work arrangements.³⁷ The situation has only grown worse during this recession, as evidenced by calls to the Center for WorkLife Law's hotline suggesting that employers are targeting family caregivers and flexible workers for termination.³⁸ One potential solution, which originated in the United Kingdom, has been gaining some traction on this side of the Atlantic. In 2003, the United Kingdom implemented a "soft touch" law that, as amended, allows employees to request a flexible or alternative work schedule to help them care for children aged 16 and under, disabled children under 18, or certain adults who require care.³⁹ The law requires an employer to meet with his employee to discuss the request and then respond in writing within 14 days of that meeting. Although the employer is not obligated to accept the employee's request, if he refuses, he must identify the business reasons for doing so. Furthermore, employees are protected from discrimination or dismissal based on having made a request for flexibility or exercised their rights under the act. This kind of "right to request" law holds great appeal, especially during tough economic times, because it does not mandate more than a conversation and does not impose significant costs on employers. Still, it could have a major impact on combating the stigma and fear that often prevent even the most progressive workplace policies from being successfully implemented.

One bright spot where states have made strides in facilitating flexibility is around parental involvement in children's education. Studies have shown that children benefit immensely from having their parents engaged with their education, but also that the parents who most need flexibility to help children with school problems are least likely to have access to it.⁴⁰ Thirteen states and the District of Columbia have recognized the importance of this issue and passed laws to guarantee parents time off to attend and participate in their children's educational activities.⁴¹ The laws vary as to eligibility and notice requirements, whether provision of such leave is mandatory, how much time parents can take off, which employees and which school events are covered, and substitution of paid leave for unpaid time off. Some states have used their state family and medical leave laws to cover leave for educational involvement while others

³⁶ Telecommuter Tax Fairness Act of 2009, H.R. 2600, 111th Cong. (2009).

³⁷ JAMES T. BOND, ELLEN GALINSKY & DAVID PROTAS, FAMILIES AND WORK INSTITUTE, HIGHLIGHTS OF THE NATIONAL STUDY OF THE CHANGING WORKFORCE (2002).

³⁸ Balancing Work and Family in the Recession: How Employees and Employers are Coping: Hearing Before the Joint Econ. Comm., 111th Cong. (2009) (statement of Cynthia Thomas Calvert, Deputy Director, WorkLife, Hastings College of Law).

³⁹ Department for Business Innovation and Skills, Flexible Working – the law and best practice, <http://www.businesslink.gov.uk/bdotg/action/layer?r.l1=1073858787&topicId=1073931239&r.lc=en&r.l2=1080898061&r.s=tl> (last visited Dec. 8, 2009).

⁴⁰ A BETTER BALANCE: THE WORK AND FAMILY LEGAL CENTER, FACT SHEET: EDUCATIONAL LEAVE (2009), available at

http://abetterbalance.org/cms/index2.php?option=com_docman&task=doc_view&gid=5&Itemid=99999999.

⁴¹ *Id.*

have passed separate statutes. These laws should be emulated in other states and public education expanded to make sure that parents know their rights and can exercise them.

The strict 9-to-5 workday is no longer necessary or efficient for many employers and their employees. In an age when technology allows people to work remotely and environmental concerns urge us to cut back on excessive travel, the arguments for expanding workplace flexibility are stronger than ever. Improving workplace flexibility, and combating the stigma that often attaches to employees who work flexible hours, is a critical step in the effort to reshape workplace norms to better serve working families.

V. Employment Discrimination Against Caregivers

Discrimination against working women has transformed over the past 40 years. Separate job listings for men and women, which were once commonplace, are now a thing of the past. Sexual harassment – a workplace scourge in the 1980s and 90s – has subsided, thanks to strong court rulings and stricter compliance. Still, discrimination persists and now often takes the form of bias against working mothers and other workers with caregiving responsibilities.

Stereotypes about mothers in the workplace are widespread and unabashed. In a recent case, a school psychologist was denied tenure after becoming a mother, despite her history of outstanding performance reviews, by supervisors who said they “did not know how she could perform [her] job with little ones” and thought it was “not possible for [her] to be a good mother and have this job.”⁴² In another case, an executive assistant at a large bank was terminated while on maternity leave and told by her boss, “when you get that baby in your arms, you’re not going to want . . . to come back to work full time . . . when a woman has a baby and she comes back to work, she’s less committed to her job because she doesn’t want to really be here, she wants to be with her baby.”⁴³

