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Legislating a Family-Friendly Workplace: Should It Be Done in the United States?

Marianne DelPo Kulow*

ABSTRACT

This Article reviews both domestic and international efforts to legislate a more family-friendly workplace, with an eye toward measuring the impact of these various initiatives and predicting both their future success and the likelihood of more widespread adoption. In particular, the Article reviews federal, state, and international legislative efforts to mandate: paid parental leaves; paid sick days; and flexible work arrangements. The Article then attempts to measure the effectiveness of such legislatively required, family-friendly policies by suggesting ways to measure and to predict the impact of U.S. legislative efforts to reconcile the conflicting responsibilities of work and parenthood. The Article concludes by presenting economic, legal, and ethical reasons why family-friendly policies should be both voluntarily adopted and legislatively required.

I. INTRODUCTION

When the H1N1 flu outbreak hit the United States in 2009,¹ hundreds of communities took the draconian measure of shuttering their schools for one or two weeks.² Among the issues raised by the school closures was a critical dilemma faced by working parents: How would they suddenly provide unanticipated childcare?³ Many parents simply stayed home with their children since they did not have all-day “emergency” childcare in place for their school-age children.⁴ Some parents, in the midst

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¹ *H1N1: Meeting the Challenge*, U.S. DEP’T OF HEALTH & HUMAN SERVICES, <http://www.flu.gov/timeline/> (last visited Feb. 25, 2011) (providing a timeline of the H1N1 flu pandemic).

² *H1N1 Closes Hundreds of Schools Across the U.S.*, FOX NEWS NETWORK (Oct. 28, 2009), <http://www.foxnews.com/story/0,2933,570129,00.html> (“At least 351 schools were closed last week alone—affecting 126,000 students in 19 states, according to the U.S. Education Department. So far this school year, about 600 schools have temporarily shut their doors.”).

³ See Thomas L. Gift et al., *Household Effects of School Closure During Pandemic (H1N1) 2009, Pennsylvania, USA*, 16 EMERGING INFECTIOUS DISEASES 1315–17 (Aug. 2010), available at <http://wwwnc.cdc.gov/eid/article/16/8/pdfs/09-1827.pdf>; Serena Gordon, *1 in 5 Parents Missed Work for H1N1 School Closings: Survey*, HEALTHDAY (July 14, 2010), <http://health.msn.com/health-topics/cold-and-flu/articlepage.aspx?cp-documentid=100261193> (“We wanted to conduct a survey to assess what impact a school closing has on a household. What kind of disruption did these parents have?” explained the study’s lead author, Thomas Gift, an economist with the U.S. Centers for Disease Control and Prevention in Atlanta. “We found that only a minority of households reported any time off from work . . . [b]ut, in the 22% of households where at least one parent had to miss work, about 40% of those parents had to miss five days of work.”).

⁴ Howard Lempel et al., *Economic Cost and Health Care Workforce Effects of School Closures in the U.S.*, PLOS CURRENTS (2009), <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2762813/> (noting that “[w]ith

of a recession and barely making ends meet, could not afford to stay home since their employers did not provide paid sick days for the care of family members.⁵ The school closures created a financial burden on families who were forced to choose between ensuring the safety of their children during the canceled school days and bringing home a week's wages.⁶ The H1N1 crisis led to increased support for a growing movement to legislatively ensure paid sick days for the care of mildly sick dependent children,⁷ but this "solution" would still not address the need to care for healthy children forced to stay home from school due to a school closure.

The H1N1 crisis is not the only recent example of unexpected and extended school closures. The winter of 2010–2011 was particularly severe in many parts of the United States.⁸ This resulted in an unusually high number of "snow days" for many school districts.⁹ In addition to school closures due to snow days, a number of schools had to close briefly to address concerns about the structural integrity of flat school roofs in the face of unprecedented amounts of heavy snow collected on rooftops.¹⁰ Once again working parents were confronted with the dilemma of closed schools and no childcare.¹¹

their children out of school, many parents will stay home from work. This absenteeism will lead to significant economic costs."); Liz O'Donnell, *H1N1 a Challenge for Working Mothers*, CARE2 (Oct. 12, 2009, 1:50 AM), <http://www.care2.com/causes/womens-rights/blog/h1n1-a-challenge-for-working-mothers/> ("Because her children were sick, Glass, who is a public relations manager for Hoovers, missed work on Monday and Thursday. Her husband, a police officer, stayed home with the children Tuesday and Wednesday.").

⁵ Jeffrey Levi et al., *Pandemic Flu Preparedness: Lessons from the Frontlines*, TRUST FOR AMERICA'S HEALTH 4 (June 2009), <http://healthyamericans.org/assets/files/pandemic-flu-lesson.pdf> ("School closings have major ramifications for students, parents, and employers. In areas where schools were closed due to H1N1, parents had to scramble to find alternative child care arrangements Many parents had to face taking sick leave from work to stay home to care for their children even if they were not ill, or taking days off without pay if they did not have sick leave.").

⁶ *Id.*

⁷ Just two months after the first confirmed cases of "swine flu" (H1N1), a Connecticut congresswoman reintroduced legislation that would allow employees to use sick leave to care for a sick child, parent, spouse, or other family member. *See* Healthy Families Act, H.R. 2460, 111th Cong. § 5(b) (2009); *see also* Carol M. Goodman, *The Impact of Pending and Existing Employment Legislation on Employment Lawyers and Clients*, ASPATORE, 2010 WL 4735539, at *3–4 (2010) ("Paid sick leave legislation [that would allow for the care of family members] was prompted, at least in part, by the country's outbreak of the H1N1 virus in recent years."); Robb Mandelbaum, *Obama Backs Mandatory Sick Leave Law*, N.Y. TIMES YOU'RE THE BOSS BLOG (Nov. 14, 2009, 11:33 AM), <http://boss.blogs.nytimes.com/2009/11/14/obama-backs-mandatory-sick-leave-law/>.

⁸ *The Snowstorms of 2010–2011*, BOSTON.COM, http://www.boston.com/news/local/massachusetts/gallery/2010_2011_snowstorms/ (last visited Oct. 20, 2011) ("The winter of 2010–2011 has been marked by significant snowfall, including two blizzards.").

⁹ *See, e.g.*, Calvin Hennick, *Stockpile of Snowdays Shrinking, Local Officials See Trouble in Forecast*, BOSTON.COM (Feb. 6, 2011), http://www.boston.com/news/education/k_12/articles/2011/02/06/snow_may_force_western_suburbs_schools_to_change_schedules/.

¹⁰ *See, e.g.*, Peter Schworm & Sarah Schweitzer, *Roofs Still Buckling Under Snow; Schools in 3 Districts Stay Shut*, BOSTON GLOBE, Feb. 8, 2011, at B1, *available at* http://www.boston.com/news/local/massachusetts/articles/2011/02/08/roofs_still_buckling_under_snow_3_school_districts_remain_closed/?page=2.

¹¹ *See, e.g.*, Katie Johnston Chase, *Feeling Buried: As Children Revel in Snow Days, Working Parents Stress Out*, BOSTON.COM, Jan. 28, 2011, at B5, *available at* http://www.boston.com/business/articles/2011/01/28/parents_struggle_to_cope_with_snow_days/.

During a recession, the media gave voice to the cries of frustrated parents.¹² Once again paid sick days did not suffice, as they were unavailable or insufficiently available to many working parents.¹³

Beyond the direct economic damage to parents who must take unpaid days away from work for school closures, there is the more insidious and long-term impact on professional development. What company will promote an employee whose work attendance is unreliable, unpredictable, and conditioned on their child's unexpected need for adult supervision during business hours? The Center for WorkLife Law at the University of California at Hastings College of the Law has coined a name for this human resources phenomenon: "family responsibility discrimination."¹⁴ The efforts of the Center for WorkLife Law, Georgetown's Workplace Flexibility 2010, and other academic and nonprofit entities addressing this issue¹⁵ have both fueled litigation¹⁶ and renewed a variety of legislative efforts to render the U.S. workplace more "family-friendly" with paid leave, paid sick days, and flexible working arrangements.¹⁷

Corporate concerns regarding the increased cost and lost productivity due to absent workers remain.¹⁸ Workers themselves may also worry that legally mandating such

¹² See, e.g., Beth Wurtmann, *Snow Day: A Challenge for Working Parents*, NEWS CHANNEL 13 (Feb. 2, 2011), <http://wnyt.com/article/stories/S1955080.shtml?cat=300> (noting that snow days cause parents to perform "a last minute scramble to figure out where the kids will go"); KJ Antonia, *Snow and the Working Mom*, SLATE (Jan. 27, 2011),

http://www.slate.com/blogs/xx_factor/2011/01/27/the_more_it_snows_the_tougher_it_is_for_working_moms_to_get_to_work.html/ (lamenting, with evident hyperbole, the "4,000th snow day," which meant mothers had to stay home from work yet again).

¹³ See, e.g., Rebecca Mazin, *Can Employees Use Sick Days for Snow Days?*, ALLBUSINESS.COM (Feb. 4, 2011), <http://www.allbusiness.com/science-technology/earth-atmospheric-science-meteorology/15479462-1.html> (indicating that generally sick days cannot be used for snow days).

¹⁴ See *About FRD*, CENTER FOR WORK LIFE LAW, U.C. HASTINGS COLL. OF LAW, <http://www.worklifelaw.org/AboutFRD.html> (last visited Feb. 9, 2011) (providing a concise discussion of the family responsibility discrimination terminology and EEOC guidelines supporting it). See generally Joan C. Williams & Stephanie Bornstein, *The Evolution of "FRd": Family Responsibilities Discrimination and Developments in the Law of Stereotyping and Implicit Bias*, 59 HASTINGS L.J. 1311 (2008).

¹⁵ See, e.g., GEO. L. WORKPLACE FLEXIBILITY 2010, <http://www.workplaceflexibility2010.org/> (last visited Feb. 9, 2011); WOMEN LEGISLATORS' LOBBY, <http://www.willwand.org/> (last visited Feb. 9, 2011); INST. FOR WOMEN'S POL'Y RESEARCH, <http://www.iwpr.org/> (last visited Feb. 9, 2011); NAT'L P'SHIP FOR WOMEN & FAMILIES, <http://www.nationalpartnership.org/site/PageServer> (last visited Feb. 9, 2011); NAT'L ASSOC. OF WORKING WOMEN, <http://www.9to5.org/> (last visited Feb. 9, 2011); SLOAN WORK AND FAMILY RESEARCH NETWORK AT BOSTON COLL., <http://wfnetwork.bc.edu/> (last visited Feb. 9, 2011); CTR. L. & SOC. POL'Y, <http://www.clasp.org/> (last visited Feb. 9, 2011).

¹⁶ See Williams & Bornstein, *supra* note 14, at 1316.

¹⁷ See *Laws Impacting Flexibility*, WORKPLACE FLEXIBILITY 2010: GEORGETOWN LAW, http://workplaceflexibility2010.org/index.php/laws_impacting_flexibility/ (last visited Feb. 10, 2011) (providing an overview of the legislative and policy initiatives supported by organizations such as Workplace Flexibility 2010).

¹⁸ See, e.g., Diana Furchtgott-Roth, *'Sick Leave' Mandates We Can Ill Afford*, REALCLEARMARKETS (Nov. 19, 2009),

http://www.realclearmarkets.com/articles/2009/11/19/sick_leave_mandates_make_us_ill_97519.html; Sally Goldenberg, *Businesses Rip Mandate on Sick Days*, N.Y. POST, Nov. 18, 2009, at 4, available at http://www.nypost.com/p/news/local/businesses_rip_mandate_on_sick_days_oStHxxxTIDfo1tKOyxw5iK; A.J. Higgins, *Paid Sick Days Proposal Meets Strong Opposition from Businesses*, MAINE PUB. BROAD.

measures will lead to “offshoring” jobs.¹⁹ Despite these theoretical concerns, many companies have already voluntarily adopted family-friendly policies.²⁰ Moreover, studies are accumulating that demonstrate the cost-effectiveness of family-friendly policies.²¹ Other studies show the lack of negative impact to the bottom line in companies, both in the United States and in other parts of the world, where these measures are well-established.²²

So where is the United States on this issue and where is it headed? Is there a legislative trend afoot? How widespread are these laws and, more importantly, how effective are they? Can a more family-friendly workplace be driven by voluntary corporate policies embraced because the business case exists for adopting them, or must these changes be legislated in the United States? This Article will address these questions. Part II reviews both the federal and state legislative efforts to date. Part III attempts to measure the effectiveness of legislatively required family-friendly policies. Part IV presents economic, legal, and ethical reasons why family-friendly policies should be both voluntarily adopted and legislatively required. While U.S. family-friendly workplace legislation is still evolving, this Article advances the idea that the time is ripe to suggest ways that one might measure and predict the impact of U.S. legislative efforts to reconcile the conflicting responsibilities of work and parenthood.

