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# Paging Health Care Workers: The NLRB Takes a Scalpel to Section 8(g) after Beverly

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# THE ROAD LESS TRAVELED – GOING BEYOND THE FAMILY AND MEDICAL LEAVE ACT TO CREATE A FAMILY-FRIENDLY LEGAL PROFESSION

## I. Introduction

Katherine was a third-year associate at a prestigious law firm when she learned she was pregnant with her first child. After giving birth to her daughter, she took her firm's standard three month maternity. Within four months of returning to work full time, Katherine became the lead associate on a major case that was to go to trial in three months. For the next three months, she worked a brutal schedule of fifteen hour days, seven days a week. During this time, she was still nursing her daughter, who had yet to sleep through the night. When the trial date finally arrived, the judge postponed the case because of an impromptu fishing trip. After this experience, Katherine decided that her inflexible career was not worth sacrificing time with her family. She therefore quit her job to care full time for her daughter and the two children who followed. Katherine "wish[es] it had been possible to be the kind of parent I want to be and continue with my legal career . . . but I wore myself out trying to do both jobs well."<sup>1</sup>

Like Katherine, many of today's female lawyers find themselves asking, "[i]s it practicable for a woman to successfully fulfill the duties of wife, mother, and lawyer at the same time?"<sup>2</sup> The answer is "probably not," at least not without major changes in the way today's legal employers approach work and family life.<sup>3</sup> While such work-life issues transcend all social classes and all levels and types of employees, this paper focuses specifically on attorneys' struggles to create successful careers while also building happy families. This paper addresses

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<sup>1</sup> Lisa Belkin, *The Opt-Out Revolution*, N.Y. TIMES, Oct. 26, 2003 § 6 (Magazine), at 46.

<sup>2</sup> Deborah Rhode, *Balanced Lives for Lawyers*, 70 FORDHAM L. REV. 2207, 2207 (2002) (citing Lelia Josephine Robinson, the first woman admitted to the Massachusetts State Bar, quoted in TASK FORCE ON PROF. CHALLENGES AND FAMILY NEEDS, BOSTON BAR ASS'N, FACING THE GRAIL: CONFRONTING THE COST OF WORK-FAMILY IMBALANCE 24 n.5 (1999), available at <http://www.bostonbar.org/workfamilychallenges.htm>).

<sup>3</sup> See Rhode, *supra* note 2, at 2207, stating that today "about one third of surveyed female lawyers doubted that it was realistic to combine successfully the roles of lawyer, wife, and mother, and only one-fifth were 'very satisfied' with the allocation of time between their personal and professional needs."

the work-life balance problems haunting so many of today's attorneys, especially female attorneys, and argues that the solution to these problems requires a transformation of the legal workplace's male-centered norms. Part II of this paper addresses the current law affecting work-life balance, namely the Family and Medical Leave Act and the recent Supreme Court case of *Nevada Department of Human Resources v. Hibbs*. Part III describes the challenges facing today's women attorneys, challenges that perpetuate discrimination against women and hamper their advancement in the law. Finally, Part IV offers specific solutions to address attorneys' work-life balance issues.

## **II. The Law Affecting Work–Life Balance**

### **A. The Family and Medical Leave Act of 1993**

Congress enacted the Family and Medical Leave Act (FMLA)<sup>4</sup> to assist individuals in balancing the demands of the workplace with the needs of their families.<sup>5</sup> In enacting the FMLA, Congress found that “the primary responsibility for family caretaking often falls on women, and such responsibility affects the working lives of women more than it affects the working lives of men.”<sup>6</sup> Because women continue to be the primary caretakers for their families, Congress' purposes in enacting the FMLA included “minimiz[ing]the potential for employment discrimination on the basis of sex by ensuring generally that leave is available for eligible medical reasons (including maternity-related disability) and for compelling family reasons on a gender neutral basis . . .”<sup>7</sup>

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<sup>4</sup> 29 U.S.C. §§ 2612-2654 (2000).

<sup>5</sup> Congress passed the FMLA eight years after it had first considered a bill that would require employers to provide their employees with parental leave. Joanna L. Grossman, *Job Security Without Equality: The Family and Medical Leave Act of 1993*, 15 WASH. UNIV. J. OF L. AND POL'Y 17, 17 (2004). Grossman notes that “[a] version of the FMLA was introduced in every Congress between 1985 and 1993. . . . Leave legislation passed both houses of Congress twice, but both times President George H.W. Bush vetoed it.” *Id.* The bill was finally passed by President Bill Clinton.

<sup>6</sup> 29 U.S.C. § 2601(a)(5) (2000).

<sup>7</sup> 29 U.S.C. § 2601(b)(4) & (5) (2000).

The FMLA gives all eligible employees, regardless of gender, the right to twelve weeks of unpaid leave per year to care for a newborn or newly adopted child or for a family member with a “serious health condition.”<sup>8</sup> Employees are eligible for FMLA leave if they have worked a minimum of 1,250 hours in the previous year for an employer who employs at least fifty workers within a seventy-five mile radius of where the leave-requesting employee reports to work.<sup>9</sup> Thus, an attorney is eligible for FMLA leave if she worked 1,250 hours in the previous year for a firm that employs fifty workers within a seventy-five mile radius of where she reports to work.

### **B. The FMLA’s Tremendous Normative Value, Despite Its Limitations**

Commentators have described the FMLA as “a major milestone in the legal support of family life because it explicitly recognizes that family life events have an impact on the workplace, and requires the workplace to accommodate these events – albeit in a modest way.”<sup>10</sup> Despite this facial appearance of wide-sweeping workplace reform, the FMLA only protects three basic rights for eligible employees: “the right to be restored into the same position following the period of leave, the right to the continuation of benefits throughout the leave, and the right to not be penalized for taking an authorized leave.”<sup>11</sup>

While the FMLA prevents an employer from denying leave requests or retaliating against an eligible employee who chooses to take qualified leave,<sup>12</sup> its remedial protections are quite

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<sup>8</sup> 29 U.S.C. § 2612(a)(1), (c) (2000).

<sup>9</sup> For the definition of an eligible employee, see 29 U.S.C. § 2611(2)(A)(ii) (2000). Those employees excluded from coverage are defined in id. § 2611(2)(B)(ii). For definition of an employer see id. § 2611(4)(A)(i).

<sup>10</sup> Belinda Smith, *Time Norms in the Workplace: Their Exclusionary Effect and Potential*, 11 COLUM. J. GENDER & L. 271, 280 (2002), citing Donna Lenhoff & Claudia Withers, *Implementation of the Family and Medical Leave Act: Toward the Family Friendly Workplace*, 3 AM. U. J. GENDER & LAW 39, 40 (1994).

<sup>11</sup> Grossman, *supra* note 5, at 20, citing 29 U.S.C. §§ 2611(2)(B)(iii), 2614(a)(1)(A), 2614(a)(2), 2614 (c)(1), 2615(a)(1), 2615(a)(2).

