

The Role of the Government in Work-Family Conflict

Heather Boushey

Summary

The foundations of the major federal policies that govern today's workplace were put in place during the 1930s, when most families had a stay-at-home caregiver who could tend to the needs of children, the aged, and the sick. Seven decades later, many of the nation's workplace policies are in need of major updates to reflect the realities of the modern workforce. American workers, for example, typically have little or no control over their work hours and schedules; few have a right to job-protected access to paid leave to care for a family member.

Heather Boushey examines three types of work-family policies that affect work-family conflict and that are in serious need of repair—those that govern hours worked and workplace equity, those that affect the ability of workers to take time off from work because their families need care, and those that govern the outsourcing of family care when necessary. In each case Boushey surveys new programs currently on the policy agenda, assesses their effectiveness, and considers the extent to which they can be used as models for a broader federal program.

Boushey looks, for example, at a variety of pilot and experimental programs that have been implemented both by private employers and by federal, state, and local governments to provide workers with flexible working hours. Careful evaluations of these programs show that several can increase scheduling flexibility without adversely affecting employers.

Although few Americans have access to paid family and medical leave to attend to family needs, most believe that businesses should be required to provide paid leave to all workers. Boushey notes that several states are moving in that direction. Again, careful evaluations show that these experimental programs are successful for both employers and employees.

National programs to address child and elder care do not yet exist. The most comprehensive solution on the horizon is the universal prekindergarten programs offered by a few states, most often free of charge, for children aged three and four.

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Heather Boushey is a senior economist at the Center for American Progress.

Laws and regulations—at all levels of government—play an important role in creating the setting in which families and workers manage work-family conflict.¹ Although public policies can help ease work-family conflicts, they can also exacerbate them, particularly if the policies are based on an outdated set of assumptions about how families live and work.

Most American workers today have family responsibilities that can create conflict with paid employment. Yet paid employment is critical to family well-being. Families who earn less than \$100,000 a year typically derive 80 percent of their income from employment.² Most workers are breadwinners or cobreadwinners, and when a worker is unemployed or cannot be at work and has no access to paid leave, his or her family loses a significant portion of its income.³ The typical U.S. middle-class family relies especially heavily on the earnings of a breadwinner or cobreadwinner because it has little in savings. In 2007, just before the onset of the Great Recession, less than a third (29.4 percent) of middle-class families had at least three months of income in savings.⁴

Given the economic importance of work and the reality that most workers are also breadwinners or cobreadwinners, finding ways to manage work-family conflicts is at the top of the agenda at kitchen tables all across the nation. American workers typically have little or no control over their work hours and schedules, and few have a right to job-protected access to paid leave to care for a family member. The workers most likely to have some control over their schedules and to have access to paid leave are disproportionately those at the top of the wage distribution.

For the most part, the foundations for the federal policies that affect the intersection of work and family in the United States today were laid by President Franklin Roosevelt and Secretary of Labor Frances Perkins during the 1930s. During that era most families had a stay-at-home caregiver, usually a mother, who could provide full-time care for children, the aged, and the sick. Few women worked outside the home, although some, disproportionately women of color and recent immigrants, always have had relatively high labor force participation.⁵ But despite remarkable changes in both women's labor supply and family structure over the decades, especially since the 1970s, the wage-and-hours regulatory system and the social insurance infrastructure put in place by Roosevelt and Perkins have not been systematically expanded to address specifically the dual role that most workers play as workers and caregivers today.

The patchwork of work and family policies that has evolved over the years typically does not cover everyone. Overtime regulations, for example, tend not to apply to the highest-paid workers, leaving them subject to long workweeks. And family and medical leave are available to only about half of all workers, leaving a disproportionate share of low-wage workers with no access at all to job-protected leave. Further, when employers voluntarily implement such policies, they are under no requirement to cover all their employees and so tend to offer benefits as “perks” to high-status workers.

Government has for many years intervened in the nation's labor market to address a wide array of issues, setting, for example, basic labor standards, such as the minimum wage, and social insurance for workers who cannot work or are unemployed. In today's

society—one in which adults are expected and encouraged to work—government also has a clear role to protect the welfare of children, the elderly, and the sick by setting standards to ensure that workers can meet their familial commitments.