II. LEGISLATIVE EFFORTS: LEAVES, SICK DAYS, FLEXIBLE WORK ARRANGEMENTS

Global legislative efforts to make the workplace more family-friendly focus on three areas: (1) paid leaves for maternity, paternity, adoption, and the care of an ill family member; (2) paid sick days that can be used not only for an employee’s illness but also for the illness of a dependent family member; and (3) flexible work arrangements, which

NETWORK (Jan. 14, 2010),

<http://www.mpbn.net/Home/tabid/36/ctl/ViewItem/mid/3478/ItemId/10600/Default.aspx>.

¹⁹ See, e.g., Robert, Comment to *Obama Backs Mandatory Sick Leave: What It Means to You*, HR BENEFITS ALERT (Mar. 19, 2009, 1:42 PM), <http://www.hrbenefitsalert.com/will-paid-sick-leave-become-mandatory/> (“[The Healthy Families Act] is just another example of a mis-named bill; it should be called the Chinese Full Employment Act! [Seven] additional paid days off for all employees would exceed our total profit in some years and is about 10% of our record profit year. Instead of doing everything possible to keep work here, we would be forced to source more and more of our product offshore.”). Cf. *Stoneridge Investment Partners, LLC v. Scientific-Atlanta*, 552 U.S. 148, 149–50 (2008) (noting that increased regulation could “[shift] securities offerings [of overseas firms] away from domestic capital markets”); Jennifer M. Gleason & Bern A. Johnson, *Environmental Law Across Borders*, 10 J. ENVTL. L. & LITIG. 67, 78 (1995) (“If U.S. laws . . . raise the costs of doing business by imposing minimum environmental safeguards, corporations may move to other nations.”).

²⁰ Ellen Galinsky et al., *2008 National Study of Employers*, FAMILIES AND WORK INST. 6 (2008), <http://familiesandwork.org/site/research/reports/2008nse.pdf>.

²¹ See, e.g., JODY HEYMANN & MAGDA BARRERA, PROFIT AT THE BOTTOM OF THE LADDER: CREATING VALUE BY INVESTING IN YOUR WORKFORCE (2010).

²² See, e.g., JODY HEYMANN & ALISON EARLE, RAISING THE GLOBAL FLOOR: DISMANTLING THE MYTH THAT WE CAN’T AFFORD GOOD WORKING CONDITIONS FOR EVERYONE 46–69; Ariane Hegewisch & Janet C. Gornick, *Statutory Routes to Workplace Flexibility in Cross-National Perspective*, CTR. FOR WORKLIFE L. U.C. HASTINGS COLLEGE OF L. (2008), <http://www.policyarchive.org/handle/10207/bitstreams/9630.pdf>. But see Dianna C. Preece & Greg Filbeck, *Family Friendly Firms: Does It Pay to Care?*, 8 FIN. SERVS. REV. 47, 59 (1999) (“The overall finding that the returns [to businesses with family-friendly policies] are not significantly different [than returns to those without such policies] could also suggest that the costs of family-friendliness offset the benefits.”).

vary from altered start and end times to the ability to work from home periodically or regularly.²³ U.S. legislative initiatives in all three of these areas are quite limited, especially in contrast with other countries.²⁴ In short: current federal laws mandate few benefits and pending federal bills appear stalled; state enhancements exist but are incomplete; and local ordinances are making headway on the issue of paid sick days but are slow to advance. While the reasons for this state of affairs may be legitimate, it is important to first examine the parameters of the current laws and legislative initiatives.

A. Maternity, Paternity, and Sick Leaves

The first significant legislative effort to render the U.S. workplace more manageable for parents was the institution of legally protected leave for the birth or adoption of a child, or to care for a seriously sick family member. Individual states²⁵ and then the federal government enacted statutes that would allow workers to take such leaves without the fear of losing their jobs. Employers are forbidden from terminating workers during such a leave and, instead, are required to hold the employees' jobs (or at least, an "equivalent position")²⁶ for them to resume after their leave.

1. Family and Medical Leave Act

Much has been written about the Family and Medical Leave Act (FMLA)²⁷ and while this Act is not the main focus of this Article, it is a necessary starting point for any discussion about federal efforts to legislate a more family-friendly workplace.²⁸ Enacted in 1993, the FMLA provides federal job protection to those who take time away from

²³ Jody Heymann et al., *The Work, Family & Equity Index: How Does the U.S. Measure Up?*, INST. FOR HEALTH & SOC. POL'Y AT MCGILL U., <http://www.mcgill.ca/files/ihsp/WFEI2007FEB.pdf> (last visited Feb. 10, 2011).

²⁴ Hadas Mandel & Moshe Semyonov, *Family Policies, Wage Structures, and Gender Gaps: Sources of Earnings Inequality in 20 Countries*, 70 AM. SOC. REV. 949, 957 (2005) (providing Welfare State Intervention Index data that reveal the United States lags behind fifteen other countries in legislatively supporting mothers' employment).

²⁵ Thirty-four states passed unpaid-leave laws before the FMLA was passed. Sharon Lerner, *Born in the U.S.A., then Back to Work*, WASH. POST, June 13, 2010, at B3.

²⁶ 29 U.S.C. § 2614(a)(1) (2011).

²⁷ Family and Medical Leave Act, 29 U.S.C. §§ 2601–2654 (2011); see, e.g., Maegan Lindsey, *The Family and Medical Leave Act: Who Really Cares?*, 50 S. TEX. L. REV. 559 (2009); Jeff Horner & Robert Nichols, *Changes in Federal Regulations: Family Medical Leave Act*, 245 EDUC. LAW REP. 535 (Aug. 20, 2009); Michael Faillace, *Family and Medical Leave Act of 1992: Statutory Requirements, Regulations, Relevant Case Law, Illustrative Examples, and Practical Recommendations*, PLI/Lit Order No. 6740 (Sept.–Nov. 2005).

²⁸ "The first law to protect new parents was the Pregnancy Discrimination Act (PDA). Before its passage, women were routinely fired as soon as their pregnancies became apparent. Passed in 1978, the PDA makes it illegal for employers to fire, refuse to hire, or deny a woman a promotion because she is pregnant." Jodi Grant et al., *Expecting Better: A State-by-State Analysis of Parental Leave Programs*, NAT'L P'SHIP FOR WOMEN & FAMILIES, 7 (2005),

<http://www.nationalpartnership.org/site/DocServer/ParentalLeaveReportMay05.pdf?docID=1052>.

However, "[t]he PDA does not guarantee job protection . . . [and so] it left many women without jobs if they needed to take time off for a pregnancy disability or to care for a newborn." *Id.*

work for the birth or adoption of a child or for the care of an ill family member: employees may take up to twelve weeks of leave without fear of job loss.²⁹

Although the FMLA appears to be a major step toward creating a U.S. workplace where parents are not penalized for having or caring for their children, the law has a number of significant limitations. First, FMLA only applies to employers who have fifty or more employees within seventy-five miles of the worksite in question—thus exempting employers who have hundreds of employees but less than fifty in any one geographic location.³⁰ The unintended impact of this is to exempt 60% of U.S. employers from FMLA obligations.³¹ Furthermore, among the 40% of employers covered, only 62% of their employees are eligible for FMLA leave since employees must have worked at least 1250 hours during the twelve months preceding the leave.³² As a result, 46.9% of the total number of private-sector employees in the United States are eligible.³³ This leaves more than half of U.S. employees without federal legal entitlement to a leave, despite a World Health Organization warning that, “[a] period of absence from work after birth is of utmost importance to the health of the mother and the infant” and “is conducive to both the optimal growth of the infant and the bonding between mother and infant.”³⁴

In addition, and of equal importance, the statute only guarantees *unpaid* leave, a luxury that many employees simply cannot afford to take.³⁵ Although approximately half of U.S. companies with at least 100 employees have voluntarily adopted policies that provide for at least a partially paid maternity leave,³⁶ this leaves employees in the other half of U.S. companies with the difficult choice between staying home and paying the bills.³⁷ Indeed, U.S. companies have actually reduced the amount they voluntarily pay for

²⁹ 29 U.S.C. § 2612 (2011) (“[A]n eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period for one or more of the following: (A) Because of the birth of a son or daughter . . . (C) In order to care for the spouse, or a son, daughter, or parent, of the employee, if such spouse, son, daughter, or parent has a serious health condition.”).

³⁰ 29 U.S.C. § 2611(2)(B)(ii) (2011); 29 C.F.R. § 825.110(a)(3) (2008) (“An ‘eligible employee’ is an employee of a covered employer who . . . (3) Is employed at a worksite where 50 or more employees are employed by the employer within 75 miles of that worksite.”).

³¹ *Overview of Job Protected Leave*, GEO. L. WORKPLACE FLEXIBILITY 2010, 1 (2010), <http://workplaceflexibility2010.org/images/uploads/EXTOJobProtection.pdf>.

³² *Id.* Under the FMLA, employees are eligible for leave if they have worked for the employer for at least 1250 hours during the twelve month period immediately preceding the start of the leave. 29 U.S.C. § 2611(2) (2011); *see also* 29 C.F.R. § 825.110.

³³ *Overview of Job Protected Leave*, *supra* note 31, at 1; *see also* Heidi Brown, *U.S. Maternity Leave Benefits Are Still Dismal*, FORBES.COM (May 4, 2009), <http://www.forbes.com/2009/05/04/maternity-leave-laws-forbes-woman-wellbeing-pregnancy.html>.

³⁴ *Valuing Parenthood, Part C: Objectives of Paid Maternity Leave*, AUSTL. HUM. RTS. COMM’N, http://www.hreoc.gov.au/sex_discrimination/paid_maternity/pml/report/sectionc.html#117 (last visited Feb. 10, 2011) (citing a June 2000 WHO document).

³⁵ 29 U.S.C. § 2612(c) (2011) (“[L]eave granted under subsection (a) may consist of unpaid leave”); *see also* Lerner, *supra* note 25 (discussing the impact of unpaid leave).

³⁶ Galinsky et al., *supra* note 20, at 19, Table 7.

³⁷ In addition, only 16% of fathers get some pay during a paternity leave. *Id.* Countries around the world recognize the importance of paid leave after the birth of a child. One hundred sixty-nine nations provide paid leave from work after childbirth, and of those, more than half offer fourteen or more weeks off work with pay. Heymann et al., *supra* note 23, at 1.

maternity leave (down from 27% providing full pay in 1998 to 16% in 2008).³⁸ To provide some context, the United States and Australia are the only two developed economies that do not provide legally mandated, paid, maternity leave.³⁹ By contrast, Serbia and Denmark offer a full year of leave at full pay; “France, Singapore, and Austria all offer four months’ paid maternity leave benefits”; Germany offers fourteen weeks; and Gambia, Somalia, and Vietnam provide at least three months of paid maternity leave.⁴⁰

Finally, a third important limitation on FMLA coverage is that, when used to cover time away from work to care for an ill family member, the relevant illness must fit the statutory definition of “serious health condition.”⁴¹ This is defined as: “an illness, injury, impairment, or physical or mental condition that involves [either] inpatient-care . . . or continuing treatment by a health care provider.”⁴² Therefore, it is quite clear that an illness such as the H1N1 flu would not be covered unless the child contracted a very serious version.⁴³ Indeed, FMLA was never intended to cover a short-term, moderate illness but rather is limited to extended absences necessitated by serious illnesses.⁴⁴ Furthermore, a situation where one’s child was not actually sick but simply home from school due to a school closure would most certainly not be covered by FMLA.

There have been recent efforts to expand FMLA coverage. The proposed Family and Medical Leave Enhancement Act of 2009 would have expanded coverage to employers with twenty-five or more employees.⁴⁵ The proposed Family Leave Insurance Act of 2009 sought to require that twelve weeks of the leave be paid.⁴⁶ Neither bill was enacted. Given the current economic climate and the 2010 midterm election results, it is unclear whether these bills will gain traction in Congress anytime soon. A more promising avenue for advocates of a legislative enhancement to FMLA is the impact of state legislative efforts to augment the limited federal statute.

³⁸ Galinsky et al., *supra* note 20, at 19; *see also* Sue Shellenbarger, *Downsizing Maternity Leave: Employers Cut Pay, Time Off*, WALL ST. J., June 11, 2008, at D1, available at <http://online.wsj.com/article/SB121313791751362341.html>.