<sup>12</sup> See 29 U.S.C. §2615(a)(1) (2000) (it is “unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise any right provided.”); §2615(a)(2) (it is also “unlawful for any employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by this subchapter.”).

limited. First, because any leave is unpaid, employees must be able to afford the compensation loss in order to use the leave. Second, although the FMLA sufficiently deals with childrearing emergencies, it allows very little time in which to bear a child and recover for work. “Neither the Act nor employers have provided much assistance to those parents who want to stay out of the workforce for any longer than the first three months of their child’s life.”<sup>13</sup> Third, the Act’s eligibility requirements severely limit its applicability to the legal workplace: those attorneys who are solo practitioners or who work for firms of less than fifty employees are ineligible for FMLA leave.<sup>14</sup>

Notwithstanding its limited remedial provisions, the FMLA has tremendous normative value. First, it is a platform upon which to build more extensive federal protection of employees’ caretaking activities. Second, by allowing leave on a gender neutral basis, the FMLA sets a federal policy recognizing that men make suitable caretakers and should have ready access to paternity leave.<sup>15</sup> Third, although the FMLA does not apply to those employees in small and mid-size workplaces, it at least prompts discourse about the hardships facing employees with substantial caretaking responsibilities and may encourage employers to adopt family leave policies in order to retain talented workers. Finally, the FMLA has forced both private employers and the courts to recognize that workplace discrimination against women, and more generally against parents, is a continuing problem in American society. The Supreme Court made such a recognition in *Nevada Department of Human Resources v. Hibbs*.

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<sup>13</sup> Smith, *supra* note 10, at 282

<sup>14</sup> Currently, roughly one half of all attorneys fall outside the Act’s definition of an eligible employee. Thirty-two percent of all lawyers are solo practitioners and 19% work in private firms of less than 20 lawyers. Eight percent of lawyers work in firms with 21-100 lawyers and another 8% work in firms of 101-250+ lawyers. NALP FOUNDATION FOR LAW CAREER RESEARCH AND EDUCATION AND THE AMERICAN BAR FOUNDATION, AFTER THE JD: FIRST RESULTS OF A NATIONAL STUDY OF LEGAL CAREERS 27 (2004), available at <http://www.abf-sociological.org/newpublication/AJP.shtml> [hereinafter AJD].

<sup>15</sup> 139 CONG. REC. §992-93 (daily ed. Feb. 2, 1993) (statement of Sen. Boxer) (“This act does not just apply to women, but to men and women, fathers as well as mothers, to sons as well as daughters.”). See also, Phyllis T.

C. *Nevada Department of Human Resources v. Hibbs*<sup>16</sup>

In the 2003 term, Justice Rehnquist, writing for the five justice majority,<sup>17</sup> applauded the purposes behind the FMLA, upheld an employee's right to bring action against a state employer, and recounted the discrimination that women continue to experience in the workplace. One commentator observed "[w]ithout question, [*Hibbs* contains] some of the Court's strongest language in the last two decades recognizing and condemning discrimination against women; the fact that it was written by Chief Justice Rehnquist, who is not known for his progressive views on gender, makes it all the more remarkable."<sup>18</sup> *Hibbs* is also the first in a series of cases to suggest a reversal in the court's federalist trend and to validate Congress' power to regulate the conduct of states under § 5 of the Fourteenth Amendment.<sup>19</sup> In prior cases, such as the notorious *U.S. v. Morrison*,<sup>20</sup> the court, with the Chief Justice siding with the majority, refused to uphold federal laws meant to protect women from gender discrimination and animus. Commentators suggest that Chief Justice Rehnquist's new-found appreciation of federal protection in *Hibbs* was due to his own personal experience, not a major philosophical shift; his daughter is a single-parent lawyer and, on several occasions, the seventy-eight year old Chief Justice has left work early to pick up his granddaughters from school and to help his daughter

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Bookspan, *A Delicate Imbalance: Family and Work*, 5 TEX. J. WOMEN & L. 37, 72 (1995).

<sup>16</sup> 538 U.S. 721 (2003).

<sup>17</sup> Justices O'Connor, Souter, Ginsburg, and Breyer joined the majority opinion. Justice Souter also filed a concurring opinion in which Ginsburg and Breyer joined. Justice Stevens filed an opinion concurring in the judgment only, while Justices Scalia and Kennedy both filed dissenting opinions, which Justice Thomas joined.

<sup>18</sup> Michael Selmi, *Is Something Better than Nothing? Critical Reflections on Ten Years of the FMLA*, 15 WASH. U. J. L. & POL'Y 65, 66 (2004).

<sup>19</sup> See e.g., *Tennessee v. Lane*, \_\_\_\_ U.S. \_\_\_\_, 124 S.Ct. 1978 (2004). In *Lane*, disabled citizens brought action against the state of Tennessee under Title II of the Americans with Disabilities Act, seeking to vindicate their right of access to the courts. Justice Stevens, writing for the majority, held that Title II of the American with Disabilities Act as applied to the fundamental right of access to the courts, constitutes a valid exercise of Congress' enforcement power under the Fourteenth Amendment and abrogated the states' sovereign immunity under the Eleventh Amendment.

<sup>20</sup> *U.S. v. Morrison*, 529 U.S. 598 (2000). In *Morrison*, the Court invalidated a federal law enabling the victim of a crime involving gender animus to bring a civil action against the perpetrator, finding the state action requirement under § 5 of the Fourteenth Amendment was not satisfied.

fulfill her child care responsibilities.<sup>21</sup> Thus, Chief Justice Rehnquist's opinion in *Hibbs* may be an example of the personal becoming political: after watching his daughter struggle to balance her work and her family, he may now empathize with working women's struggles and realize the critical importance of federal protection for care giving obligations.

## 1. Background

Plaintiff, William Hibbs, was employed in the Welfare Division of the Nevada Department of Human Resources.<sup>22</sup> When his wife was seriously injured in an automobile accident, he sought unpaid leave from his job in order to care for her.<sup>23</sup> Nevada initially granted the requested leave because Hibbs fell within the FMLA's definition of an eligible employee.<sup>24</sup> After Nevada later fired Hibbs, he sued the state in federal court, seeking damages for the state's alleged violation of the FMLA's family care provision.<sup>25</sup>

The district court granted Nevada's motion for summary judgment on the grounds that the Eleventh Amendment barred the FMLA claim and that Nevada had not violated Hibbs' Fourteenth Amendment rights.<sup>26</sup> Hibbs appealed and the Ninth Circuit reversed.<sup>27</sup> The Supreme Court granted certiorari<sup>28</sup> in order to resolve a circuit split on the question of whether an individual may sue a State for money damages for violation of the FMLA.<sup>29</sup>

## 2. The Issue: Does the FMLA Abrogate States' Sovereign Immunity?

The Eleventh Amendment grants immunity to non-consenting states from suits for money

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<sup>21</sup> Selmi, *supra* note 18, at 66, citing Linda Greenhouse, *Evolving Opinions: Heartfelt Words from the Rehnquist Court*, N.Y. TIMES, July 6, 2003, §4 (Week in Review) at 3.

<sup>22</sup> *Hibbs*, 538 U.S. at 725.

<sup>23</sup> *Id.* at 725.

<sup>24</sup> *Id.* at 725.

<sup>25</sup> See 29 U.S.C. § 2612(a)(1)(C) (2000).

<sup>26</sup> *Hibbs*, 538 U.S. at 725.

<sup>27</sup> 273 F.3d 844 (2001).

<sup>28</sup> 536 U.S. 938 (2002).