Stereotypes about motherhood also extend to pregnant women, or women who may become pregnant and have children. In a 2007 case, the president of a company said to a female employee, who became pregnant and took maternity leave, that he “should no longer allow women to work for him because women who have babies lose too many brain cells to continue to work.”⁴⁴ The prevalence of such bias is evidenced by a steady increase in claims of pregnancy discrimination, particularly as pregnant women are targeted for layoffs during this recession. In 2008 alone, complaints filed with the Equal Employment Opportunity Commission increased by 12.5% over the previous year to a 12-year high of 6,285 claims nationwide.⁴⁵

Although men often benefit slightly at work from their status as fathers,⁴⁶ those who choose to resist the traditional role of breadwinner in favor of playing a more active role in caregiving are also subject to potent discrimination. Studies have shown that fathers who take

⁴² *Back v. Hastings on Hudson Union Free Sch. Dist.*, 365 F.3d 107, 115 (2d Cir. 2004).

⁴³ *Pizzo v. HSBC USA, Inc.*, No. 04-CV-114A, 2207 WL 2245903, 4 (W.D.N.Y. Aug. 1, 2007).

⁴⁴ *Drebing v. Provo Group, Inc.*, 519 F. Supp. 2d 811, 823 (N.D. Ill. 2007).

⁴⁵ EEOC, *Pregnancy Discrimination Charges*, available at <http://archive.eeoc.gov/stats/pregnanc.html> (last accessed Oct. 19, 2009).

⁴⁶ Shelly J. Correll, Stephen Benard & In Paik, *Getting a Job: Is there a Motherhood Penalty?*, AM. J. OF SOCIOLOGY 1297 (2007).

parental leave are recommended for fewer rewards and considered less committed than women who did so.⁴⁷ And both men and women with eldercare responsibilities encounter similar pushback from employers when they seek to alter their work schedules or take time off to care for their aging parents.

Over the past decade, a new area of employment law, known as family responsibilities discrimination (FRD), has developed to seek redress for workers treated unfairly at work because of their responsibilities to care for family members. Lawyers around the country have litigated cases under Title VII of the Civil Rights Act of 1964, arguing successfully that stereotyping of working mothers is prohibited gender discrimination under the law, and have used the “relationship or association” clause of the Americans with Disabilities Act to provide protection for caregivers of family members with disabilities. The Pregnancy Discrimination Act and the FMLA are also commonly used to protect caregivers in the workplace. Even the Employee Retirement Income Security Act (ERISA) has been used by caregivers to recoup pension credits denied due to personnel policies that required pregnant women to stop working, to challenge adverse actions based on employer fears of high health insurance premiums associated with sick or disabled relatives, and to seek redress when pregnant employees are fired to prevent them from using maternity leave benefits. As a result, claims of FRD have risen nearly 400% since the mid 1990s⁴⁸ and in 2007, the EEOC weighed in, issuing enforcement guidance about the unlawful disparate treatment of workers with caregiving responsibilities under federal equal employment laws.⁴⁹

Although the existing framework of laws captures a significant portion of cases involving unfair treatment of family caregivers, there are still many cases that fall through the cracks. The statutory cutoffs that limit the number of eligible employees under the FMLA, for example, consequently restrict the reach and protection of the only federal law passed explicitly to address work/family conflict. This will become an even larger issue as more Americans shoulder eldercare responsibilities and have few protections under other laws. And although Title VII can be used to challenge unfair treatment based on gender-role stereotypes about motherhood or fatherhood, it requires evidence that the discrimination is based at least in part on sex. If an employer discriminates against employees based on gender-*neutral* stereotypes about caregivers (*i.e.*, that all caregivers, regardless of their sex, are unreliable workers), he may be outside the reach of the law.⁵⁰

⁴⁷ Joan C. Williams & Stephanie Bornstein, *The Evolution of “FRD”: Family Responsibilities Discrimination and Developments in the Law of Stereotyping and Implicit Bias*, 59 HAST. L.J. 1311, 1331 (2008).

⁴⁸ MARY C. STILL, CENTER FOR WORKLIFE LAW, LITIGATING THE MATERNAL WALL: U.S. LAWSUITS CHARGING DISCRIMINATION AGAINST WORKERS WITH FAMILY RESPONSIBILITIES (2006).

⁴⁹ EEOC, Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities (2007), available at <http://www.eeoc.gov/policy/docs/caregiving.html>. In May 2009, the EEOC supplemented its 2007 guidance by issuing Employer Best Practices for Workers with Caregiving Responsibilities, which go beyond federal non-discrimination requirements, in an attempt to reduce the chance of EEO violations against caregivers and remove barriers to equal employment opportunity. See EEOC, Employer Best Practices for Workers with Caregiving Responsibilities (2009), available at <http://www.eeoc.gov/policy/docs/caregiver-best-practices.html>.