³⁹ Brown, *supra* note 33.

⁴⁰ *Id.* In addition, in the United Kingdom a woman receives 90% of her salary for up to a year off with her baby while Swedish mothers get 480 days at 80% pay. *Id.*

⁴¹ 29 U.S.C. § 2611(11) (2011).

⁴² *Id.*; *see also* 29 C.F.R. § 825.114 (2010) (defining “inpatient care”).

⁴³ Faillace, *supra* note 27, at 851 (noting that “minor illnesses such as the common cold, the flu, ear aches, upset stomachs, minor ulcers, headaches other than migraines, routine dental or orthodontia problems, and periodontal disease do not meet the definition of a ‘serious health condition’” unless “they cause incapacity for more than three consecutive calendar days and require a regimen of continuing treatment by a health care provider”).

⁴⁴ S. Rep. No. 103-3, at 28 (1993), *reprinted in* 1993 U.S.C.C.A.N. 3, 30 (“The term ‘serious health condition’ is not intended to cover short-term conditions for which treatment and recovery are very brief.”).

⁴⁵ Family and Medical Leave Enhancement Act of 2009, H.R. 824, 111th Cong., § 2 (2009).

⁴⁶ Family Leave Insurance Act of 2009, H.R. 1273, 111th Cong. § 103 (2009) (“[A]n eligible employee of a covered employer shall be entitled to a family and medical leave insurance benefit for a total of 12 workweeks of leave during any 12-month period . . .”).

2. State Enhancements of FMLA

State efforts to expand FMLA coverage have been somewhat successful. A multitude of state leave laws have passed both prior to⁴⁷ and following the passage of the FMLA.⁴⁸ While these laws are similar to the FMLA, they are not identical. Coverage may be greater under state law than it is under the FMLA. For example, in at least fifteen states an employer with fewer than fifty employees is required to comply with the state leave law, though exempt from the FMLA.⁴⁹ In addition, the employee eligibility threshold (length of service or hours worked) is lower in at least eleven states⁵⁰ and the definition of a covered family member may be more expansive.⁵¹ In all, at least nineteen states provide some form of enhancement to FMLA by state statute.⁵²

Most of the early state legislative efforts focused on maternity leaves.⁵³ Attention has also been paid to health and life issues of the employees themselves. For example, at least twelve jurisdictions “provide or encourage employers to provide leave to employees who wish to be organ, bone marrow, or blood donors.”⁵⁴ Also, “laws have been passed that mandate leave for employees who are victims of crime or domestic violence, employees who are called to jury duty, employees who are serving as a witness in a legal proceeding and employees who are voting.”⁵⁵ Finally, “at least fourteen states have laws

⁴⁷ Thirty-four states passed unpaid leave laws before the FMLA was passed. Lerner, *supra* note 25.

⁴⁸ *State by State Guide to Unpaid, Job-Protected Extended Time Off Laws*, GEO. L. WORKPLACE FLEXIBILITY 2010 (2006), http://workplaceflexibility2010.org/images/uploads/State_FMLA_chart_FINAL.pdf [hereinafter *State by State Guide*]; see also Grant et al., *supra* note 28, at 16; Faillace, *supra* note 27, at 898–911; Robert S. Whitman, *Employee Leaves of Absence: FMLA, USERRA and State and Local Laws*, 801 PLI/Lit 949, 973–76 (2009).

⁴⁹ Those states include: California, Iowa, Montana, Ohio, Washington, Illinois, Maine, Massachusetts, Maryland, Nebraska, Rhode Island, Vermont, Louisiana, Minnesota, New York, and Oregon. *Overview of Job Protected Leave*, *supra* note 31, at 1–2.

⁵⁰ Those states include: Washington, Massachusetts, Vermont, New York, Oregon, New Jersey, Rhode Island, Wisconsin, Connecticut, Hawaii, and Tennessee. *Overview of Job Protected Leave*, *supra* note 31, at 1–2.

⁵¹ Whitman, *supra* note 48, at 974; see also *State by State Guide*, *supra* note 48 (listing Arizona, Georgia, Hawaii, Oregon, Rhode Island, and Vermont as having expanded definitions of “family member”).

⁵² *Overview of Job Protected Leave*, *supra* note 31, at 1–2; see also *State by State Guide*, *supra* note 48.

⁵³ Whitman, *supra* note 48, at 974 (“Almost 20 states—California, Colorado, Connecticut, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Montana, Nevada, New Hampshire, New York, North Dakota, Oklahoma, Tennessee, and Washington—have [their own] laws that expressly mandate leave for pregnancy-related conditions, birth and/or the adoption of a child”).

⁵⁴ *Id.* (“Arkansas (for organ and bone marrow donors), Connecticut (for organ and bone marrow donors), District of Columbia (organ/bone marrow donors), Illinois (for organ and bone marrow donors; paid leave is required), Louisiana (for organ and bone marrow donors; paid leave is required), Maine (for organ donors), Minnesota (for bone marrow donors; paid leave is required), Nebraska (for bone marrow donors; employers encouraged to provide paid leave), New York (for bone marrow and blood donors), Oregon (for bone marrow donors; employees permitted to use accrued paid leave), Pennsylvania (for organ and bone marrow donors; employers eligible for tax credit if paid leave provided), and South Carolina (for bone marrow donors; paid leave is required)”).

⁵⁵ *Id.* at 975 (“Nearly every state provides leave to appear for jury duty and at least 30 states provide leave to vote during work hours. More than two-thirds of these states require that leave to vote be paid. Many states have laws that protect victims of crime or domestic violence, either mandating that such individuals are entitled to protected leave or stating that employers may not penalize such workers for taking leave to attend to matters relating to their status as crime victims (for example, to attend court proceedings or meet with state prosecutors). Those states include Arizona, California, Colorado, Connecticut, Florida, Hawaii,

requiring private employers to provide leave to those employees who are volunteer emergency and/or disaster service workers.”⁵⁶

As laudable as these various additions to leave-eligibility may be, it is notable that only nine states and the District of Columbia have mandated leave for employees to attend their children's school-related activities⁵⁷ and that no state requires leave to attend to a child's short-term, moderate illness or unexpected school closure. Moreover, the mandated, school-activity leaves that do exist are generally unpaid.⁵⁸

In recent years, three states have legislated mandatory paid leave.⁵⁹ California became the first to do so in 2002.⁶⁰ In 2007, legislation was passed in Washington State requiring employers to provide paid sick or family leave to their employees.⁶¹ In 2008, New Jersey became the third state to enact a paid, family leave insurance program for private and public sector employees when the governor signed into law a bill allowing workers to take up to six weeks of leave per year at partial pay to care for a newborn or newly adopted child or a sick child, spouse, parent, or domestic or civil-union partner.⁶² These paid leaves, however, are still limited to adoption, birth, or “serious” illnesses.⁶³

Illinois, Iowa, Kansas, Maine, Maryland, Michigan, Minnesota, Nebraska, New Hampshire, New York, North Carolina, Ohio, Oregon, Pennsylvania and Rhode Island, Virginia and Washington.”)

⁵⁶ *Id.* at 976 (“Those states include California, Illinois (only covers emergency service workers), Indiana, Kentucky, Louisiana, Maine, Missouri, North Carolina, Ohio, South Carolina, Tennessee, Texas, Washington, and West Virginia. As with leave provisions for bone marrow and organ donors, a considerably greater number of states provide leave for emergency workers who work for state or local government.”).

⁵⁷ *Id.* at 975 (“These states are: California (for school visits; employer may require use of accrued paid time off), District of Columbia (for school visits), Illinois (for school visits), Louisiana (for school visits), Massachusetts (for ‘family obligations’; employer may require use of accrued paid time off), Minnesota (for school visits), Nevada (for school visits; law does not specify a leave allotment), North Carolina (for school visits), Rhode Island (for ‘school-related activities’), and Vermont (for school visits).”); *see, e.g.*, R.I. GEN. LAWS § 28-48-12(a) (“School involvement leave. An employee who has been employed by the same employer for twelve (12) consecutive months shall be entitled to a total of ten (10) hours of leave during any twelve (12) month period to attend school conferences or other school-related activities for a child of whom the employee is the parent, foster parent or guardian.”).

⁵⁸ Whitman, *supra* note 48, at 975; *see, e.g.*, R.I. GEN. LAWS § 28-48-12(c) (2010) (“Nothing in this section shall be construed to require the leave be paid . . .”).

⁵⁹ *See also* Darrell R. VanDeusen & Donna M. Glover, *The Maryland Flexible Leave Act: Is It Really that Simple?*, 40 U. BALT. L.F. 59, 60 (2009) (“The MFLA requires employers who provide employees with any form of accrued paid time off, such as vacation, sick, or personal leave, to permit employees to use that paid time off because of the illness of a spouse, parent, or child.”).

⁶⁰ Sue Shellenbarger, *Mixed Bag for Family Leave*, WALL ST. J. BLOGS (Jan. 26, 2011), <http://blogs.wsj.com/juggle/2011/01/26/mixed-bag-for-family-leave/>; PAID FAMILY LEAVE CAL., <http://www.paidfamilyleave.org/> (last visited Feb. 11, 2011).

⁶¹ *Washington Enacts Paid Family Leave Act*, JACKSON LEWIS LLP (May 15, 2007), <http://www.jacksonlewis.com/legalupdates/article.cfm?aid=1116>.

⁶² Susan K. Livio, *Gov. Corzine Signs Paid Family Leave Act*, NJ ON-LINE LLC (May 2, 2008), http://www.nj.com/news/index.ssf/2008/05/corzine_signs_family_leave_act.html; *see also* Sarah Fass, *Paid Leave in the States*, NAT'L CTR. FOR CHILDREN IN POVERTY (Mar. 2009), http://www.nccp.org/publications/pub_864.html; Whitman, *supra* note 48, at 973.

⁶³ Fass, *supra* note 62.

B. Paid Sick Day Statutes

More recent state efforts appear to be less focused on maternity/paternity leaves or extended leaves to care for seriously ill children and more focused on paid sick days that can be used not only for an employee's own illness but also to care for a sick family member.⁶⁴ These efforts seem to begin to recognize that the impact on a worker's career of having a child does not end with childbirth and its associated recovery period, nor is it limited to a catastrophic illness requiring an extended leave. More commonly, working parents have the daily and ongoing responsibility of caring for their children. This responsibility can unexpectedly interrupt a parent's work schedule when a school-aged child falls briefly ill, when the usual childcare provider becomes unavailable with short notice, or when a child's school is suddenly closed—due, for instance, to inclement weather, school structural problems, or a flu pandemic. When these unplanned situations cause fear of losing one's job, or even just a temporary loss of income, parents are placed in an untenable position.⁶⁵

Furthermore, if parents must ask for special treatment in these short-term but common situations, they can appear to be less dedicated to their job, making career advancement all the more challenging.⁶⁶ Indeed, as noted in the Introduction of this Article, there is an increasing number of cases being litigated on the issue of family responsibility discrimination.⁶⁷ Given the growing number of successful lawsuits,⁶⁸

⁶⁴ Nearly twenty-four million Americans do not have a single paid sick day to recover from common, short-term illnesses, let alone the right to use such a paid sick day to care for a sick child. See Vicky Lovell, *No Time to Be Sick: Why Everyone Suffers When Workers Don't Have Paid Sick Leave*, INST. FOR WOMEN'S POL'Y RES., 13 (June 2004), <http://www.iwpr.org/pdf/B242.pdf>.

⁶⁵ See generally Gregory Acs, *A Good Employee or a Good Parent? Challenges Facing Low Income Working Families*, 4 U. ST. THOMAS L.J. 489 (2007).

⁶⁶ Cynthia Thomas Calvert, *Family Responsibilities Discrimination: Litigation Update 2010*, CTR. FOR WORKLIFE L., 2 (2010), <http://www.worklifelaw.org/pubs/FRDupdate.pdf> (listing statements made by employers and supervisors to employees with family responsibilities). See generally Williams & Bornstein, *supra* note 14; Lovell, *supra* note 64, at 13–14 (“The burden of inadequate paid sick leave and paid sick family leave falls heaviest on mothers. Given current norms of caregiving, they are more likely to need to stay home with a sick family member than fathers, yet mothers are less likely than fathers to have any paid time off, and those who do have some paid leave have fewer weeks of paid time off than dads (Ross Phillips 2004). And because women earn less than men, and mothers are among the younger employed women, in workplaces where leave arrangements are negotiated between individual workers and supervisors, mothers with the fewest financial resources to sustain them during periods of unpaid sick leave (or, in the worst case, after being fired) face the greatest difficulty in winning adequate paid time off (Glass and Estes 1997).”).