<sup>29</sup> *Hibbs*, 538 U.S. at 725.

damages brought in federal court.<sup>30</sup> To abrogate this immunity, Congress must clearly express its intent to do so and rely on its power under § 5 of the Fourteenth Amendment to prohibit unconstitutional and discriminatory behavior by the states.<sup>31</sup> The Court found that Congress clearly expressed an intent in the FMLA to abrogate the states' sovereign immunity by enabling "employees to seek damages 'against any employer (including a public agency) in any Federal or State court of competent jurisdiction."<sup>32</sup>

In determining whether Congress acted properly under § 5 of the Fourteenth Amendment, the Court stated the FMLA "aims to protect the right to be free from gender-based discrimination in the workplace."<sup>33</sup> This is a valid statutory purpose under the Fourteenth Amendment only if formed in response to "a pattern of constitutional violations on the part of the States in this area."<sup>34</sup>

### **3. A History of Discrimination Against Women in the Workplace**

The *Hibbs* Court found a well-established history of state-sponsored discrimination against women in the workplace. In the late nineteenth and early twentieth centuries, states enacted laws, such as prohibitions on practicing law<sup>35</sup> and tending bar,<sup>36</sup> meant to minimize women's ability to work outside the home and to maximize their obligations as mothers and homemakers.<sup>37</sup> Based upon the more-recent evidence Congress used in enacting the FMLA,<sup>38</sup>

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<sup>30</sup> *Hibbs*, 538 U.S. at 726.

<sup>31</sup> *Id.* at 726-27.

<sup>32</sup> *Id.* at 726.

<sup>33</sup> *Id.* at 728. The Court stated that the text of the Act makes this clear because congress found that "due to the nature of the roles of men and women in our society, the primary responsibility for family caretaking often falls on women, and such responsibility affects the working lives for women more than it affects the working lives of men." *Id.* at 728 n.2, citing 29 U.S.C. §2601(a)(5).

<sup>34</sup> *Hibbs*, 538 U.S. at 729.

<sup>35</sup> *Bradwell v. Illinois*, 83 U.S. 130 (1872) and *Hoyt v. Florida*, 368 U.S. 57 (1961). In a concurring opinion to *Bradwell*, Justice Bradley stated that "[t]he paramount destiny and mission of women are to fulfill the noble and benign offices of wife and mother." *Bradwell*, 83 U.S. at 141 (Bradley, J. concurring).

<sup>36</sup> *Goesaert v. Clearly*, 335 U.S. 464, 466 (1948)

<sup>37</sup> Grossman, *supra* note 5, at 24.

<sup>38</sup> The majority opinion greatly relied on the legislative history of the FMLA in finding a history of discrimination.



the Court found that states continue to rely on invalid gender stereotypes in the employment context, especially in the administration of leave benefits.<sup>39</sup> In the early 1990s, Congress faced a record showing that both state and private sector employers tended to use policies that “created and perpetuated a society in which women were largely responsible for family caretaking either because leave was only available to women or because no leave was available.”<sup>40</sup> For example, a 1990 Bureau of Labor Statistics survey found that maternity leave policies covered 37% of the surveyed private sector employees, while paternity leave policies only applied to 18% of the surveyed employees. Many states offered extended maternity leave exceeding the typical four-to-eight week period of physical disability due to pregnancy and childbirth, but few provided parallel paternity leave.<sup>41</sup> The *Hibbs* Court opined that such differential leave policies were not based upon men’s and women’s differing physical needs, but rather the “pervasive sex-role stereotype that caring for family members is women’s work.”<sup>42</sup>

The Court also considered employers’ discriminatory implementation of facially neutral leave policies.<sup>43</sup> Testimony before Congress had shown that “[p]arental leave for fathers . . . is rare. Even . . . [w]here child-care leave policies do exist, men . . . receive notoriously discriminatory treatment,” either in the form of outright denials of leave requests or in the form of hostility toward fathers taking paternity leave.<sup>44</sup> This discrimination was exacerbated when

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The minority found the legislative history used by the majority to be of limited utility and flatly refused to rely on the evidence before Congress when it enacted the FMLA, stating it related to private, not public, state employers and simply recited a general history of employment discrimination against women. *See Hibbs*, 538 U.S. at 745-53. The minority concluded, “[c]onsidered in its entirety, the evidence fails to document a pattern of unconstitutional conduct sufficient to justify the abrogation of States’ sovereign immunity. The few incidents identified by the Court ‘fall far short of even suggesting the pattern of unconstitutional discrimination on which § 5 legislation must be based.’” *Id.*

<sup>39</sup> *Id.* at 730.

<sup>40</sup> Grossman, *supra* note 5, at 25.

<sup>41</sup> *Id.* at 731. For example, fifteen States provided women up to one year of extended maternity leave, while only four provided men with the same. *Id.*

<sup>42</sup> *Id.* at 731.

<sup>43</sup> *Id.* at 732.

<sup>44</sup> *Id.* at 731.

employers gave individual supervisors full discretion to make leave decisions.<sup>45</sup> Based on this evidence, the Court determined that employers continued to regard the family as women's domain and therefore discouraged men from taking family leave.<sup>46</sup> Such assumptions reinforced the stereotypical role of women as primary caregivers and discouraged men's participation in care giving activities.<sup>47</sup> "[T]hese mutually reinforcing stereotypes created a self-fulfilling cycle of discrimination that forced women to continue to assume the role of primary family caregiver, and fostered employers stereotypical views about women's commitment to work and their value as employees."<sup>48</sup> This pattern, partially state-created, justified congressional action.

The Court held that the FMLA was an appropriate Congressional response to the history of discrimination against women in the workplace. "By setting a minimum standard of family leave for *all* eligible employees, the FMLA attacks the former state-sanctioned stereotype that women are responsible for family care giving, thereby reducing employers' incentives to engage in discrimination by basing hiring and promotion decisions on stereotypes."<sup>49</sup> The Act was "narrowly targeted at the fault line between work and family" where "sex-based overgeneralization has been and remains strongest."<sup>50</sup> By encouraging men to share in the care giving obligations of their families, the FMLA removed the stigma borne by female employees as the predominant leave-takers.<sup>51</sup>

In holding that state employees may recover money damages in federal court for their employer's failure to comply with the FMLA's leave provisions, the Supreme Court "endorsed

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<sup>45</sup> *Id.* at 732. For an example of this, see *Knussman v. Maryland*, 272 F.3d 625, 629-30 (4th Cir. 2001). When Howard Knussman discussed his eligibility for nurturing leave as the primary giver for his newborn child, the manager of his employer's benefit plan stated "God made woman to have babies and, unless [Knussman] could have a baby, there is no way [he] could be primary caregiver [unless] his wife [was] in a coma or dead."

<sup>46</sup> *Hibbs*, 538 U.S. at 736.

<sup>47</sup> *Grossman*, *supra* note 5, at 27.

<sup>48</sup> *Hibbs*, 538 U.S. 736.

<sup>49</sup> *Id.* at 737. Therefore, the FMLA ensures that employers cannot evade leave obligations by simply hiring men.

<sup>50</sup> *Id.*

an inspiring interpretation of . . . an Act . . . conceived and implemented in order to promote equality for women.”<sup>52</sup> Although a stepping stone to reallocating and equalizing the care giving burdens faced by American families, it has yet to truly equalize the care giving realities facing today’s women attorneys. The FMLA provides only limited assistance to those attorneys who fit within the definition of an eligible employee and absolutely no help to those attorneys who fall outside of the FMLA’s technical restrictions.