⁵⁰ This exact issue arose in *Chadwick v. Wellpoint, Inc.*, where a claims agent at a health insurance company alleged that she was passed over for promotion after her supervisor found out that she had six-year-old triplets and explained that Chadwick would not be promoted because “you’re going to school, you have the kids and you just have a lot on

As in other areas of work/family policy, states and localities have begun to step up to fill in where federal policy is lacking.⁵¹ The District of Columbia’s human rights law prohibits employment discrimination based on family responsibilities, and Alaska law prohibits employment discrimination based on “parenthood.”⁵² New York, California, and Maine, among other states, have introduced legislation to include family responsibilities, familial status, or family caregiver status, respectively, to the categories protected from employment discrimination under their state laws.⁵³ Cities and localities have also been active in this area of policy development, and can provide a powerful example for other jurisdictions.⁵⁴ There has been no effort on the federal level to pass legislation explicitly to protect family caregivers from employment discrimination, but this is certainly an area for future advocacy.

Discrimination against employees because of their family responsibilities harms individuals and their families while depriving our society of talented and capable workers. We need targeted legal reform and public education, in addition to litigation, to combat such discrimination and make the workplace a safe place for working mothers and caregivers.

VI. Workplace Equity

In addition to the family responsibilities discrimination described above, many working mothers confront persistent pay inequities and the problem of the part-time penalty in the workplace. These types of discrimination can be challenging to remedy through litigation because of the limitations of the Equal Pay Act and the reluctance of courts to recognize discrimination claims based on part-time status.

A. The Pay Gap

Although working women have been steadily chipping away at the pay gap over the last 30 years, as of 2006, women were still only paid 77 cents for every dollar men earned. Over the course of a lifetime, this pay differential costs the average full-time working woman between

your plate right now.” *Chadwick v. Wellpoint, Inc.*, 550 F. Supp. 2d 140 (D. Me. 2008), *rev’d*, 561 F.3d 38 (1st Cir. 2009). The district court ruled in favor of the employer; according to the judge, Chadwick had not shown that her employer’s assumption that she would be unable to handle the demands of work and home was based on her sex. *Id.* at 147. The Court of Appeals recently reversed the lower court decision, finding sufficient evidence for a jury to conclude that sex was indeed a motivating factor behind the employer’s failure to promote Chadwick, *see Chadwick v. Wellpoint, Inc.*, 561 F.3d 38 (1st Cir. 2009), but the problem still remains: while stereotypes about female caregivers are prohibited by law, stereotypes about caregivers in general are legally permissible.

⁵¹ Federal law does prohibit employment discrimination against federal government employees on the basis of their “status as a parent.” Exec. Order No. 13, 152, 50 Fed. Reg. 26, 115 (May 2, 2000).

⁵² D.C. Human Rights Act, D.C. CODE §§ 2-1401.04, 2-1401.02(12), 2-1402.11, 2-1411.02; ALASKA STAT. § 18.80.220.

⁵³ STEPHANIE BORNSTEIN & ROBERT J. RATHMELL, THE CENTER FOR WORKLIFE LAW, CAREGIVERS AS A PROTECTED CLASS?: THE GROWTH OF STATE AND LOCAL LAWS PROHIBITING FAMILY RESPONSIBILITIES DISCRIMINATION 5-6 (Dec. 2009), *available at* <http://www.worklifelaw.org/pubs/LocalFRDLawsReport.pdf>.

⁵⁴ *See, e.g.*, STATE COLLEGE, PENNSYLVANIA, ANTI-DISCRIMINATION ORDINANCE, *available at* http://abetterbalance.org/cms/index2.php?option=com_docman&task=doc_view&gid=20&Itemid=99999999. *See also* New York City, NY, Proposed Intro. No. 565-A, *available at* <http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=451297&GUID=BF186FE1-59F1-4C52-83EB-AF193F92D937&Options=ID|Text|&Search=565-A>.

\$700,000 and \$2 million.⁵⁵ Even as women as a group have narrowed the wage gap, mothers have lagged behind. Studies have found a 7% wage penalty for mothers compared to non-mothers, just one third of which can be explained by differences in experience and seniority.⁵⁶ The remaining part may be due largely to employer discrimination. In one particularly striking study, mothers were offered starting salaries that were 7.4% lower than those offered to otherwise equally qualified childless women, and mothers were rated significantly less promotable and less likely to be recommended for management positions.⁵⁷ This kind of pay and promotional discrimination is seriously hurting family finances as more women take on the role of breadwinner in their households.