⁶⁷ Calvert, *supra* note 66 (noting a 400% increase in litigation over the past decade with verdicts and settlements averaging \$500,000); see also *Questions and Answers About Family Responsibility Discrimination (FRD)*, SLOAN WORK & FAMILY RES. NETWORK AT BOSTON COLL. 1 (2010), http://wfnetwork.bc.edu/pdfs/FactSheet_FRD.pdf (providing a summary of facts related to Family Responsibility Discrimination).

⁶⁸ See, e.g., *Lust v. Sealy, Inc.*, 383 F.3d 580 (7th Cir. 2004) (assessing case of mother who was denied promotion on belief that she would not want to move her family); *Lehman v. Kohl's Dep't Store*, No. CV-06-581501 (Ohio Cuyahoga Cnty. Ct. C.P. May 25, 2007) (reviewing incident where store manager with children was denied promotion and transferred after she became pregnant again, while men and women who were not going to have children were promoted in her place); see also Calvert, *supra* note 66 (detailing many successful cases and settlements). See generally Joan Williams & Nancy Segal, *Beyond the Maternal Wall: Relief for Family Caregivers Who Are Discriminated Against on the Job*, 26 HARV. WOMEN'S L.J. 77 (2003).

employers may need to make a cost-benefit assessment of their policies even if there is no legislative requirement to modify them.

The current status of paid sick-day legislation is detailed below. As will be demonstrated, economic pressure on employers caused by court decisions may be the best short-term hope for working parents without paid sick days. This is because, despite legislative initiatives in the federal legislature and in a number of states,⁶⁹ there is still no federal legal requirement for paid sick days in the United States and only one such statewide requirement.⁷⁰ As discussed below, however, local efforts have been somewhat more successful.

1. Federal Efforts

At the federal level, the proposed Healthy Families Act (H.R. 2460), introduced in May 2009, is the latest iteration of a bill first introduced in 2005 by Representative Rosa DeLauro. The Act requires businesses with fifteen or more employees to provide up to seven days (fifty-six working hours) of paid sick leave each year.⁷¹ Several components of the bill are of significant benefit to parents as the proposed paid leave would cover not only recovery from routine illness but also care for an ill family member, doctor's appointments and other preventative care.⁷² The bill, which had 125 co-sponsors, was referred to a House subcommittee on June 11, 2009, where it stalled,⁷³ despite endorsement from the White House⁷⁴ and support from most Americans.⁷⁵ This most

⁶⁹ *Paid Sick Days Campaigns*, NAT'L P'SHIP FOR WOMEN & FAMILIES, http://paysickdays.nationalpartnership.org/site/PageServer?pagename=psd_campaigns (last visited Feb. 11, 2011) ("In 2010, there were 26 states and cities that either had bills introduced, had active campaigns or both . . ."); *State and Local Action on Paid Sick Days as of October 2011*, NAT'L P'SHIP FOR WOMEN & FAMILIES (2011), http://paysickdays.nationalpartnership.org/site/DocServer/Paid_Sick_Days_Tracking_Update_July_2010.pdf?docID=1922 (providing list and details of fourteen states and five cities); Jodie Levin-Epstein & Laura Boyd, *Paid Sick Days Legislation: A Legislator's Guide*, CTR. L. & SOC. POL'Y (Nov. 2006), <http://www.clasp.org/admin/site/publications/files/0326.pdf> (providing supportive data and model legislation).

⁷⁰ See *State and Local Action on Paid Sick Days as of October 2011*, *supra* note 69.

⁷¹ See Rajiv Bhatia & Jonathan Heller, *A Health Impact Assessment of the Healthy Families Act of 2009*, HUM. IMPACT PARTNERS (June 11, 2009), http://www.nhwomen.org/pdf/NationalPaidSickDaysHIA_summary.pdf. The federal model is similar to the San Francisco statute with graduated maximum paid sick hours determined by the size of the employer. See also Steven Greenhouse, *Bill Would Guarantee up to 7 Paid Sick Days*, N.Y. TIMES, May 15, 2009, at A9, available at <http://www.nytimes.com/2009/05/16/health/policy/16sick.html>.

⁷² Healthy Families Act, H.R. 1902, 109th Cong. (2006); see also Healthy Families Act, S. 932, 109th Cong. (2006). Federal bills seeking to fund longer sick leaves might also impact parents' ability to care for routinely sick children. These include: the Family Leave Insurance Act of 2009, H.R. 1723, 111th Cong. (2009), which would provide for partially paid FMLA leaves; and the Family & Medical Leave Enhancement Act of 2009, H.R. 824, 111th Cong. § 2 (2009), which would expand coverage of the FMLA to employers with twenty-five or more employees rather than the current level of fifty or more.

⁷³ See *Bill Summary & Status, 111th Congress (2009–2010)*, LIBR. OF CONG., <http://thomas.loc.gov/cgi-bin/bdquery/z?d111:HR02460:@@L&summ2=m&> (last visited Feb. 23, 2011).

⁷⁴ Steven Greenhouse, *White House Endorses Paid Sick Leave Bill*, N.Y. TIMES ECONOMIX BLOG (Nov. 11, 2009), <http://economix.blogs.nytimes.com/2009/11/11/white-house-endorses-paid-sick-leave-bill/?scp=2&sq=%22Healthy%20Families%20Act%22&st=cse>.

recent federal paid sick-day bill made more congressional progress and saw more widespread support than its predecessors so it may represent a significant incremental step toward federal resolution of this issue. However, the current state of the economy has halted the momentum of the federal paid work day legislative initiative, temporarily shifting the focus onto state-level legislative initiatives.

2. State Efforts

At least fourteen states and the District of Columbia pursued legislative campaigns for paid sick days in 2011.⁷⁶ Efforts to achieve legislative change have been led by various organizations, depending on the state. For example, in Connecticut a successful effort was co-led by Connecticut Working Families and the Everybody Benefits Coalition, culminating in the passage of the first statewide paid sick days law on July 1, 2011.⁷⁷ In Illinois, the movement is led by an organization called Women Employed.⁷⁸ In Vermont, efforts have been made by two organizations, Voices for Vermont's Children and the Vermont Livable Wage Campaign.⁷⁹ Despite the support of diverse groups, Connecticut remains the only state to have passed a paid sick day statute to date.

3. Local Ordinances

Three cities currently legally require paid sick days from all employers within their jurisdiction. Landmark legislation at the local level began in San Francisco, where an ordinance went into effect on February 5, 2007, allowing workers to earn one hour of paid sick time for every thirty hours worked, up to a total of either five or nine paid sick days per year, depending on the size of the employer.⁸⁰ The following year, the Washington, D.C. council enacted a similar measure. The Accrued Sick and Safe Leave Act of 2008, which became effective in November of that year, allows workers in Washington, D.C. to earn three, five, or seven days of paid sick time depending on the size of their companies.⁸¹ Also in November 2008, Milwaukee's "Paid Sick Leave Ordinance" was overwhelmingly approved by voters in a binding referendum. However, the state of Wisconsin enacted a preemption bill in May 2011, barring enforcement of the

⁷⁵ Steven Greenhouse, *Most Americans Support Paid Sick Leave, Poll Finds*, N.Y. TIMES ECONOMIX BLOG (June 22, 2010), <http://economix.blogs.nytimes.com/2010/06/22/most-americans-support-paid-sick-leave-poll-finds/?scp=8&sq=%22Healthy%20Families%20Act%22&st=cse>.

⁷⁶ The states are Arizona, California, Hawaii, Illinois, Maine, Massachusetts, New Hampshire, New Jersey, New York, North Carolina, Pennsylvania, Vermont, Washington, and Wisconsin. *State and Local Action on Paid Sick Days as of October 2011*, *supra* note 69. An interactive map tracking efforts at the state level is provided by the National Partnership for Women & Families. *Paid Sick Days Campaigns*, *supra* note 69.

⁷⁷ *State and Local Action on Paid Sick Days as of October 2011*, *supra* note 69, at 2.

⁷⁸ *Id.* at 3.

⁷⁹ *Id.* at 6.

⁸⁰ S.F., CAL., ADMIN. CODE § 12W (2006), <http://library.municode.com/HTML/14131/level1/CH12WSILE.html>; *see also Paid Sick Days Campaigns*, *supra* note 69 (providing full details on other attempted and evolving measures).

⁸¹ D.C. CODE § 32-131.02 (2008). Under the Act, employees may use the earned paid "sick" time for: the employee's own or a family member's illness; when the employee or his/her family member (child, parent, spouse, domestic partner) needs routine or preventative medical care; or when the employee who is a domestic violence victim needs time off to seek medical care, shelter, counseling, a court order, or other services related to the domestic violence. *Id.* at 3.

Milwaukee ordinance and rendering moot the possibility of enacting similar legislation in other Wisconsin municipalities.⁸² The Seattle Coalition for a Healthy Workforce led a successful effort in that city that resulted in paid sick day legislation in September 2011, making it the third city to pass such legislation (excluding Milwaukee).⁸³ In August, 2009, the New York City Council introduced legislation entitled “Provision of Paid Sick Time Earned by Employees” but this initiative remains stalled.⁸⁴ Parallel efforts are afoot in Philadelphia, Miami, and Denver but, like federal efforts, none are yet law.⁸⁵

C. Flexible Work Arrangements

Clearly, paid sick days alone will not address all of the potential work interruptions described in this Article. Flexible work arrangements (FWAs), in contrast, can provide for more fluid arrangements between employers and employees. These are varied in their composition but, according to Georgetown Law’s Workplace Flexibility 2010 project, they generally include one or more of the following: flexibility in work scheduling (e.g., varied start and end times); flexibility in the number of hours worked; and flexibility in the place at which work is completed.⁸⁶ The Georgetown project has collected data illustrating the types of case-by-case arrangements between employees and employers that currently exist in the United States.⁸⁷ While these are often creative and effective, to date such job modifications are entirely voluntary because there is no legal requirement for an employer to offer them. There are some efforts afoot to change this.

1. Federal “Right to Ask” Legislation

On the federal level, the proposed Working Families Flexibility Act, introduced in 2009, bears the same title as a 2007 bill considered by both the House and Senate and would provide an employee the right to request alternative work arrangements without risk of negative job repercussions.⁸⁸ This Act, modeled on United Kingdom and New

⁸² The state preemption bill followed a vigorous court battle. On June 12, 2009, the Milwaukee County Circuit Court issued a permanent injunction prohibiting the implementation and enforcement of the Paid Sick Leave Ordinance (PSLO). The Wisconsin State Court of Appeals sent the PSLO case to the Wisconsin Supreme Court for hearing. *Paid Sick Leave Ordinance*, CITY OF MILWAUKEE, <http://city.milwaukee.gov/der/PSLO>. In October 2010 the state supreme court issued a split decision and sent the case back to the Court of Appeals for further ruling, finally leading to victory for PSLO advocates. Telephone Interview with Amy Stear, Director, Wisconsin 9to5 (Mar. 4, 2011); see also *State and Local Action on Paid Sick Days as of October 2011*, *supra* note 69, at 7.

⁸³ See *State and Local Action on Paid Sick Days as of October 2011*, *supra* note 69, at 6.

⁸⁴ A paid sick leave law in New York City was rendered moribund in October 2010. See Neil deMause, *Diagnosing a Defeat: Why the Sick Leave Bill Failed*, CITY LIMITS (Dec. 21, 2010), <http://www.citylimits.org/news/articles/4245/diagnosing-a-defeat-why-the-sick-leave-bill-failed>.

⁸⁵ *State and Local Action on Paid Sick Days as of October 2011*, *supra* note 69.

⁸⁶ *Flexible Work Arrangements: A Definition and Examples*, GEO. L. WORKPLACE FLEXIBILITY 2010, http://workplaceflexibility2010.org/images/uploads/general_information/fwa_definitionexamples.pdf (last visited Oct. 19, 2011).

⁸⁷ *A Summary of Data from Families and Work Institute’s National Study of Employers*, GEO. L. WORKPLACE FLEXIBILITY 2010, <http://workplaceflexibility2010.org/images/uploads/SummaryofDatafromFWIStudyofEmployers.pdf> (last visited Feb. 11, 2011).

⁸⁸ Working Families Flexibility Act, H.R. 1274, 111th Cong. (2011); Working Families Flexibility Act, H.R. 4301, 110th Cong. (2008); Working Families Flexibility Act, S. 2419, 110th Cong. (2008).