### **III. Continuing Problems in the Legal Workplace, Despite the FMLA’s Normative Value**

#### **A. The “Sticky Floor”—Women Remain Underrepresented In Positions Of Power**

The women of today have made dramatic educational and professional progress. “More than 56% of all college graduates are women. Forty-five percent of the labor force is female, two-thirds of all new work force recruits are women, and only one of every three mothers stays home to provide full-time childcare.”<sup>53</sup> Despite these incredible gains in education and representation in the professions, such as law, women continue to be dramatically “underrepresented in positions of greatest status, influence and economic reward.”<sup>54</sup> According to the ABA Commission on Women in the Profession, women comprise forty-five percent of entering law school classes and twenty-three percent of the bar, but are only nineteen percent of tenured faculty, thirteen percent of law firm partners, ten to twelve percent of judges, and eight percent of law school deans.<sup>55</sup>

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<sup>51</sup> *Id.*

<sup>52</sup> Grossman, *supra* note 5, at 21.

<sup>53</sup> Jacquelyn H. Slotkin, *Should I Have Learned To Cook? Interviews with Women Lawyer Juggling Multiple Roles*, 13 HASTINGS WOMEN’S L.J. 147, 147 (2002).

<sup>54</sup> *Id.* at 148.

<sup>55</sup> Maryann Jones, *And Miles to go before I Sleep: The Road to Gender Equity in the California Legal Profession*, 34 U.S.F. L. REV. 1, 15 (1999), citing AMERICAN BAR ASSOCIATION COMMISSION ON WOMEN IN THE PROFESSION, UNFINISHED BUSINESS: OVERCOMING THE SISYPHUS FACTORS 5, 7, 11, 16, 8 (1995). There are now close to

Recent scholarship suggests that the “glass ceiling” metaphor does not accurately explain the above statistics. “Instead . . . the appropriate metaphor might be a sticky floor – gendered work practices and compensation systems that do not allow women to progress.”<sup>56</sup> Unlike their male colleagues, women entering the legal profession remain stuck to the bottom of legal hierarchy because of heavy domestic responsibilities and law firm environments that tend to undervalue their work, underestimate their commitment, and prevent quality mentoring relationships.<sup>57</sup>

The different career patterns men and women experience are often caused by the simple fact that women continue to “perform two-thirds of all domestic chores in the home.”<sup>58</sup> A recent survey by the Department of Labor shows that the average working woman spends twice as much time as the average working man on household chores and the care of children.<sup>59</sup> Commentators describe this phenomenon as the “second shift,” where “women in two-career marriages bear overwhelming responsibility for domestic work.”<sup>60</sup> Because women remain assigned to the primary role of family caregiver, “while men are assigned the role of primary wage earners,”<sup>61</sup> female attorneys often feel more pressure in balancing career and family than their male counterparts. Not only do women attorneys face a “second shift” when they return

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400,000 women attorneys. ABA COMMISSION ON WOMEN IN THE PROFESSION, *BALANCED LIVES: CHANGING THE CULTURE OF LEGAL PRACTICE* 11 (2001), available at <http://abanet.org/woemn/balancedlives/pdf> [hereinafter ABA COMMISSION].

<sup>56</sup> Nancy Reichman & Joyce Sterling, *Opting Out: Women Lawyers, Gendered Law Firms, and the Context of Choice*, 14 RES. L. 1, 10 (2003).

<sup>57</sup> Reichman & Sterling, *supra* note 56, at 1.

<sup>58</sup> Jones, *supra* note 55, at 17. See also, Wynn R. Huang, *Gender Differences in the Earnings of Lawyers*, 30 COLUM. J. L. & SOC. PROBS. 267, 298 (1997).

<sup>59</sup> Edmund L. Andrews, *Survey Confirms It: Women Outjuggle Men*, N.Y. TIMES, Sept. 15, 2004, § A, page 23. The study found that “the average working woman, for example, spends about an hour and a half day caring for other members of the family, the average working man barely 50 minutes. Likewise, the average working women spend more than 1 hour 20 minutes on household chores, the average working man less than 45 minutes.”

<sup>60</sup> Rebecca Korzec, *Working on the “Mommy-Track”: Motherhood and Woman Lawyers*, 8 HASTINGS WOMEN’S L.J. 117, 126 (1997). Sociologist Arlie Hochschild, who coined the term “second shift,” estimates that mothers’ second shifts amount to their working an extra month of twenty-four hour days per year. ARLIE HOCHSCHILD WITH ANNE MACHUNG, *THE SECOND SHIFT: WORKING PARENTS AND THE REVOLUTION AT HOME* 230 (1989). See also,

home from work, but, once a woman becomes a mother her legal colleagues often question her commitment.<sup>62</sup> Such questioning affects partnership decisions, especially for women who have young children.<sup>63</sup>

Commentators suggest that women with young children hit “the maternal wall” when their firms reject them for partnership. This wall represents the clash between employers’ expectations of workers without family responsibilities and a family system that still relies heavily on family care, especially a mother’s care.<sup>64</sup> The “maternal wall” perpetuates stereotypes that women are not available, or should be not available, to work long hours because of their roles as wives and mothers, even when they are willing to work around the clock.<sup>65</sup> Since their gender alone causes employers to question their commitment, working mothers are less likely than their male colleagues to reach the highest levels of the legal profession. As a result, women’s efforts

have subsidized the cost of parenting for men. Men can enjoy the status of parenting while remaining ‘ideal’ traditional workers who may devote all efforts to professional advancement. In fact, the joint status of husband and father increases a man’s desirability as a worker as he is regarded as more stable and mature than his childless bachelor counterpart. Conversely, the mere status of motherhood diminishes the value of women employees in the eyes of employers, thereby exacting high career costs for women.<sup>66</sup>

Motherhood’s adverse affects on career advancement make female attorneys cautious about having children. Common advice that “having children before partnership or having more than one child would be ‘death to their careers’” increases many women’s concerns about the

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ARLIE HOCHSCHILD, *THE SECOND SHIFT* 3-10 (1989).

<sup>61</sup> Jones, *supra* note 55, at 24.

<sup>62</sup> *Id.* at 25.

<sup>63</sup> *Id.* at 26. Those women who do reach the highest levels of their professions, are often unmarried and childless.

<sup>64</sup> Joan C. Williams, *Canaries in the Mine: Work/Family Conflict and the Law*, 70 *FORDHAM L. REV.* 2221, 2223 (2002).

<sup>65</sup> Reichman & Sterling, *supra* note 56, at 9.

<sup>66</sup> Jones, *supra* note 55, at 26.

career consequences of having a family.<sup>67</sup> Consequently, a staggering 76% of women lawyers ages 27-32 do not have children, compared with 29% of women that age in the general population.<sup>68</sup> Those women who do become mothers face the normal stresses of parenting and the “unpredictable, grueling and excessive hours, constant competition, and rigid hierarchy” of their law firms.<sup>69</sup>

## **B. Workplaces Remain Fixed To Male Norms**

The traditional law firm is based on men’s experience, assuming “a married male lawyer with a wife attending to home and kids,” and glorifying “the workaholic lawyer who takes no time for family life.”<sup>70</sup> This model requires an “ideal worker” “available to work long hours, at least five days a week, all year round, with few periods of short scheduled leave”<sup>71</sup> and who “is necessarily unencumbered by non-employment responsibilities, such as family caring work.”<sup>72</sup> The ideal worker’s characteristics create an atmosphere adverse to most women’s needs by reinforcing a patriarchal workplace where employment and family must occupy wholly separate spheres.<sup>73</sup> Such a workplace “ignores the experience and life patterns of women, especially those with children.”<sup>74</sup>

Firms ignore women’s experiences by failing to provide adequate part-time or flexible

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<sup>67</sup> ABA COMMISSION, *supra* note 55, at 17.