Empirical evidence points to a failure of the market to come to grips with this issue on its own. Economists hypothesize—based on the theory of “compensating wage differentials”—that workers who need or value workplace flexibility will choose jobs that offer flexibility and will be willing to trade off higher wages in exchange.⁶ But researchers have found that many workers appear to have limited ability to bargain for these benefits. The workers who most need workplace flexibility report having the least access to it, and the workers who have the greatest access to flexibility are those who are well paid.⁷ Researchers have also found that motherhood itself, beyond time out of the labor force or the practice of taking advantage of family-friendly policies, entails a wage penalty, although there is evidence that workers who take advantage of flexible hours may see slower wage growth over time.⁸

One reason why the market may not be able to produce greater workplace flexibility is that so few U.S. workers today are covered by collective bargaining agreements that address wages, hours, and workplace flexibility. Unions have made progress in getting those issues into their contracts, but with fewer than one in ten private-sector U.S. workers belonging to a union today, those contracts do not help many working families.⁹ With unionization falling sharply over the past half-century, from nearly one in three workers in 1948 to 11.9 percent in 2010, broad union coverage is no longer the norm.¹⁰

My discussion focuses on three work-family issues: employees’ ability to have some control over their hours of work, their ability to take time off from work to tend to their families’ care, and their ability to find suitable options for outsourcing family care when necessary. Accordingly I examine three types of policies that shape the interaction between the labor market and family life—those that govern hours worked and workplace equity, those that provide income support when workers cannot be at work because their families need care, and those that govern the existence of and access to care for families who do not have a stay-at-home caregiver. I also examine how and how well the market is managing these issues and the appropriate role for government intervention.

The first large set of work-family policies involves what happens at work and how work intersects with the need to provide family care. The cornerstone is the 1938 Fair Labor Standards Act (FLSA), which first set out the nation’s regulatory wage-and-hours framework. Congress enacted the FLSA following earlier state action to limit hours worked by women and children. Although the FLSA was not designed to address work-family conflict, it limited the hours of work for some workers and established the minimum wage, both of which affect the ability of workers to reserve time to care for families. Because the assumption underlying the FLSA is that workers are employed full time—in that era, commonly ten to twelve hours each day—the law did not deal with or encourage workplace flexibility.

Another issue at work is whether an employer can treat workers differently based on their status as caregivers or on family relationship. Until the 1950s, for example, many employers refused to hire married women or

mothers, because women were presumed to belong in the home.¹¹ Title VII of the 1964 Civil Rights Act took a giant first step toward ensuring that work performance, not a worker's personal characteristics, determined employment and pay, but large gaps remained—and remain still—for workers with care responsibilities.

The second large set of work-family policies addresses the need for income support when a worker cannot be at work because a family member requires care. The cornerstone of this set of policies is the Social Security Act of 1935, which established Old Age and Survivors Insurance, unemployment insurance, and income assistance to mothers and children. Because the law was grounded in the assumption that men were breadwinners and women were caretakers, it left a legacy of gaps in coverage and eligibility for today's families. Policy makers have since tried to fill many of these gaps, but inequalities that affect caregivers remain, perhaps most notably the failure of the law to cover caregiving leave. In two states, California and New Jersey, state-level programs provide social insurance to workers for family leave, but the United States remains the only developed nation that does not provide some type of paid leave to new parents nationwide.¹²

The third broad set of policies involves the need for families to provide care when potential caregivers are either working or in school and training for work. Because the United States does not provide a system of care for the young, the ill, or the aged, families must patch together various, mostly private, solutions. The subsidies available to help pay for this care are typically available only to the poor, while tax relief is available to middle- and upper-class citizens who pay

for care.¹³ One key reason for the absence of a unified system of care is the deeply held belief that mothers belong in the home, not the workplace.

I examine each of these three sets of policies in turn: those that regulate work, those that provide income support for those who cannot be at work, and those that help provide care for workers' family members while their caretakers are at work. I conclude each section with an analysis of proposals now on the policy agenda.

At Work, but Needing Flexibility and Equity

Most American workers today are also caregivers. In 2008, among mothers of children under age eighteen, 71 percent participated in the workforce, which means most families no longer have a full-time stay-at-home parent; among all workers, both male and female, 42 percent reported that they had cared for an elderly person within the past five years.¹⁴ Workers with care responsibilities may be able to perform their jobs fully, but may also need some flexibility from their employers to manage work-family conflicts; such flexibility would include, for example, being allowed to negotiate, have input into, or control their hours or location of work, without fear of discrimination or penalty. For professional workers and those subject to mandatory overtime, the problem is most often too much work; for low-wage workers, it is more often too few hours and unpredictable schedules.¹⁵ Many higher earners, whether they are professionals tied to their BlackBerry or nurses struggling to comply with mandatory overtime on little or no notice, would like to work fewer hours, while many low-wage workers can find only part-time work, or none at all, and often have highly unpredictable schedules.¹⁶

Several surveys confirm that employees see control over their hours of work as critical for managing day-to-day quality-of-life issues. A recent poll conducted by the Rockefeller Foundation and TIME, Inc., for *The Shriver Report: A Woman's Nation Changes Everything* asked, "Which of these things, in particular, would need to change in order for working parents to balance evenly their job or business, their marriage, and their children?" In response to the four broad options given—longer school hours or school years, more flexible work schedules, more paid time off, or better and more day-care options—half (51 percent) of those polled picked more flexible work schedules.¹⁷ In a poll conducted for the Heartland Alliance, "Millennials" (members of the generation born during the last quarter of the twentieth century) reported that workplace flexibility was almost as important to them as wages; they also ranked workplace flexibility as more important than strong benefits or intellectually interesting work.¹⁸ Workers caring for an elder family member too report that they would like to see greater schedule flexibility and options for managing time at work.¹⁹