Zealand statutes, is not a new idea.⁸⁹ A recent study of cross-national workplace flexibility laws found that of twenty high-income countries examined in comparison with the United States, seventeen have statutes to help parents adjust working hours; six help with family caregiving responsibilities for adults; twelve allow change in hours to facilitate lifelong learning; eleven support gradual retirement; and five countries have statutory arrangements open to all employees, irrespective of the reason for seeking different work arrangements.⁹⁰

In 2002, the United Kingdom passed legislation granting employees with young or disabled children the right to request FWAs from their employers. The law does not guarantee a right to flexible work but seeks to increase flexibility in U.K. workplaces by requiring a process for negotiation between employees and employers. That process is structured such that the initial responsibility rests with the employee to propose a new work arrangement and to explain its potential impact on the employer. The employee and employer must then consider the request together, and the employer may refuse the request only for certain business reasons.⁹¹ Similar “right to ask” legislation exists in New Zealand, New South Wales, the Netherlands, and Germany.⁹² This is just one of many ways that the United States lags behind other nations in its efforts to make the workplace more accessible to parents.⁹³

A 2009 study by scholars at Harvard and McGill found the United States lags behind other nations in the following ways:

- 163 nations around the world guarantee paid sick leave; the United States does not.
- 164 nations guarantee paid annual leave; the United States does not.

⁸⁹ Hegewisch & Gornick, *supra* note 22, at vii (“The large majority of high-income countries have introduced flexible working statutes aimed at making it easier for employees to change how many hours, and when and where they work within their current job. Patchy progress towards more diversified work arrangements is pushing workers out of the labor market altogether, or into jobs that are below their skill levels and potential. Few economies can afford such a waste of human resources in view of changing demographics, reduced labor force growth, and global competition for knowledge.”).

⁹⁰ *Id.* at 18.

⁹¹ Employment Act, 2002, c. 22, § 47(1–2) (U.K.), available at <http://www.opsi.gov.uk/acts/acts2002/20022—f.htm#47>; see also *Legal Memo: The United Kingdom Flexible Working Act*, GEO. L. WORKPLACE FLEXIBILITY 2010, http://workplaceflexibility2010.org/images/uploads/C_LegalMemo_FWAUK.pdf (last visited Jan. 12, 2012).

⁹² *Labor Standards Requiring FWAs in US and Abroad*, GEO. L. WORKPLACE FLEXIBILITY 2010, <http://workplaceflexibility2010.org/images/uploads/LaborStandardsRegardingFWAsinUSandAbroad.doc> (last visited Feb. 12, 2011) (providing a table comparing the law of FWAs in the United States, United Kingdom, Australia, New Zealand, the Netherlands, and Germany).

⁹³ *Raising the Global Floor: Unprecedented New Study Finds that Family-Friendly Workplace Policies and Protections Support Jobs, Enhance Competitiveness*, NAT’L P’SHIP FOR WOMEN & FAMILIES (Nov. 17, 2009) <http://www.nationalpartnership.org/site/News2?page=NewsArticle&id=21961> [hereinafter *Raising the Global Floor: Unprecedented New Study*] (“[T]he United States [is] far behind other economically successful nations in terms of adopting policies that support workers and families. The new study finds that 14 of the world’s 15 most competitive countries provide paid sick leave, 13 guarantee paid leave for new mothers, 12 provide paid leave for new fathers, 11 provide paid leave to care for children’s health needs, eight provide paid leave to care for adult family members, and seven guarantee breastfeeding breaks to nursing mothers on the job. At the federal level, the United States offers its workers none of those supports.”).

- 177 nations guarantee paid leave for new mothers; the United States does not.
- 74 nations guarantee paid leave for new fathers; the United States does not.
- 48 nations guarantee paid time off to care for children's health; the United States does not.
- 157 nations guarantee workers a day of rest each week; the United States does not.⁹⁴

Based on the findings of this groundbreaking study, the McGill Institute for Health and Social Policy created a new website to serve as a gateway to international labor and work policy data and to provide the means to measure, compare, and map this data.⁹⁵ The website graphically illustrates how far behind the United States is internationally on these issues⁹⁶ and begs the question why, particularly since the Working Families Flexibility Act, like the Healthy Families Act seeking to require paid sick days, has stalled in committee.⁹⁷ In addition, unlike the issues of paid leaves and sick days where state (leaves) and local (sick days) efforts seem to be making some inroads, state and local legislative initiatives to mandate a right to ask for a flexible work arrangement appear virtually nonexistent.

2. State and Local "Right to Ask" Efforts

There are no known local efforts to legislate Flexible Work Arrangements (FWAs). On the state level, New Hampshire⁹⁸ has attempted to introduce a United Kingdom-style "right to ask" statute but to date no such broad efforts have been successful. There are a number of state laws that address the issue piecemeal.⁹⁹ For example, under Montana

⁹⁴ HEYMANN & EARLE, *supra* note 22; *Raising the Global Floor: Unprecedented New Study*, *supra* note 93.

⁹⁵ "Raising the Global Floor: Adult Labour" is a World Legal Rights Database. With the support of the Ford Foundation and the Canada Foundation for Innovation, Raising the Global Floor measures governmental performance around the world in meeting the needs of working women, men, and their families. Developed by researchers at the McGill University Institute of Health and Social Policy and the Harvard School of Public Health, the elements of the database comprise an evidence-based set of national labor policies that affect workers' ability to meet health and welfare needs. *See Raising the Global Floor: Adult Labour*, MCGILL INST. FOR HEALTH & SOC. POL'Y, <http://raisingtheglobalfloor.org/> (last visited Feb. 16, 2011).

⁹⁶ *See id.*

⁹⁷ On August 19, 2009, the bill was referred to the Subcommittee on Courts and Competition Policy. *See H.R. 1274: Working Families Flexibility Act*, CIVIC IMPULSE LLC, <http://www.govtrack.us/congress/bill.xpd?bill=h111-1274>. (last visited Feb. 23, 2011).

⁹⁸ Hilary Niles, *Front Door Politics: From the State House to Your House*, THE WIRE (N.H.), Mar. 6, 2009, <http://www.wirenh.com/news-mainmenu-4/11-news-general/3448-front-door-politics-from-the-state-house-to-your-house.html> (reporting that advocates "at the first annual New Hampshire Summit on Work and Family last October [2008] . . . convinced some legislators that two benefits would help people balance work obligations and family demands: paid time off, and the right to ask for a flexible schedule."); *see also* Andrew Sparrow, *Flexible Working Hours Under Threat, Claims TUC*, GUARDIAN (U.K.), Aug. 7, 2011, <http://www.guardian.co.uk/politics/2011/aug/08/flexible-working-hours-threat-tuc> (discussing the U.K. right to ask for flexible work hours).

⁹⁹ *Examples of State Flexible Work Arrangement (FWA) Laws*, GEO. L. WORKPLACE FLEXIBILITY 2010 (Spring 2006), http://workplaceflexibility2010.org/images/uploads/FWA_StateFWA.doc.

law, on request of a current employee, a position may be considered for job sharing.¹⁰⁰ In Oregon, each state agency must adopt a written policy that “[r]equires the agency, in exercising its discretion, to consider an employee request to telecommute in relation to the agency’s operating and customer needs.”¹⁰¹ While helpful to the employees impacted, these isolated statutes seem unlikely to lead to a statewide FWA mandate.

III. EFFECTIVENESS AND EMPLOYER IMPACT OF FAMILY-FRIENDLY POLICIES

Given the scattered landscape of legislative efforts to render the U.S. workplace more compatible with parental responsibilities, it is difficult to say that any clear trend or pattern is emerging, even on the specific issues of paid sick days or paid leaves.¹⁰² Yet, while it seems that there is no strong regional pattern in the state and local legislative efforts, it does appear that local and state initiatives are advancing more steadily than national ones, with local ordinances for paid sick days beginning to be passed and state statutes for partially paid leaves gaining in number.¹⁰³ This makes sense in a country as large and diverse as the United States. National change is likely dependent on a showing of not only need but also effectiveness and lack of negative business impact.¹⁰⁴ In this way, inroads at the local and state level may provide the necessary data to support national change. To do so, it will be necessary to assess how effective the local and state measures are proving to be as well as what impact they have had on employers. To the extent that sufficient data are not yet available to test the effectiveness and employer impact of such laws, one can substitute data drawn from other countries¹⁰⁵ as well as from U.S. companies that voluntarily adopt policies that mirror the few laws that do exist or are proposed.

A. Defining and Measuring a Family-Friendly Workplace

In order to measure the effectiveness of paid leave laws, paid sick day laws or FWA laws on making the U.S. workplace more family-friendly, the term “family-friendly workplace” must be defined. A family-friendly workplace might first be defined simply as one where primary caregiver parents¹⁰⁶ who must work can do so in a way that does

¹⁰⁰ *Id.*

¹⁰¹ OR. REV. STAT. § 240.855 (2011); *see also Examples of State Flexible Work Arrangement (FWA) Laws*, *supra* note 99.

¹⁰² *Paid Sick Days Campaigns*, *supra* note 69 (providing a map that illustrates the scattered legislative initiatives and limited success of these, and making it apparent that the northeastern United States has more paid sick day legislative initiatives but not actual laws yet).

¹⁰³ *Id.*

¹⁰⁴ Hegewisch & Gornick, *supra* note 22.

¹⁰⁵ *See, e.g., Ariane Hegewisch, Employers and European Flexible Working Rights: When the Floodgates Were Opened*, U.C. HASTINGS CTR. WORKLIFE L. ISSUE BRIEF (Fall 2005), http://www.worklifelaw.org/pubs/european_issue_brief_printversion.pdf (concluding that the floodgates in Europe were not opened as feared when “right to ask” FWA legislation was passed in the United Kingdom, the Netherlands, and Germany).

¹⁰⁶ Women are still the primary caregivers for our children but the impact would be equal on the father who serves as the primary caregiver. *Child Custody and the Role It Plays in Gender*, SEX, GENDER & U.S. SOC’Y (Oct. 15, 2009), <http://www.sexandgender.net/2009/10/15/child-custody-between-fathers-and-mothers/> (“[W]omen still provide the majority of childcare in couple and single-parent households, regardless of their employment status and that of their partners.”); Leora N. Rosen et al., *Fathers’ Rights*

not consistently pose difficult economic choices between work and family obligations. Under a second possible formulation, a family-friendly workplace may be a workplace that also does not professionally punish parents for choosing to limit their work hours to attend to their children. Finally, a third definition of “family-friendly workplace” may be one where parents who can financially afford to stay home with their children will nonetheless want to work since that work is not only tailored around their parenthood, but is also financially and intellectually rewarding.

These three different definitions stem from three different economic perspectives: (1) the parent who must work as many hours as possible; (2) the parent who must work but can afford to limit working hours; and (3) the parent who can financially afford to choose to stay at home but who wishes to continue a career. Families reflecting all three of these perspectives exist and have slightly different workplace needs; though in fact all families would benefit to differing degrees from achieving any one of the three defined “family-friendly workplaces.” Indeed, it may be most useful to consider this as a three-tiered definition, ranging from minimum to maximum impact, as illustrated below.

Each of the three above definitions of a family-friendly workplace requires a different workplace adjustment and a different measurement of effectiveness. For example, the first definition—avoiding difficult economic choices—is one where paid sick days or sick leaves could have a real and tangible impact. To measure the effectiveness of this initiative, one might look at the current lost wages to parents who lack paid sick days (or leaves) or survey parents to learn how many of them have forgone taking a day off to be with a sick or otherwise homebound child due to financial constraints. To assess the impact on the employer, one would need to offset the lost productivity during the days the employee is absent by the employees’ increased productivity during the days the employee is present, also adjusting for potentially lower health expenditures, lower employee turnover, and advantages in recruitment and morale.¹⁰⁷

The second definition of a family-friendly workplace—no punishment for reduced or limited hours—is unlikely to be achieved merely with five to nine statutorily required sick days.¹⁰⁸ This workplace requires a broader flexibility, such as that contemplated by the Working Families Flexibility Act, so that parents can limit their working hours even while peers are working longer hours. Parents in this group certainly wish to be able to take a sick day when a child is home from school with illness (or an extended leave should a child’s illness require it) but they are also likely to be concerned about having “parents’ hours”: periodically adjusting start and end times for school schedules, appointments, or sports activities; avoiding unplanned overtime so as to reliably relieve

Groups: Demographic Correlates and Impact on Custody Policy, 15 VIOLENCE AGAINST WOMEN 513, 517 (2009), available at <http://vaw.sagepub.com/content/15/5/513.full.pdf+html> (“[W]omen still provide the majority of childcare in couple and single-parent households, regardless of their employment status and that of their partners”). See generally *Who’s Minding the Kids? Care Arrangements: Winter 2002*, U.S. CENSUS BUREAU (Oct. 2005), <http://www.census.gov/prod/2005pubs/p70-101.pdf>.