<sup>68</sup> AJD, *supra* note 14, at 60. *See also*, PHYLLIS HORN EPSTEIN, WOMEN-AT-LAW 173 (2004). Women who wait to have children may have difficulties conceiving; new studies mark women’s decline in fertility at the age of twenty-seven. Even more significant, women who put their careers first often have difficulty actually finding a spouse to begin a family with, which explains why female attorneys are less likely to be married than their cohorts in the general population: “Women who exit law school in their late twenties, as most do, have devoted most of their fertile years to the all-consuming study of law, rather than dating. The next few years are devoted to finding employment and then working like crazy to keep that job.” This leaves little time for women attorneys to date, marry, and start having children before their fertility declines. *Id.*

<sup>69</sup> Martha Fay Africa, *The Opt-Out Alternative*, L. PRAC., April 2004, at 41.

<sup>70</sup> Ida O. Abbott, *Women in Law Firms: Redefining Success*, L. PRAC., April 2004, at 36.

<sup>71</sup> Smith, *supra* note 10, at 275. *See also* JOAN WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT 64-113 (2000).

<sup>72</sup> Smith, *supra* note 10, at 275.

<sup>73</sup> *Id.*

<sup>74</sup> Abbott, *supra* note 70, at 36.

schedules.<sup>75</sup> In many law firms, a part-time schedule requires an attorney to work forty hours per week, which most non-legal workplaces would consider as full-time.<sup>76</sup> Moreover, part-time lawyers often face negative career consequences, including permanent associate status, less prestigious work, and a greater percentage cut in pay than cut in hours.<sup>77</sup> Consequently, while ninety-five percent of law firms have part-time policies, a mere three percent of lawyers actually work part-time.<sup>78</sup> Of those working part-time, only “one percent become partners” because “assumptions about the inadequate commitment of attorneys on reduced schedules often influence performance evaluations, promotion decisions, and opportunities for both the mentoring relationships and challenging assignments that are prerequisites for advancement.”<sup>79</sup>

Although the inadequacy of flexible and part-time schedules carries a cost for all lawyers, “women pay a disproportionate price” because “most male attorneys have spouses who assume the bulk of family responsibilities; most female attorneys do not.”<sup>80</sup> Since very few women have partners who are primary caretakers, women attorneys tend to shoulder the larger burden of their families’ household and caretaking responsibilities.<sup>81</sup> Thus, a woman who leaves her firm to care for her children or to find a more family-friendly workplace may “describe her decision to quit as her ‘choice,’ when what she really means is that her employer is inflexible and her children’s father should help shoulder the responsibility for caring for them.”<sup>82</sup>

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<sup>75</sup> Rhode, *supra* note 2, at 2213.

<sup>76</sup> See Epstein, *supra* note 68, at 192-93. Epstein cites the policy in a large Los Angeles law firm where part-time lawyers must bill 1,950 hours per year, which “requires a 40-hour week for 50 weeks of the year, billing every minute.” *Id.* at 192. A recent ABA survey notes that work weeks of more than sixty hours are routine in many practice settings, with most firms considering forty-hour weeks as “part-time.” ABA COMMISSION, *supra* note 55, at 14.

<sup>77</sup> EPSTEIN, *supra* note 68, at 188.

<sup>78</sup> *Id.*, citing figures compiled by NALP for over one thousand law firms. Additionally, only a quarter of women attorneys believe that they can use a flexible work arrangement without jeopardizing their prospects for advancement. CATALYST, WOMEN IN LAW: MAKING THE CASE, EXECUTIVE SUMMARY 10 (2001).

<sup>79</sup> Rhode, *supra* note 2, at 2213.

<sup>80</sup> Rhode, *supra* note 2, at 2215.

<sup>81</sup> *Id.* at 2216.

<sup>82</sup> Joan Williams, *From Difference to Dominance to Domesticity: Care as Work, Gender as Tradition*, 76 CHI-KEN

### C. Stigma Attached to Male Attorneys' Requests for Family Leave

While American law and society commonly view “questions involving workplace accommodation of family responsibilities [as] ‘women’s issues,’”<sup>83</sup> men face similar problems. Workplaces that are reluctant to provide flexible schedules to accommodate working mothers are “even more resistant” to working fathers.<sup>84</sup> Even when family leave is formally available and financial barriers to leave are removed, workplace hostility deters many fathers from actually taking such leave.<sup>85</sup> Law firms will do their utmost to provide leave to a male attorney who is in the midst of a family crisis, but are far less accommodating when attorneys request paternity leave or a schedule that provides time to pursue family, or other, interests.<sup>86</sup> This continuing hostility toward paternity leave explains why only ten to fifteen percent of law firms and Fortune 1000 companies offer the same paid parental leave to both men and women and why almost fifty percent of male attorneys think it is unacceptable to request part time work.<sup>87</sup> Because of the hostility toward paternal leave, less than five percent of male attorneys take reduced schedules or extended leave for family reasons.<sup>88</sup>

“Workplace policies that disadvantage men also disadvantage women”<sup>89</sup> because “[l]ow participation rates in paternal leave programs are matched by low paternal participation rates in child-care tasks.”<sup>90</sup> Policies that discourage men from assuming an equal division of household

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L. REV. 1441, 1474 (2001).

<sup>83</sup> Martin H. Malin, *Fathers and Parental Leave*, 72 TEX. L. REV. 1047, 1047 (1994).

<sup>84</sup> Rhode, *supra* note 2, at 2216.

<sup>85</sup> Malin, *supra* note 83, at 1078.

<sup>86</sup> See Africa, *supra* note 69, at 41-43. Africa compares the leave requests of two men. Henry asked for a reduced schedule to care for his children after his wife died of cancer, while Nathan asked for a reduced schedule to pursue classical piano as a member of a quartet. Henry’s firm granted his request immediately and with little discussion. However, Nathan had to prepare a detailed presentation and threaten resignation before his firm granted his request.

<sup>87</sup> ABA COMMISSION, *supra* note 55, at 18.

<sup>88</sup> *Id.* See also, Rhode, *supra* note 2, at 2216. Rhode quotes one father’s response to a Boston Bar Association question about the amount of paternity leave taken by male attorneys: “it may be ‘okay [for men] to say that [they] would like to spend more time with the kids, but it’s not okay to do it, except once in a while.’”

<sup>89</sup> Rhode, *supra* note 2, at 2217.

<sup>90</sup> Malin, *supra* note 83, at 1050.



responsibilities reinforce gender stereotypes that women hold sole responsibility for family care, whether or not they are employed outside of the home in a demanding profession. To end discrimination against women who are, or may become, mothers, employers and society must fully recognize and protect men's parenting responsibilities. Men, by becoming equal partners in parenting, can reduce working mothers' struggle to balance their families and their careers.