Several policy solutions could help to address the motherhood pay gap. First is the Paycheck Fairness Act,⁵⁸ introduced in Congress in 2009, which would update and strengthen the Equal Pay Act of 1964 and, among other things, prohibit employers from punishing employees for sharing salary information with their coworkers. Other solutions include work/life policies, like the ones discussed above, which make the workplace more hospitable to women and mothers so that they can advance in their careers and close the wage gap. For example, research shows that women with access to paid maternity leave are more likely to return to work after they have a child, thus increasing their lifetime employment and earnings.⁵⁹

B. The Part-Time Penalty

Working part-time is one way in which family caregivers balance their work and family responsibilities, but it often comes with a steep price tag. Part-time workers earn on average 20% less per hour than other workers with the same level of education and experience.⁶⁰ They also receive far fewer benefits. According to the Economic Policy Institute (EPI), only 17% of part-time workers receive employer-provided health care coverage in contrast to 69% of full-time workers.⁶¹ Only 21% of part-time workers receive an employer-provided pension plan compared to two-thirds of full-time workers.⁶² Many federal laws explicitly deny or authorize the denial of benefits and protections to part-time employees by excluding them from statutory coverage. The tax code allows employers to exclude from health insurance coverage individuals who work fewer than 35 hours a week. ERISA allows employers to exclude from employer pension plans employees who have worked fewer than 1,000 hours in a year (*i.e.*, less than 20 hours per week). Many states exclude part-time workers from unemployment insurance (UI) by requiring them to be looking for full-time work in order to receive benefits, even though these workers' wages are subject to UI payroll taxes and their earnings prior to layoff meet state eligibility rules.

⁵⁵ NATIONAL COMMITTEE ON PAY EQUITY, *The Wage Gap Over Time: In Real Dollars, Women See a Continuing Gap*, available at <http://pay-equity.org/info-time.html>.

⁵⁶ *Strengthening the Middle Class*, *supra* note 3.

⁵⁷ Correll, Benard & Paik, *supra* note 46.

⁵⁸ H.R. 12, 111th Cong. (2009).

⁵⁹ BOUSHEY, *supra* note 25, at 19.

⁶⁰ JEFFERY WENGER, ECONOMIC POLICY INSTITUTE, THE CONTINUING PROBLEMS WITH PART-TIME JOBS, Issue Brief #155, Mar. 31, 2001, available at http://www.epi.org/publications/entry/issuebriefs_ib155/.

⁶¹ *Id.*

⁶² *Id.*

Quality part-time work is essential to family economic security, especially in this recession as more workers juggle multiple part-time jobs or work part-time involuntarily. Outdated laws and policies that exclude part-time workers put families in jeopardy and do not reflect the reality of today's workforce. This is an area ripe for legal reform, starting with the debate over healthcare reform. We need to analyze our laws and policies through the lens of parity and equitable coverage for part-time workers. For example, many of the paid sick days bills being considered across the country would allow for pro-rata accrual of time off for part-time workers: part-timers would earn one hour of time off for every 30 hours worked, like full-time workers, but would take longer to accumulate the same number of days because they work fewer hours. Part-time workers should be afforded pro-rata pay and benefits as well and states should experiment with incentives to encourage employers to do better by their part-time workers. States could also consider legislation like the E.U. directive, explicitly prohibiting discrimination against part-time workers in pay and benefits because of their status.

Pay penalties and other inequities at work harm working mothers and the families that rely on them for essential income. Combating these persistent injustices will not only advance the cause of women's equality in the workplace, and at home, but will also help to ensure the economic security of their families.

VII. Conclusion

American workplace policies and laws are long overdue for a significant restructuring. We have reached a demographic tipping point as more mothers enter the labor force and baby boomers are retiring and requiring more care. We no longer live in a world of breadwinners and homemakers, where employers can expect their employees to be dedicated to one job, week after week, year after year, without interruption. Most families rely on two wage-earners and many others get by on the income of a single parent. All of these earners shoulder the responsibilities of family care in addition to their responsibilities at work and still only have 24 hours each day to handle it all.

The workforce of the 21st century requires an updated, 21st century workplace – one that recognizes and supports families. We have been operating under laws and policies that were created in a very different time, for an entirely different workforce. What we need now is a complete re-imagining of the laws that govern our workplaces and of how they interact with our families. This is a tall order, for sure, but essential. In the mean time, the policy proposals outlined above are manageable and, in many cases, proven measures that would do a great deal to release some of the pressure on working mothers and families. By implementing some of these reforms at the local, state, and federal level, we can begin to make good on the promise of “family values” by finally valuing the unsung and indispensable work of families.