¹⁰⁷ See Lovell, *supra* note 64, at 13 (demonstrating costs and benefits to both workers and employers); see also HEYMANN & BARRERA, *supra* note 21 (demonstrating that enterprises have profited by improving working conditions).

¹⁰⁸ This represents the typical range of both enacted and proposed legislation. See *State and Local Action on Paid Sick Days as of October 2011*, *supra* note 69 (providing list and details of a number of states and cities).

childcare; even, for some, being able to be home by 3:00 to meet the bus and do the afternoon chauffeuring and homework supervision. To measure the success of FWAs against this definition, one would need to track parents with access to FWAs against comparably employed parents without such access and compare the hourly income of the two groups over a period of time. To assess the impact on the employer, one would need to examine any costs caused by covering for absent employees offset by the relative productivity of the two groups.

Finally, if one is seeking to achieve the third definition—a workplace tailored to parenthood with career advancement still possible—then neither a handful of paid sick days nor the ability to work reduced or flexible hours is likely to suffice. Parents who are financially secure enough to consider taking a complete break from the paid workplace will care about sick days, leaves, and reduced or flexible hours, but will also care about having interesting work and the hope of some career progression. They will not wish to remain stagnant in their careers over time, despite their reduced hours. Otherwise, why would those without an economic imperative bother working at all? To measure the success of FWAs for these parents, one can look at the number of parents in the paid workplace, as this overall number will increase when FWAs are effective. This increase will result, at least in part, from the addition of parents who have a choice about whether to work outside the home.¹⁰⁹ Of course, this is a crude measurement since other factors, such as the economy, might also cause an increase in the number of working parents. Survey or interview tools would be needed to control for these factors.

The current challenge in measuring effectiveness and employer impact is the small number of data points within the United States: two cities mandating paid sick days, three states requiring paid leave in some form, and no jurisdictions requiring even a right to ask for flexible work arrangements. Therefore, to date, commentators have relied on data from other countries where legally required paid leave or sick days and the right to ask for FWAs are more widespread and have already been in place for some time.¹¹⁰

Continental Europe and the United Kingdom now have an established history of legislating policies regarding workers' hours and leaves, as well as widespread legislation on workplace flexibility. These laws were triggered by the demands of changing demographics paralleling those faced by the United States. There are more employees caring for elderly parents, more baby boomers looking for gradual retirement options, more employees looking to educate themselves further while still working, and more parents without at-home partners.¹¹¹ Legislation in countries such as Germany, the Netherlands, and Great Britain was passed in recognition of an economic need to “speed

¹⁰⁹ See Hegewisch & Gornick, *supra* note 22, at 2 (noting that the United States experienced a decrease in the number of prime age women (ages 25–54) in the labor force between 1994 and 2006, while many other countries experienced increases). The number of prime age women in the labor force can be used as a surrogate measurement for the number of parents in the paid work place, since most primary caregivers are mothers, and many prime age women are also mothers of school age children.

¹¹⁰ HEYMANN & EARLE, *supra* note 22 (presenting an analysis of policies, protections and supports in 190 of the 192 United Nations countries); see also Hegewisch & Gornick, *supra* note 22; Jodie Levin-Epstein, *How to Exercise Flexible Work: Take Steps with a “Soft Touch” Law*, CTR. L. & SOC. POL’Y (July 2005), <http://www.policyarchive.org/handle/10207/bitstreams/15404.pdf> (describing a U.K. “soft touch” law that creates a “right to ask” for flexible work arrangements and concluding that, despite cultural differences, such a law would be a good first step in the United States).

¹¹¹ Hegewisch, *supra* note 105.

up the pace of workplace change and make it easier for employees to find a match between their work and non-work responsibilities.”¹¹² Since the United States faces similar demographic trends in its workers¹¹³ and, consequently, a similar misalignment between workplace and family obligations, these countries provide relevant national experiences for U.S. perusal.

Despite the fears of many business owners, the sky did not fall in when workplace flexibility policies became law overseas. Indeed, lessons learned from Dutch, German, and English “right to ask” statutes include: fewer requests for FWAs were made than expected, most requests were acceptable to employers, and costs were not a major issue in implementation.¹¹⁴ When there have been court disputes, it has usually been over details such as scheduling (versus overall hours), employer delays in responses to requests, or whether the flexible agreement was binding on the employee once negotiated.¹¹⁵ Of course, relying on these foreign experiences calls into question cultural differences. While there are many similarities between the European corporate experience with working parents and that of U.S. employers,¹¹⁶ examining the U.S. experience with voluntary policies may provide more relevant and compelling data.

B. Extra-legislative Change: Voluntary Corporate Initiatives Make the Business Case

Combining all three variations of the proposed definition, an optimally family-friendly workplace has paid maternity and paternity leave, paid sick leave for serious illnesses, paid sick days which can be used for one’s self and one’s dependents, *and* the opportunity for reasonable flexible working arrangements. One can then begin to see the U.S. business case for adopting these family-friendly policies by examining studies of what happens when businesses voluntarily offer such benefits to their employees. As more and more companies choose to implement these initiatives, more studies emerge that document the positive effects of such initiatives on both employees and businesses.¹¹⁷ For example, studies show that providing FWAs and time off to take care of personal and family needs can help limit unscheduled absences.¹¹⁸ Employees with

¹¹² Hegewisch & Gornick, *supra* note 22, at 5.

¹¹³ See Robert I. Lerman & Stefanie R. Schmidt, *An Overview of Economic, Social, and Demographic Trends Affecting The U.S. Labor Market*, U.S. DEPT. OF LABOR (2011), <http://www.dol.gov/oasam/programs/history/herman/reports/futurework/conference/trends/trendsI.htm>; see also Marlene A. Lee & Mark Mather, *U.S. Labor Force Trends*, POPULATION BULLETIN, June 2008, <http://www.prb.org/pdf08/63.2uslabor.pdf>.

¹¹⁴ Hegewisch, *supra* note 105 (detailing these lessons and concluding that the flood gates in Europe were not opened as feared when “right to ask” FWA legislation was passed in the United Kingdom, the Netherlands, and Germany); see also Hegewisch & Gornick, *supra* note 22.

¹¹⁵ Hegewisch, *supra* note 105.

¹¹⁶ *Id.* at 1 (discussing whether the European experience is relevant to the United States).

¹¹⁷ See *The Business Case for Flexible Work Arrangements*, GEO. L. WORKPLACE FLEXIBILITY 2010, (2010), <http://workplaceflexibility2010.org/images/uploads/BusinessCaseforFWAs.pdf> (last visited Feb. 16, 2011) (providing an overview and relevant links); see also Watson Wyatt Human Capital Index: *Human Capital as a Lead Indicator of Shareholder Value*, WATSONWYATT.COM (Feb. 2002), <http://www.watsonwyatt.com/research/printable.asp?id=W-488>.

¹¹⁸ Diane F. Halpern, *How Time-Flexible Work Policies Can Reduce Stress, Improve Health, and Save Money*, 21 STRESS & HEALTH 157 (2005), available at <http://www.cmc.edu/berger/pdf/Halpern2005.Stress.pdf>; Arlene Johnson et al., *Business Impacts of*

these benefits report less work-life stress and, as a result, have not only fewer unscheduled absences but also increased productivity.¹¹⁹

Other studies demonstrate that employees with access to FWAs tend to be more satisfied, committed, and engaged with their jobs.¹²⁰ Research has shown that this leads to increased innovation, quality, productivity, and corporate market share.¹²¹ Research by the Corporate Leadership Council concluded that every 10% improvement in commitment can increase an employee's level of effort by 6% and performance by 2%,¹²² while decreasing an employee's probability of departure by 9%.¹²³ In short, highly committed employees perform at a higher level than non-committed employees and are less likely to leave, thereby creating economic benefits.

Findings from Corporate Voices for Working Families, a nonprofit organization, indicate that for companies that offer them, FWAs: (1) improve retention and recruitment; (2) foster greater employee satisfaction, commitment, and engagement; and (3) correlate with increased productivity and revenue generation, as well as positive impacts on cycle time and client service.¹²⁴ Case studies from Corporate Voices reports demonstrate how FWAs help businesses recruit and retain valuable workers. For example, "80% of [one large firm's] employees said that their ability to balance work and home life roles had an impact on their career choices and their desire to stay [with the company]."¹²⁵ Another firm found that by offering more flexible work arrangements, and thus retaining more female employees, it was able "to increase the number of women in leadership positions from fourteen in 1993 to 168 in 2003."¹²⁶

Finally, studies show that FWAs can directly impact financial performance and operational and business outcomes. For example, one insurance company that implemented various forms of FWAs through a team approach in its Claim Services Department experienced increases in the number and efficiency of claim files processed—without a decrease in quality—as well as reductions in unscheduled paid time off and overtime hours.¹²⁷

Flexibility: An Imperative for Expansion, CORP. VOICES FOR WORKING FAMILIES (Nov. 2005), <http://www.cvworkingfamilies.org/system/files/Business%2520Impacts%2520of%2520Flexibility.pdf>.

¹¹⁹ *Id.*

¹²⁰ See, e.g., Jill Landauer, *Bottom-Line Benefits of Work/Life Programs*, 74 HR FOCUS 3 (1997); see also Joe Lineberry & Steve Trumble, *The Role of Employee Benefits in Enhancing Employee Commitment*, 16 COMP. & BENEFITS MGMT. 9 (2000).

¹²¹ Johnson et al., *supra* note 118, at 4; Boris B. Baltes et al., *Flexible and Compressed Workweek Schedules: A Meta-Analysis of Their Effects on Work-Related Criteria*, 84 J. APPLIED PSYCHOL. 496, 505 (1999).

¹²² *Employment Value Proposition: Corporate Leadership Council (CLC) Research Summary*, N.C. OFF. OF STATE PERSONNEL, <http://www.performancesolutions.nc.gov/EVP/EmploymentValuePropositionB.pdf> (last visited Oct. 26, 2011).

¹²³ *Employment Value Proposition and Retention*, N.C. OFF. OF STATE PERSONNEL, at 3, <http://www.performancesolutions.nc.gov/retention/step1/docs/EmployeeValuePropositionAndRetention.pdf> (last visited Oct. 26, 2011).

¹²⁴ See generally Johnson et al., *supra* note 118; Ellen Galinsky et al., *When Work Works: A Status Report on Workplace Flexibility*, FAMILIES & WORK INST. (2004), <http://familiesandwork.org/3w/research/downloads/status.pdf>.

¹²⁵ Johnson et al., *supra* note 118, at 9.

¹²⁶ *Id.* at 10.

¹²⁷ *Chubb Workplace Flexibility Initiative Boosts Employee Productivity*, CHUBB (July 18, 2005), <http://www.chubb.com/corporate/chubb3897.html>.

Additional studies that measure effectiveness and employer impact as defined above in subpart III.A. would help quantify the actual impact of the few statutes that do exist and the likely impact of legislation that would standardize the now-scattered voluntary workplace policies.¹²⁸ This is particularly important if the compliance of corporate America is to be secured, since the bottom line still often dominates “best practices” decisions: numbers are the language of business, so providing numeric cost and benefit data will be essential to convincing businesses that family-friendly policies are in their best interests.¹²⁹

Historically, legislated workplace improvements have been most effective when the business culture has been ready to change.¹³⁰ However, allowing change to occur *only* via voluntary business practices can result in unacceptably slow and inequitable change. This is why cultural change is so often a product of both legislative enforcement and social evolution.¹³¹ Indeed, when these phenomena occur in tandem, the chances for lasting change are optimized.

C. Cultural Change Is Imminent

Cultural change is most often incremental rather than cataclysmic. Often, statutes merely codify policies that are partially in place as a next step toward uniformity and acceptability.¹³² Just as same-sex marriage is more likely to be legalized in states that have already decriminalized sodomy and passed workplace anti-discrimination laws,¹³³

¹²⁸ One such study has already been done, prospectively, on proposed legislation in New Hampshire. See Kevin Miller & Claudia Williams, *Valuing Good Health in New Hampshire: The Costs and Benefits of Paid Sick Days*, INST. FOR WOMEN’S POL’Y RES. (Oct. 2009), <http://www.nhwomen.org/pdf/B276NH.pdf>.