#### **IV. Solutions to Attorneys' Work-Life Balance Problems – A Relational Perspective**

##### **A. Changing Workplace Norms From Gender-Neutral to Family-Friendly**

Almost one half of lawyers participating in a recent ABA survey felt that they did not have enough time for themselves or their families and almost three quarters of lawyers with children reported difficulty in balancing their personal and professional demands.<sup>91</sup> These difficulties confirm formal equality's failure to accommodate family responsibilities or to supply women with the support systems necessary to achieve high levels of professional success and personal satisfaction. Commentators point out that "in the march for equality, feminists forgot to emphasize the uniqueness of motherhood and the joys and burdens that attach to it."<sup>92</sup> As a result, women attorneys have been forced to accept a male model of work and responsibility where firms expect them to "practice within established structures" that have not changed to accommodate them.<sup>93</sup>

The legal workplace has failed to adapt to women's different needs and perspectives.<sup>94</sup> Legal employers continue to construct workplaces around male norms, thereby denying equal employment opportunities to women.<sup>95</sup> As Joan Williams states, "[t]o expect an employee to work overtime, travel on short notice, or to undertake other tasks that require insulation from

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<sup>91</sup> ABA COMMISSION, *supra* note 55, at 11.

<sup>92</sup> Bookspan, *supra* note 15, at 71.

<sup>93</sup> Deborah Rhode, Gender and Professional Roles, 63 *Fordham L. Rev.* 39, 40 (1994).

<sup>94</sup> Smith, *supra* note 10, at 290.

family needs is to presuppose an employee who is male or who is, at least, inhabiting a masculine gender role.”<sup>96</sup> Solutions to work-life balance problems must therefore begin by transforming male-centered norms and shifting the focus away from whether women meet the norms of the traditional, unencumbered male attorney.<sup>97</sup> New workplace norms must recognize that all attorneys may have significant family responsibilities and must operate to prevent both male and female attorneys with such responsibilities from being treated as non-conformers. New workplace norms must also recognize that all attorneys, including those without children, have relationships, responsibilities, and interests outside of their work.

Instead of formal equality, a relational approach that recognizes care giving roles will allow all attorneys to create their own models within the legal profession, and will ensure that firms adequately address uniquely female issues and concerns. Such a relational approach will prevent talented, but overworked and overburdened women from “opting-out” of the most prestigious legal positions to care for their families and have a life outside of their work.<sup>98</sup> However, the focus of reform should not be specifically on women and motherhood, but on parenthood in general and on all attorneys’ need to pursue interests outside of their work.

The workplace will not change until men are included in the reformation.<sup>99</sup> Until responsibilities within the home are shared equally between men and women, women’s

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<sup>95</sup> Kathryn Abrams, *Cross-Dressing in the Master’s Clothes*, 109 YALE L.J. 745, 754 (2000).

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

<sup>97</sup> Smith, *supra* note 10, at 290.

<sup>98</sup> In her NY Times Article, “The Opt-Out Revolution,” Lisa Belkin uses the term “opting-out” to describe professional women who left the paid workforce because they found it impossible to have both a successful career and a meaningful family life. See Belkin, *supra* note 1.

<sup>99</sup> Bookspan, *supra* note 15, at 71. The FMLA is one step in this reformation. While, the FMLA’s requirement that employers provide leave following the birth of a child is clearly targeted at working mothers, the Act also provide parental leave rights to all workers, regardless of gender. This approach prevents employers from discriminating against women of child-bearing age. In passing the FMLA, Congress expressly found “[E]mployment standards that apply to one gender only have serious potential for encouraging employers to discriminate against employees and applicants for employment who are of that gender.” 29 USC § 2601(a)(6) (2000).

opportunities in the workplace will remain limited.<sup>100</sup> Deborah Rhode states “[a]s long as work/family problems are viewed as problems primarily for women, potential solutions may receive inadequate attention in decision-making structures dominated by men.”<sup>101</sup> Therefore, solutions to the work-life balance problem must encompass both men and women and account for the different problems facing each gender.

## **B. Specific Solutions To Transform the Legal Workplace**

Legal employers’ current lack of family-friendly policies creates a “self-perpetuating cycle of devaluation in which equality in formal rights masks inequality in daily experience.”<sup>102</sup> Women with substantial caretaking obligations have no choice but to leave the most demanding legal positions; those women who remain in such positions are often single, childless, or willing to minimize family responsibilities.<sup>103</sup> Thus, the individuals with the greatest influence on workplace policies and structure are “those with the least personal understanding of its inadequacies.”<sup>104</sup>

Currently, most managerial positions are held by “men who grew up in an era in which they were not expected to assume time-consuming family responsibilities.”<sup>105</sup> Those few women in managerial positions “often believe that if they managed without special accommodation of family-related needs, so can others” and “find it hard to empathize with younger colleagues who seem oblivious to those tradeoffs and who demand options that prior generations never had.”<sup>106</sup> Despite the views of top managers, younger lawyers refuse to repeat the sacrifices of their predecessors who either never had children or who rarely see their children. Employer’s must

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<sup>100</sup> Deborah Rhode, *The “No-Problem” Problem: Feminist Challenges and Cultural Change*, 100 YALE L. J. 1731, 1733 (1991).

<sup>101</sup> Rhode, *supra* note 2, at 2216.

<sup>102</sup> Deborah Rhode, *supra* note 100, at 1768.

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

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

<sup>105</sup> ABA COMMISSION, *supra* note 55, at 15.

transform their workplace structures to attract the new generation’s brightest and most talented attorneys, attorneys who are not willing to sacrifice their personal lives to the legal profession.<sup>107</sup>

This transformation will require a combination of federal and private initiatives.

### **1. Federal Initiatives - Expanding the FMLA**

Although the FMLA was based upon the promise that workers will “never again have to choose between the job they need and the family they love,”<sup>108</sup> it fails to capture the work-life balance struggles that occur beyond a child’s first twelve weeks of life. One possible solution to the work-life struggle is to expand the FMLA to apply to more employees and to address the daily challenges of balancing work and family-life.<sup>109</sup> Such an expansion would aid in creating a workplace standard “where every employee’s full-time job responsibility leaves enough time for participation in outside daily activities.”<sup>110</sup> The following suggestions are a starting point for creating such a standard.

#### **a. Eliminate the FMLA’s Technical Restrictions On Eligibility**

Currently, the FMLA only applies to those attorneys who meet the definition of an “eligible employee,” which leaves small and mid-size law firms outside of the Act’s purview.<sup>111</sup> Therefore, one option that would make family leave more widely available to attorneys and other

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

<sup>107</sup> *Id.* “The result is a generational conflict, between Gen-Xers concerned about ‘having a life’ and baby boom partners who ‘don’t even have a clue how many billable hours they work, they don’t care, it’s part of their modus operandi.” JOAN C. WILLIAMS & CYNTHIA THOMAS CALVERT, *BALANCED HOURS: EFFECTIVE PART-TIME POLICIES FOR WASHINGTON LAW FIRMS* 9 (2001), available at <http://www.pardc.org> [hereinafter WILLIAMS & CALVERT].

<sup>108</sup> U.S. National Archives and Records Administration, Clinton Presidential Materials Project, *Statement by the President on the Fifth Anniversary of the Family and Medical Leave Act*, available at <http://clinton6.nara.gov/1998/08/1998-08-05-statement-by-the-president-on-5th-year-anniversary-of-fmla.html> (Aug. 5, 1998).

<sup>109</sup> Leslie Larkin Cooney, *Lawyer, Heal Thyself: Bringing Rational Expectations to the Law Firm Environment*, 22 WHITTIER L. REV. 967, 983 (2001). See also, See Pauline T. Kim, *The Family and Medical Leave Act of 1993: Ten Year’s of Experience*, 15 WASH. U. J. L. & POL’Y 1, 13 (2004); Katharine B. Silbaugh, *Is the Work-Family Conflict Pathological or Normal Under the FMLA? The Potential of the FMLA to Cover Ordinary Work-Family Conflicts*, 15 WASH. U. J. L. & POL’Y 193 (2004).