Although workers report needing and wanting some flexibility in terms of hours or location of work, the nation's wage-and-hours regulatory structure, based on outdated models of who works and who gives care, provides little guidance to help employers deal with the realities of today's workforce. The FLSA, which lays out the national regulatory structure on hours, remains grounded in assumptions about work and family that are no longer valid—and in fact were never valid for large numbers of workers. Although many employers do address workplace flexibility issues, wide gaps exist regarding which workers have access to flexibility. Further, a growing body of research suggests that mothers and

caregivers often experience explicit discrimination because of their roles as caregivers and their need for workplace flexibility.

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The Fair Labor Standards Act

The 1938 Fair Labor Standards Act is the foundation of the nation's regulatory structure governing hours of work. The FLSA sets overtime thresholds by defining a regular workweek as being forty hours and requiring that workers covered by the law be paid 150 percent of the usual hourly wage for any hours worked above that threshold. When Congress passed the FLSA, its intent was to encourage employers to curtail the long hours of their current employees and to put more people to work. The law specifies that workers who need protection in terms of hours of work are those employed full time at regular jobs. The legislation was passed following decades of state efforts to restrict excessive work hours, at least for women and children.²⁰ The FLSA initially excluded some groups of workers, but was gradually extended from the 1940s through the 1980s to include almost every worker except employees of state and local government and small farms, as well as some domestic workers.²¹

The FLSA's overtime provisions do not apply to all workers; indeed, they cover only the six

in ten workers who are paid hourly wages.²² Salaried workers who earn at least \$23,600 a year, who are paid on a salary basis with a “guaranteed minimum,” and who perform exempt job duties are not protected by the FLSA’s overtime provisions.²³ No statutory limit governs the number of hours that salaried (known as “exempt”) employees can be asked to work in a given week. In 2004, the Bush administration increased the share of workers who are categorized as exempt by expanding the definition of “executive, administrative, and professional” workers. At the time, analysts estimated that the redefinition would make 8 million more workers (about 6 percent of the total employed workforce) ineligible for overtime pay.²⁴ The FLSA’s failure to provide universal coverage thus creates conditions of overwork for exempt employees.

To the extent that the FLSA limits overtime for covered workers, it may help them better manage work-family conflict. In addition, its overtime provisions have improved the take-home pay of millions of lower- and middle-class families who benefit from overtime pay. But it places no limit on overtime work. Many workers must often work overtime with little or no notice, a practice that not only exacerbates the work-family conflict but is also a frequent source of contention between managers and employees.²⁵

Because the FLSA was never targeted at the problem of underwork, it does not address part-time parity, sufficient hours of work, or scheduling. A careful analysis by Susan Lambert and Julia Henly of the scheduling issues facing low-wage workers documents how low-wage employees often experience “fluctuating and reduced work hours and unpredictable work schedules that can compromise their job performance and their

ability to earn an adequate living.”²⁶ The authors find that “employers can and do vary workers’ hours,” making it hard for workers to coordinate work schedules with a family’s need for care. The FLSA offers no guidance on these issues.

Private-Sector Responses to the Need for Scheduling Flexibility

The gaps in FLSA worker protections leave a great deal of room for private-sector employers to experiment with flexible schedules to address work-family conflict. The FLSA itself allows workers and employers great leeway in how and where hours are worked.²⁷ Employers can allow any employee—whether covered by or exempt from the FLSA overtime provisions—to vary arrival and departure times, days worked, and shift arrangements, or to take time off during the day so long as covered workers put in no more than forty hours in a given week if the employer wants to avoid paying overtime. Employers have even more flexibility regarding the hours of exempt workers. For example, exempt employees can have compressed workweeks over two-week intervals, working nine-hour days each week Monday through Thursday, then, every other Friday, alternating between working eight hours and taking the day off.

Whether compensatory time (a program, known as “comp time,” that allows employees to work more hours than usual and bank them to use later to compensate them for the extra work) or flexibility programs are helpful for employees struggling to resolve work-family conflict hinges on how they are implemented. A review of litigation history on comp time found that even within the public sector, where comp time is less contentious than it is in the private sector, employers limit their employees’ ability to

use comp time at their own discretion.²⁸ In the private sector, which is less regulated and less unionized than the public sector, employees are likely to be even less able to make use of their comp time when it suits them.