¹²⁹ A breakthrough effort of this type can be found in HEYMANN & BARRERA, *supra* note 21. There, the authors recount stories from around the world of companies that are linking successes at the top to those on all other rungs. Drawing from thousands of interviews with employees from front line to C-suite at companies around the world, they show how enterprises have profited by improving working conditions. The authors also demonstrate that lower-skilled employees—in call centers, repair services, and product assembly—are not expendable. To the contrary, such employees can determine ninety percent of a company’s profitability.

¹³⁰ See generally Kenton K. Yee, *Coevolution of Law and Culture: A Coevolutionary Games Approach*, 2 COMPLEXITY 4 (1997) (noting that social expectations fuel the rise of law that embody those expectations).

¹³¹ The British Government in a 2000 green paper argued that “[b]est practice[s] [are] unlikely to permeate the whole economy and frequently [do] not reach the lowest paid. Statutory options may therefore need to be considered to provide minimum standards . . .” See Hegewisch & Gornick, *supra* note 22, at 5.

¹³² Hegewisch, *supra* note 105, at 3 (“In [the Netherlands, Germany, and the United Kingdom] requests for changes in working hours or working time flexibility are nothing new. Many companies had voluntarily introduced flexible working policies or did so in the context of collective agreements. Yet, a problem not unfamiliar to many U.S. employers, often policies look good on paper but implementation is uneven or policies become symbolic. Under these circumstances, the new legislation offered companies the opportunity to update and revitalize their policies. This positive effect is attested to by human resource managers: ‘The [U.K.] Right to Request has furthered the cultural change that was already underway in terms of increasing the acceptability of flexible working and in seeing the benefits for the business and individual particularly in areas of the business with few people on flexible contracts[,]’ said the human resource manager of a major transport company. ‘People have a framework, line managers have a process by which to agree or disagree’ is the assessment of the benefits of the legislation by a human resource manager for the well-known retail chain Marks & Spencer.”)

¹³³ Marianne DelPo Kulow, *Same Sex Marriage: A Scandinavian Perspective*, 24 LOY. L.A. INT’L & COMP. L. REV. 419, 437 (2002); Kees Waaldijk, *Civil Developments: Patterns of Reform in the Legal Position of Same-Sex Partners in Europe*, 17 CAN. J. FAM. L. 62, 66–74 (2000).

family-friendly workplace policies are more likely to be legislatively adopted in states that already have a critical mass of employers who voluntarily provide paid maternity and paternity leaves, paid sick time to care for family members, and flexible work arrangements. To the extent that these policies can be legislated, it is more likely to happen locally first and then to gain traction at the state level when enough municipalities require such things as paid sick days and the sky does not fall in.

This, by definition, is a much slower route to change than federal legislation mandating paid leaves, paid sick days, and the right to ask for flexible work arrangements. It also likely leads to a lack of nationally standardized practices. Hence, efforts will continue on the federal level simultaneous with the state and local initiatives. It is perhaps unrealistic to expect to successfully implement such policies on a national level before local and state laws take root when the United States consists of fifty states with such variously evolved local laws. On the other hand, Title VII was passed at a time when states' policies were at grossly different points on the workplace anti-discrimination spectrum, with only about half the states having statutes outlawing some form of workplace discrimination.¹³⁴ Of course, half the country forbidding workplace discrimination is a significantly higher percentage than the current number of states legislatively embracing family-friendly workplace policies. Still, the legislative landscape under-illustrates the corporate landscape of family-friendly policies, most of which are in place voluntarily. Moreover, just as the country as a whole was poised for change in 1964 when the Civil Rights Act was passed,¹³⁵ the best hope for federal family-friendly workplace initiatives may be that the United States is once again at a similar juncture, where the country may be at a "tipping point"¹³⁶ on the realities of a co-ed workplace.

The support for this position lies in various data. Current university students and young professionals of child-bearing age have dramatically different attitudes about work and family than did their parents.¹³⁷ This youngest generation of working Americans wants time for family and is much less interested in jobs with high burn out rates.¹³⁸

¹³⁴ *Strategic Plan for Fiscal Years 2000–2005*, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, <http://archive.eeoc.gov/abouteeoc/plan/strategic-2000.html> (last modified Oct. 23, 2000) ("At the time Title VII was passed in 1964, more than half of the states already had similar laws prohibiting employment discrimination enforced by a state or local agency.").

¹³⁵ *Teaching with Documents: The Civil Rights Act of 1964 and the Equal Employment Opportunity Commission*, U.S. NATIONAL ARCHIVES, <http://www.archives.gov/education/lessons/civil-rights-act/> (last visited Feb. 16, 2011); see also GARY A. DONALDSON, *THE MAKING OF MODERN AMERICA* 174 (2009) (noting that the demand for social change "swept the nation" and was "unparalleled in the nation's history").

¹³⁶ MALCOLM GLADWELL, *THE TIPPING POINT* 12 (2000) (defining a tipping point as "the moment of critical mass, the threshold, the boiling point"). Gladwell's book seeks to explain and describe the "mysterious" sociological changes that mark everyday life. As he states, "[i]deas and products and messages and behaviors spread like viruses do." *Id.* at 7. The examples of such changes in his book include the rise in popularity and sales of Hush Puppies shoes in the mid-1990s and the precipitous drop in New York City crime rate after 1990.

¹³⁷ Stephanie Armour, *Generation Y: They've Arrived at Work with a New Attitude*, USA TODAY, Nov. 6, 2005, at B1, available at http://www.usatoday.com/money/workplace/2005-11-06-gen-y_x.htm; Jeanna Bryner, *Big Generation Gaps in Work Attitudes Revealed*, LIVE SCI. (Mar. 10, 2010), <http://www.livescience.com/6195-big-generation-gaps-work-attitudes-revealed.html>.

¹³⁸ See Clarence Chua, *Try Managing Robinho, Rivaldo and Zico—All in One Team*, DELOITTE, http://www.deloitte.com/view/en_MY/my/7fddd74387a87210VgnVCM200000bb42f00aRCRD.htm (last visited Feb. 23, 2011) ("Research shows that women in the knowledge workforce have long been striving

Corporate America has already modified its recruitment strategies in acknowledgement of this shift in priorities.¹³⁹ Thus, it appears that the culture is shifting toward a new view of success that may drive support for employment policies that honor personal and family time.¹⁴⁰

One example of this is the corporate response to the brain drain caused by female MBAs dropping out of high-powered jobs due to incompatibility with family goals¹⁴¹ and the parallel exodus of female lawyers from private practice before they attain partnership.¹⁴² Employers are calculating the impact that the loss of these highly trained and educated women has on their bottom lines and are therefore seeking to modify their policies to retain them.¹⁴³ The most common of these modifications are FWAs,¹⁴⁴ which respond to the ever-growing number of studies that detail the reasons why women leave the workforce.¹⁴⁵

for this shift in priorities due to family obligations, and now men too are feeling this way—demanding meaningful work and meaningful personal lives.”).

¹³⁹ See, e.g., *Women’s Initiative*, DELOITTE, http://www.deloitte.com/view/en_US/us/About/Womens-Initiative/index.htm (last visited Feb. 23, 2011) (noting Deloitte’s aggressive marketing of its Women’s Initiative (WIN)).

¹⁴⁰ See Kirstin Downey Grimsley, *Family a Priority for Young Workers; Survey Finds Change in Men’s Thinking*, WASH. POST, May 3, 2000, at E1 (reporting on a survey by Harris Interactive and the Radcliffe Public Policy Center); Blanca Torres, *A Difficult Balancing Act; Post-Baby Boom Dads Are Trying to Better Reconcile the Competing Demands Posed by Careers and Families*, BALT. SUN, Apr. 6, 2005, at 1K; Patricia Wen, *Gen X Dad*, BOS. GLOBE MAG., Jan. 16, 2005, at 20; Stephanie Clifford, *Young, Female, and Demanding*, INC., Jan. 1, 2006, <http://www.inc.com/magazine/20060101/priority-hr.html> (“In contrast [to working baby boomer women], Gen-X women see family-friendly work policies as a birth right.”); RICHARD SETTERSTEN & BARBARA E. RAY, NOT QUITE ADULTS: WHY 20-SOMETHINGS ARE CHOOSING A SLOWER PATH TO ADULTHOOD 60 (2010) (“In 1980, three-fourths of young people saw work as being central to their lives. By 2004, only 60 percent thought work to be a defining aspect of their lives.”).

¹⁴¹ See Jenna Goudreau, *What Women Do with Their MBAs*, FORBES.COM (June 21, 2010), <http://www.forbes.com/2010/06/21/graduate-education-business-school-high-paying-jobs-forbes-woman-leadership-mba.html>; *Planning for Career-Family Balance*, WASH. POST, http://www.washingtonpost.com/wp-adv/specialsales/exec_education/article4.html (last visited Feb. 23, 2011).

¹⁴² Timothy L. O’Brien, *Why Do So Few Women Reach the Top of Big Law Firms*, N.Y. TIMES, Mar. 19, 2006, <http://www.nytimes.com/2006/03/19/business/yourmoney/19law.html> (“[S]omething unusual happens to most women after they begin to climb into the upper tiers of law firms. They disappear.”); Wendy Werner, *Where Have the Women Attorneys Gone?*, L. PRACTICE TODAY (May 2004), <http://apps.americanbar.org/lpm/lpt/articles/mgt05041.html>.

¹⁴³ See, e.g., *2010 Working Mother 100 Best Companies*, WORKING MOTHER, <http://www.workingmother.com/BestCompanies/2010/08/2010-working-mother-100-best-companies> (last visited Feb. 23, 2011) (“Showing just how well these companies continue to respond to the needs of working mothers at all stages of their lives, all winners also provide private lactation rooms as well as help finding elder-care services.”).

¹⁴⁴ See, e.g. Chua, *supra* note 138 (describing a “dial up or down” practice that allows workers to adjust their work roles at pivotal stages of their lives).

¹⁴⁵ See, e.g., Elizabeth Matthey, *Do All Women Leaving the Workforce Have a Choice?*, INST. FOR WOMEN’S POL’Y RES. (June 16, 2008), <http://www.iwpr.org/blog/2008/06/16/do-all-women-leaving-the-workforce-have-a-choice/> (disputing the notion that women leave the workforce by choice and offering data and study cites to support the idea that “women leave the workforce for many reasons, including child care costs, lack of workplace flexibility, and earnings disparity”); Sylvia Ann Hewlett & Carolyn Buck Luce, *Off-Ramps and On-Ramps: Keeping Talented Women on the Road to Success*, HARV. BUS. REV. 45 (Mar. 2005)

IV. ECONOMIC, LEGAL, AND ETHICAL REASONS TO ADOPT FAMILY-FRIENDLY LEGISLATIVE POLICIES

We have seen that legislative initiatives to create a more family-friendly workplace are growing in the United States, but that the United States is not a leader in this arena and indeed is behind many other countries in addressing the issues of paid maternity, paternity, and sick leaves; paid sick days for personal and family care; and the right to ask for flexible work arrangements. So far, progress in each of these areas has been slow, particularly at the federal level, with local paid sick day ordinances and state paid leave statutes representing the most progressive recent efforts. Nevertheless, a number of economic, legal, and ethical factors suggest that family-friendly legislative policies are likely to prevail in the relatively near future. While a thorough exploration of these factors is beyond the scope of the current Article, an overview is provided below as a framework for future analysis and as additional support for this Article's multi-pronged recommendation.

A. Economic Factors

When the economy stabilizes, the United States will face a labor shortage.¹⁴⁶ This is because “baby boomers are beginning to leave the workforce as the flow of new people entering the workforce is slowing.”¹⁴⁷ Even though birth rates are at the replacement rate and continue to be high relative to many other high-income countries, birth rates are much lower than they were a few decades ago.¹⁴⁸ Annual labor force growth rates (including growth due to immigration) between 2004 and 2014 are predicted to be less than what they were during the previous ten-year period.¹⁴⁹ It therefore makes economic sense to fully employ all qualified U.S. workers and to maximize the productivity and loyalty of those employed. Studies show that family-friendly workplace policies would help achieve both of these goals.¹⁵⁰

In addition, the business case exists for adopting family-friendly workplace policies, though this case could be strengthened with more quantitative data. In the United States, perhaps the most persuasive data will come from voluntary business policies. These policies are more likely to be set by companies whose leaders respect family obligations. Since women are still more likely to hold these responsibilities than men, it may be helpful to have more women in corporate leadership positions. This is

(offering statistics on why women leave: 44% (child-care or elder-care); 23% (earn a degree or pursue other training); 17% (work not satisfying or enjoyable); 16% (change careers)).