<sup>110</sup> Cooney, *supra* note 109, at 984.

<sup>111</sup> Heather A. Peterson, *The Daddy Track: Locating the Male Employee Within the Family and Medical Leave Act*,

employees of small workplaces is to amend and expand the FMLA’s definition of eligible employees. This expansion could occur in one of two ways: (1) eliminate the fifty employee requirement altogether and make all employees who work at least 1,250 hours per year eligible for FMLA leave or (2) reduce the employee requirement from fifty to a lesser number that will encompass more employees without substantially burdening the smallest of America’s workplaces with the significant costs associated with mandatory parental leave policies.

### **b. Flexible Leave Schedules**

Congress should expand the FMLA to allow intermittent or reduced-leave schedules. Currently, the FMLA does not allow parental leave after the first twelve weeks of a child’s life.<sup>112</sup> Changes in FMLA leave to provide flexibility in the timing of parental leave would alter entrenched gender roles by increasing the number of fathers able to take family leave.<sup>113</sup> Since “[b]iology necessitates that mothers use parental leave immediately before and after childbirth. . . . the most practical time, both financial and otherwise, for fathers to take advantage of the FMLA’s parental leave is sometime after the mother’s leave has expired.<sup>114</sup> For example, the first six weeks after a child’s birth could be available on a reduced-leave schedule, with an additional six weeks of leave available after the child’s mother returns to work. Such a schedule

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15 WASH. U. J. L. & POL’Y 253, 273 (2004).

<sup>112</sup> 29 U.S.C. § 2612(b)(1) (2000) (stating that leave because of the birth of a child shall not be taken by an employee intermittently or on a reduced leave schedule, unless the employer and employee agree otherwise).

<sup>113</sup> The time immediately following childbirth is a critical period in the determining the long-term division of child-rearing responsibilities within a family. See, Angie K. Young, *Assessing the Family and Medical Leave Act in Terms of Gender Equality, Work/Family Balance, and the Needs of Children*, 5 MICH. J. GENDER & L. 113, 124 (1998). Young states:

If fathers participated in infant care to the same extent that mothers did, they could debunk the myth that women have a special ‘maternal instinct’ that makes them better parents, or that the mother-infant bond is more natural and more important than the father-infant bond. Parenting seems to be more a function of practice and opportunity than of maternal instinct. Though a first-time mother and father may begin with the same level of parenting skills, the perception that mothers have greater skills can be a self-fulfilling prophecy. If only the mother is home after childbirth, both parents are likely to perceive her as more knowledgeable and skilled in childcare.

<sup>114</sup> Peterson, *supra* note 111, at 271.

would ensure “the kind of regularity and formality needed to facilitate continued productivity” for the employer and the kind of father-child bonding needed to equalize child care-taking responsibilities.<sup>115</sup>

**c. Paid Family Leave**

Including a form of wage replacement within the FMLA would foster gender equality;<sup>116</sup> without a form of wage replacement, many parents cannot simultaneously support their families and take advantage of family leave provisions.<sup>117</sup> Thus, unpaid leave is “one of the most significant obstacles to male employees’ ability to access the legislation.”<sup>118</sup> Because “few families can afford to live without at least one wage-earner,” unpaid FMLA forces men and women to compete for its use.<sup>119</sup> Women usually win this competition: since the mother is already on leave due to her disability following childbirth, many couples make the rationale choice that she should be the parent to take advantage of FMLA leave, allowing her husband to continue as a wage-earner for the family.<sup>120</sup> Thus, paid FMLA leave would make the “legislation financially feasible for male employees”<sup>121</sup> by removing the need for one parent in a family to remain at work in order to provide for the family’s growing expenses.

Paid leave should be initiated at a level that is significant enough to remove the financial barriers that currently prevent male employees from taking parental leave<sup>122</sup> and could be provided through employee and employer contributions to a federally funded leave program.<sup>123</sup>

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<sup>115</sup> *Id.* at 281.

<sup>116</sup> Young, *supra* note 113, at 154.

<sup>117</sup> *Id.*

<sup>118</sup> Peterson, *supra* note 111, at 268.

<sup>119</sup> *Id.* at 269.

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

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

<sup>122</sup> Young, *supra* note 113, at 154. “Many experts have suggested wage replacement at seventy-five percent of pre-leave income” would remove employees’ financial barriers to FMLA leave. *Id.*

<sup>123</sup> Peterson, *supra* note 111, at 279. “Opponents of employer-funded family leave argue that imposing costs on employers will promote sex discrimination in hiring since employers will perceive women in their child bearing year as more costly.” *Id.* at n. 118.

Employer contributions would occur through “a yearly tax related to their size alone, rather than employee composition. This kind of objective tax scheme eliminates any incentives . . . to discriminate against the perceived higher costs associated with hiring women of child-bearing age.”<sup>124</sup> Employer contribution to parental leave would be a starting point in transforming societal attitudes regarding the importance of effectively balancing work and family and would alleviate employees’ fears, especially those of male employees, of the career and financial repercussions associated with taking leave.<sup>125</sup> However, employers should not bear the full financial burden of the implementation of paid leave. As beneficiaries of family leave, employees should also make contributions, such as through a mandatory payroll tax.<sup>126</sup> Because all of American society would be participating in funding paid family leave, “affirmation of the importance of family would eventually make parental leave not only acceptable but the ‘norm’ among workers.”<sup>127</sup>

## **2. Employers’ Adoption Of Effective Balanced Hours Policies**

Because of the technical barriers to applying the FMLA to smaller legal workplaces and the difficulties Congress will surely face in amending the FMLA, all legal employers must embrace the FMLA’s normative message and create family and life-friendly workplaces for their attorneys. Firms’ creation of such workplaces represents a sound business decision to retain talented attorneys and an ethical choice to maintain the integrity of the profession by enabling attorneys to simultaneously be good lawyers, good partners, and good parents.

### **a. Elements of Effective Balanced Hours Policies**

Beyond the FMLA and government-sponsored family leave, private employers must

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<sup>124</sup> *Id.* at 279. Opponents argue that employer-funded family leave has the potential for substantial inequities caused by employers’ differing abilities to pass the cost on of parental leave. *Id.* at n. 120.

<sup>125</sup> *Id.* at 280.

<sup>126</sup> *Id.*

adopt effective balanced hours policies that allow all attorneys to make choices regarding the amount of time they allocate to work and family. Many lawyers who seek to reduce work-life conflict do not want part-time work policies that carry with them the implication of partial commitment. Rather, what these lawyers seek are balanced lives combined with suitable career development.<sup>128</sup> Therefore, the legal workplace must transform itself by allowing all attorneys, regardless of their parental status, to lead rich and rewarding lives.

Employers should begin this transformation by implementing alternative working arrangements that are as broadly available as possible and do not carry the stigma associated with current part-time policies. Not only does broad availability provide more men with the option of balanced hours, but it also prevents stigmatizing women who choose such work arrangements. “Desires for balanced lives are not unique to women with children, and alternative schedules are less likely to be stigmatized if they are not used exclusively by mothers.”<sup>129</sup> Moreover, lawyers at all levels should be able to request a reduced schedule or temporary leave for legitimate reasons since worries that unrestricted eligibility will lead to all lawyers wanting reduced schedules are unfounded. “Except for relatively short parts of their careers, most professionals appear reluctant to sacrifice the income, structure, and relationships that come with full-time work.”<sup>130</sup> Even if substantial numbers of attorneys would opt for an unstigmatized reduction of hours coupled with a commensurate reduction in income, firms offering such an alternative would still “realize substantial gains in efficiency, morale, and recruitment.”<sup>131</sup>

When employers adopt effective alternative work arrangements, both the employer and

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

<sup>128</sup> WILLIAMS & CALVERT, *supra* note 107, at 1.

<sup>129</sup> ABA COMMISSION, *supra* note 55, at 24.

<sup>130</sup> *Id.*



its employees benefit from the improved morale and broadened perspective that attorneys with other commitments bring to their work.<sup>132</sup> However, such improved morale only occurs when alternative work arrangements are fairly compensated. Compensation for employees working non-traditional schedules should be calculated on a pro-rata basis<sup>133</sup> and such employees should retain full benefits so long as they work above a minimum number of hours per year.<sup>134</sup>

Employers must also ensure that those employees who seek family accommodations or reduced schedules do not pay a permanent price.<sup>135</sup> Because “[p]rofessional experience and expertise have the same value whether acquired on a full-time or part-time basis,” the period an attorney spends on a reduced schedule should count as part of the progression toward partnership or other senior positions<sup>136</sup>

Effective reduced schedules allow employers and employees to choose from a variety of alternative work arrangements, including telecommuting, job-sharing, and adjustments in working hours (specifying a certain number of days per week, weeks per month, or months per year).<sup>137</sup> Flexible work-sites allowing employees to work at home when feasible lets employees be parents and productive employees. Additionally, balanced hours and flex-time that allow employees to set their own schedules within certain parameters enables employees to more efficiently allocate their time between family and work responsibilities.

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<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at 35. What this means in practice will necessarily vary depending on how the organization normally makes compensation decisions for full-time attorneys.

<sup>134</sup> *Id.* at 36. The ABA states that providing a generous benefits package rewards and encourages “the loyalty of lawyers working under challenging circumstances. The cost will be relatively small compared to the potential positive effects on recruitment and retention. For that reason, many organizations provide full employer-paid benefits for lawyers on alternative schedules.” *Id.*

<sup>135</sup> *Id.* at 24.

<sup>136</sup> *Id.* at 36. Effective firm policies provide that working less than full-time will not halt partnership progress, but will rather slow down progression toward partnership on a pro rata basis. Other policies provide that the effect of reduced schedules on partnership decisions will depend upon the professional development of the individual attorney. *Id.*

<sup>137</sup> *Id.* at 34.

**b. The Business and Ethical Dimensions of Family-Friendly Policies**

Both employers and employees profit from the implementation of family friendly work arrangements and policies: “firms are beginning to realize that ‘bottom-line’ profits are generated by more than hard work. Happier employees are better and more loyal employees. Better employees are more productive. Loyal employees do not leave as readily.”<sup>138</sup> In the long run, employers who fail to adopt family and life friendly policies will incur excessive costs in recruiting and training replacements<sup>139</sup> as the lack of such policies increases turnover, impairs recruiting, and compromises job performance.<sup>140</sup> Thus, in evaluating the economic consequences involved in adopting alternative work arrangements, legal employers must consider the long-term advantages inherent in such arrangements: “retention of talented, experienced attorneys; preservation of client and collegial relationships; and reduction in training and recruitment costs.”<sup>141</sup> Because the most desirable firms for the newest generation of attorneys are those that “give them a life” as opposed to “more cash”<sup>142</sup> effective flexible work policies will enable firms to retain their best young attorneys and to attract talented new attorneys. Thus, firms’ adoption of non-stigmatized flexible work policies will translate into millions of dollars in savings, not only in reduced attrition costs but also in the recruitment of

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<sup>138</sup> Bookspan, *supra* note 15, at 79.

<sup>139</sup> ABA COMMISSION, *supra* note 55, at 12. Most associates do not begin to generate profits until their third or fourth years, but at this point, almost half have left their first employer in favor of a more accommodating workplace. *Id.* at 20. It then costs at least 150% of a worker’s annual salary to recruit and train a replacement. *Id.* at 21. Conservative estimates state that a firm loses one million dollars every time five associates leave. WILLIAMS & CALVERT, *supra* note 107, at 4, 7.

<sup>140</sup> Rhode, *supra* note 93, at 64.

<sup>141</sup> ABA COMMISSION, *supra* note 55, at 41. Several recent studies have shown that attorneys cite flexible schedules as the most effective retention tool, even more effective than salary increases. *Id.* at 21.

<sup>142</sup> WILLIAMS & CALVERT, *supra* note 107, at 8. Williams and Calvert note that “[t]oday’s young attorneys have watched what’s happened to their parents and others. They have seen people work hard for a payoff down the road that never comes.” *Id.* at 9. They therefore have a high regard for friends and family and state that their biggest fear regarding the legal profession is the lack of a life outside of the office. *Id.* at 8.

today's brightest law school graduates.<sup>143</sup>

Beyond the tremendous savings, there is an ethical component to creating a friendlier workplace for all attorneys and to ending the requirement that lawyers of all levels sacrifice family responsibilities and other important interests for the benefit of the legal profession.<sup>144</sup> Firms have ethical obligations to promote the health and wellbeing of their attorneys while also providing effective counsel to their clients; they fail to fulfill these obligations when the only schedule offered to attorneys is one of oppressively long hours with no opportunity to pursue a life outside of the office.<sup>145</sup> Research shows that part-time employees who have the time to pursue outside interests exercise better professional judgment and are more efficient than their full-time counterparts, especially those working oppressive schedules. By increasing attorney health and morale and raising the efficiency of client representation, effective alternative work arrangements allow firms to fulfill their ethical obligations within the legal profession.<sup>146</sup>

## V. Conclusion

At the 2001 Women's Leadership Summit, Janet Reno noted that if "[w]e can put a man on the moon, surely we can create a workplace where it is possible to have a meaningful life and do right by those we love."<sup>147</sup> The FMLA was meant to be one step in achieving such a workplace. However, its effectiveness in truly creating balanced lives for attorneys, and for all working parents, is severely limited by its technical restrictions and the attitudes and assumptions of private employers. In changing America's legal workplaces, society, government, and private employers must work to eradicate the traditional stereotypes of women as homemakers and to

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<sup>143</sup> *Id.* at 8.

<sup>144</sup> ABA COMMISSION, *supra* note 55, at 3.

<sup>145</sup> *Id.* at 12. Such oppressive working arrangements are the "leading cause of lawyer's disproportionately high rates of reproductive dysfunction, stress, substance abuse, and mental health difficulties . . . [which] contribute to performance problems and liability risks." *Id.*

<sup>146</sup> *Id.* at 21.

<sup>147</sup> Rhode, *supra* note 2, at 2220.

transform inflexible workplace norms that leave no room for family responsibilities. Today's female attorneys are not asking for too much in desiring such changes. They are simply refusing to "make the sacrifices that earlier generations of female professionals often made, such as foregoing personal relationships and motherhood;" more importantly, they "merely want the same [successful career and meaningful family life] their male colleagues take for granted."<sup>148</sup>

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<sup>148</sup> Jones, *supra* note 55, at 48.