¹⁴⁶ Hegewisch & Gornick, *supra* note 22, at vii (“U.S. employers are faced with a dramatic increase in the share of older workers and a significant slowdown in labor force growth, even if demographic trends in the United States are less dramatic than in most other high-income countries. The growth in mothers’ labor force participation, a major source of additional labor in recent decades, has stalled and U.S. labor force participation for women has fallen behind in cross-national comparison.”).

¹⁴⁷ *Id.* at 3; see also Hewlett & Luce, *supra* note 145.

¹⁴⁸ See Mitra Toossi, *Labor Force Projections to 2014: Retiring Boomers*, 128 MONTHLY LABOR REV. 25 (2005).

¹⁴⁹ *Id.* at 38.

¹⁵⁰ See, e.g., Hewlett & Luce, *supra* note 145, at 50.

itself a challenge since less than 10% of C-level jobs in the United States are held by women¹⁵¹ and corporate boards are comprised of only 18% women.¹⁵²

In 2003, Norway legislatively mandated greater gender parity in their boards of directors by requiring that companies ensure that 40% of corporate board positions be held by women by the year 2008 or face dissolution or hefty fines.¹⁵³ This goal was reached.¹⁵⁴ Can or should such a mandate be implemented in the United States? Would changes at the top have a positive trickle-down effect that would result in more companies voluntarily adopting the types of measures discussed in this Article, thereby generating more quantitative data supporting the business case for such policies? Perhaps, but such legislation would be exceedingly difficult to pass in the United States at this juncture. Norway did not start with this particular measure. It instead represents the latest in a series of successful pieces of social legislation.¹⁵⁵ These measures succeed in Scandinavia because the Scandinavian countries' cultures are progressive on social issues and because they have a long history of legislating social change. It is unlikely that the United States, which lags behind so many other countries on these social issues, and which will not pass the Family Medical Leave Enhancement Act, the Family Leave Insurance Act, the Healthy Families Act, or the Working Families Flexibility Act, will first pass legislation mandating gender parity on corporate boards. Therefore, the pace of voluntary corporate commitment to family-friendly policies will probably not be increased by legislatively manipulating the gender composition of corporate boards. Still, the business case does exist for adoption of family-friendly policies, and data supporting the case will grow with time.

When businesses try progressive initiatives and find them to be effective without negatively impacting the bottom line, they are less likely to oppose legislative efforts. If legislative efforts prove reasonable and easily implemented, then companies will tend to

¹⁵¹ Eileen McKeown, *Top Suite in Corporate America Still Eludes Women*, CBS BUS. NETWORK (Jan. 2011), http://findarticles.com/p/articles/mi_m4467/is_201101/ai_n56828387/. "C-level" is an adjective used to describe high-ranking executives within an organization, such as Chief Executive Officer (CEO), Chief Operations Officer (COO), and Chief Financial Officer (CFO). In technology companies, a Chief Technology Officer (CTO) is central, and for companies with a strong information technology capacity a Chief Information Officer (CIO) is also significant. "C," therefore, stands for "Chief," and C-level executives are said to be part of the "C-suite." *Id.*

¹⁵² *Examining the Cracks in the Ceiling: A Survey of Corporate Diversity Practices of the S&P 100*, CALVERT INVESTMENTS 4 (Oct. 2010), <http://www.calvert.com/nrc/literature/documents/BR10063.pdf>; see also *Womenomics 101 Survey*, 20 FIRST'S 2010, 1 (Oct. 2010), <http://www.20-first.com/1406-0-the-core-metric-of-competitiveness-gender-balance-on-executive-committees.html>? ("Of the 1,230 Executive Committee members of America's top 101 companies 193 are women, or 15%.")

¹⁵³ Sharon Reier, *Women Take Their Place on Corporate Boards*, N.Y. TIMES (Mar. 21, 2008), http://www.nytimes.com/2008/03/21/business/worldbusiness/21iht-wbwomen.2.11315428.html?_r=1&scp=1&sq=Women%20Take%20Their%20Place%20on%20Corporate%20Boards&st=cse; see also *Representation of Both Sexes on Company Boards*, MINISTRY OF CHILDREN, EQUALITY, AND SOCIAL INCLUSION, <http://www.regjeringen.no/en/dep/bld/Topics/Equality/Rules-on-gender-representation-on-compan.html?id=416864> (last visited Jan. 6, 2012) (summarizing law and penalties).

¹⁵⁴ *Representation of Both Sexes on Company Boards*, *supra* note 153.

¹⁵⁵ See generally Gösta Esping-Andersen & Walter Korpi, *From Poor Relief to Institutional Welfare States: The Development of Scandinavian Social Policy*, in *THE SCANDINAVIAN MODEL* 39–74 (Robert Erikson et al., eds., 1987) (discussing the development of Scandinavian social policy throughout the 1900s).

comply and, indeed, go beyond the minimum statutory requirements. Hence, while one waits for data to be collected and analyzed so that corporate America will voluntarily embrace family-friendly workplace initiatives and move toward gender parity on boards and in C-suites, legislative efforts are desirable in order to accelerate the changes in the business culture that are already occurring but at a glacial pace.

B. Legal and Ethical Perspectives

There are, of course, legal issues of equal import that call for legislative, rather than corporate, actions in order to achieve family-friendly workplace policies. Family responsibility discrimination is a viable, if recently articulated, claim.¹⁵⁶ Legislation would obviate the need for many of these claims. It would also codify and legitimize the legal rights embodied by family responsibility discrimination claims.¹⁵⁷ Corporate America would likely take legal claims based on a statute more seriously, leading to more settlements and more preventative corporate measures to avoid costly, time-consuming, and futile litigation. This, in turn, would ensure that employees' rights were more appropriately and timely honored. This perspective provides legal support for legislative initiatives.

There are also several ethical reasons to advance family-friendly workplace initiatives. One of these is the retention of working mothers so as to avoid another generation of drop-out mothers.¹⁵⁸ This loss is unethical as well as poor economic policy, because it represents an avoidable loss of talented and skilled labor of only one gender. While young fathers also seek more time for their families, mothers remain the primary caregivers and the parents more likely to leave the workforce for family reasons. Many of these mothers never return to the workplace,¹⁵⁹ and those who do often struggle to re-

¹⁵⁶ Calvert, *supra* note 66, at 10; Naomi C. Earp, *Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities*, EEOC NOTICE NO. 915.002, § II.A.3. (May 23, 2007), <http://www.eeoc.gov/policy/docs/caregiving.html#52> (“Although the federal [Equal Employment Opportunity] laws do not prohibit discrimination against caregivers per se, there are circumstances in which discrimination against caregivers might constitute unlawful disparate treatment [under Title VII or the Americans with Disabilities Act].”).

¹⁵⁷ See *Davis v. Cabela’s Inc.*, 2008 WL 183717 at *3 (N.D. W. Va. Jan. 18, 2008) (holding that a plaintiff’s claim of family responsibility discrimination could avoid removal to federal court because only state law causes of action were asserted). At least one state and the District of Columbia have already enacted family responsibility or parenthood discrimination legislation. See also D.C. CODE § 2-1402.11 (“family responsibilities”); ALASKA STAT. § 18.80.200 (2011) (“parenthood”).

¹⁵⁸ Kyle Stock, *Lost Generation: Young Women Flee Finance*, FINS FINANCE (Apr. 26, 2011), <http://www.fins.com/Finance/Articles/SB130280163124105253/Lost-Generation-Young-Women-Flee-Finance> (detailing how young mothers are leaving the finance industry).

¹⁵⁹ Paul Taylor et al., *From 1997 to 2007 Fewer Mothers Prefer Full-Time Work*, PEW RES. CTR. (2007) <http://pewresearch.org/pubs/536/working-women> (demonstrating that “among working mothers with minor children (ages 17 and under), just one-in-five (21%) say full-time work is the ideal situation for them, down from the 32% who said this back in 1997, according to a new Pew Research Center survey. Fully six-in-ten (up from 48% in 1997) of today’s working mothers say part-time work would be their ideal, and another one-in-five (19%) say she would prefer not working at all outside the home. There’s been a similar shift in preferences among at-home mothers with minor children. Today just 16% of these mothers say their ideal situation would be to work full time outside the home, down from the 24% who felt that way in 1997. Nearly half (48%) of all at-home moms now say that not working at all outside the home is the ideal situation for them, up from the 39% who felt that way in 1997.”); see also PAMELA STONE, *OPTING OUT? WHY WOMEN REALLY QUIT CAREERS AND HEAD HOME* (2007); *Facts for Features: Mother’s Day*, U.S.

enter what can be an inhospitable environment.¹⁶⁰ This creates an unjust, gender-skewed situation.

The broader, gender-neutral ethical challenge here is to create a workplace that works best for everyone in it, not just for the childless or for those parents with partners who are able and willing to stay home full-time. It is also about what is best for our children, who thrive best when they are cared for by a loving parent.¹⁶¹ To abandon these children would be to create another generation like the one coming through college now, who question whether a career is really worth it after watching their parents sacrifice critical family time to move ahead in their careers.¹⁶² The advancement of family-friendly legislation would help to address these ethical dilemmas.

V. CONCLUSION: A MULTI-PRONGED RECOMMENDATION

Given the many reasons why the United States should take steps to better align itself with its peer nations with respect to progress toward a more family-friendly workplace, legislation is an appropriate tool. This does not mean that legislation alone will be a panacea or that it will pass quickly. Most immediately, more of corporate America needs to experiment with voluntary adoption of family-friendly policies. These experiments will dispel theoretical concerns and instead provide concrete data about the policies. Indeed, it is vital that more studies quantify the neutral or positive financial impact on businesses that policies such as paid leaves, paid sick days, and FWAs deliver. These data will lend support to legislative initiatives and will encourage corporate compliance with statutes once they are passed. Local ordinances and state statutes are also important interim measures. While these risk inconsistent policies across regions, they also provide opportunities for communities to experience firsthand the impact of family-friendly policies and to remove some of the current fear of the unknown and untried. Local experiments will allow state and federal legislators to fine-tune legislation

CENSUS BUREAU NEWS (Mar. 9, 2010), <http://www.census.gov/newsroom/releases/pdf/cb10-ff09.pdf> (offering statistics related to working mothers); Hewlett & Luce, *supra* note 145, at 46.

¹⁶⁰ Eve Tahmincioglu, *Moms' Road Back to Work Often Bumpy*, MSNBC (July 15, 2007), <http://www.msnbc.msn.com/id/19747356/> (“[O]pting out can come back to haunt some women.”); Robert Gardella, *Off Track: Helping Women Re-enter the Workforce*, HARV. BUS. SCH. WORKING KNOWLEDGE (Sept. 4, 2001), <http://hbswk.hbs.edu/archive/2458.html> (“Re-entering the workplace after a gap is difficult in most situations, regardless of whether a stay-at-home parenting stint is involved. It is even harder when desiring to do something ‘different,’ such as working in a part-time role. Unfortunately, there aren't many permanent part-time professional/managerial positions available, and most people who find PT work do so for an employer they've already worked for and have proven themselves to. Often the employee sets up this strategy while still employed full time in that organization.”). *But see* IRELAUNCH: THE CAREER REENTRY EXPERTS, <http://www.irelaunch.com/> (last visited Feb. 24, 2011) (providing information resources, programming, and support to individuals seeking to re-enter the workforce after taking extended leaves of absence to stay home with children).

¹⁶¹ *See* *Hendrickson v. Hendrickson*, 603 N.W.2d 896, 902 (N.D. 2000) (“[W]ithholding contact with a loving parent works against the best interests of the children.”).

¹⁶² Jessica Bennett et al., *Are We There Yet?*, NEWSWEEK, Mar. 18, 2010, <http://www.newsweek.com/2010/03/18/are-we-there-yet.html> (discussing, in the voice of young women journalists, the progress and lack thereof that has been made); Lisa Belkin, *The Opt-Out Revolution*, N.Y. TIMES, Oct. 26, 2003, (noting that some women question the value of high power careers); *see also* Claudia Wallis, *The Case for Staying Home: Why More Young Moms are Opting Out of the Rat Race*, TIME, Mar. 22, 2004.

for optimal effectiveness and minimal corporate impact. The upcoming generation of working parents is demanding a better balance between family and professional obligations, and that cry for progress is likely to be answered as the labor pool shrinks. A generation from now the sorts of policies currently in place in the United States may appear as alien as the “Men Only” employment ads of the 1950s appear today.