Firms that experiment with workplace flexibility often allow employees to make requests for flexibility, thus beginning a process of negotiation over how the schedule will help both employees and employers to meet their needs.²⁹ Few workers, however, have access to workplace flexibility, and those that do are still too often “mommy tracked.” Only about a quarter of employees report having some kind of flexibility, although from about half to most of all employers report offering flexibility of some kind.³⁰ Workers with the least access to predictable work schedules are disproportionately low-wage workers, women, and workers of color.³¹

Some firms offer comp time to their salaried employees who are exempt from the overtime provisions of the FLSA. In the private sector, this policy is available only to workers exempt from the FLSA’s overtime provisions; about a third (36 percent) of employers offer comp time to some workers and one in five (18 percent) makes it available to all workers.³²

Firms that voluntarily implement flexibility do so because they see it as good for their bottom line. A growing body of empirical research suggests that these policies enhance productivity by improving retention and reducing turnover. In 2010, the Council of Economic Advisers reviewed evidence on the economic value of adopting workplace flexibility and concluded that the “costs to firms of adopting these kinds of management practices can also be outweighed by reduced absenteeism, lower turnover, healthier

workers, and increased productivity.”³³ In a review of research in *The Shriver Report*, Brad Harrington and Jamie Ladge cite several studies showing that when firms allow workers flexibility and managers implement it, the benefits are considerable.³⁴

New Ideas for Workplace Flexibility

Government policy has a clear role in workplace flexibility. Although the government has been setting basic labor standards pertaining to hours of work for nearly a century, workers today both need and want better policies. Generally, to be considered effective at addressing workplace flexibility, new policies must work for employees as well as employers and give them some control over the hours or location of work so they can address their work-family conflicts. Further, participation should be at the worker’s discretion and should not entail disparate pay or promotion penalties; it may entail pay cuts commensurate with reduced hours, but not penalties over time. Finally, new policies should not exacerbate the gaps left by the FLSA or undermine its protections.

Alternative Schedules and Compressed Workweeks. Federal, state, and local governments have experimented with several innovative programs to increase scheduling flexibility that could provide a model for policy makers. Since the late 1970s, for example, federal employees have had some access to two kinds of alternative work schedules, a “flexible work schedule” and a “compressed work schedule.”³⁵ In 2010, the Office of Personnel Management launched a pilot program called Results-Only Work Environment that allows employees to work whenever and wherever they want, as long as they complete their tasks. Initial results from the evaluation of the federal pilot found greater employee satisfaction, a shift in focus

among both employees and employers to output instead of hours worked, and improved perception of leadership.³⁶

State and local governments have also implemented alternative schedules. In 2008 Utah Governor Jon Huntsman moved most state employees to a four-day workweek by executive order.³⁷ Although the primary goal of the reform was to reduce energy expenses, a Brigham Young University study found that implementing compressed schedules in Utah reduced work-life conflict and improved productivity.³⁸ In 2006 Houston Mayor Bill White began a Flexible Workplace Initiative Program to encourage companies to implement flexible work-scheduling policies. In an annual Flex in the City program, participating Houston area employers “adopt new flexible workplace policies for two weeks.” City government surveys of both employees and employers found that the flexible scheduling reduced traffic congestion, lowered commute costs, and increased productivity.³⁹

Right-to-Request. The United Kingdom, New Zealand, and Australia have implemented policies that give workers the right to request a flexible schedule without fear of retaliation.⁴⁰ Because many U.S. workers are subject to being disciplined for even asking about flexibility or predictability, the right to request could be a very important addition to the U.S. work-family policy framework.⁴¹ The new policies implemented abroad require employers to set up a process to discuss and negotiate workplace flexibility and permit them to turn down the requests only for certain business reasons. In the United Kingdom, for example, employers may refuse the request for flexibility only for such reasons as the burden of additional costs, negative effects on meeting customer demand or on business quality and performance, or the

inability to reorganize the existing staff to make it work.⁴²

Right-to-request legislation has increased the number of workers in the United Kingdom with flexible schedules.⁴³ Only 10 percent of requests have been turned down since the law was enacted. And although the law applied originally only to workers with a child under the age of six, the business community joined with workers to lobby to extend it gradually to workers with caregiving responsibilities for disabled or ill adults or for children under age eighteen by April 2011.⁴⁴

Making the right-to-request model work in the United States would require careful analysis of how to adapt it to fit the U.S. legal and institutional structure. For example, the right to request would have to be made available to workers across the income distribution.⁴⁵ Employees would have to be assured a right to request a schedule that works for them, as well as their employer, even in the absence of a union setting. For right-to-request to be effective in the United States, it should also be used to help workers who do not want to (or cannot) work overtime, who want to place limits on their hours, and who need help in addressing the issue of scheduling predictability. Right-to-request legislation, in the form of the Working Families Flexibility Act, was introduced in the 111th Congress by Carolyn Maloney in the House of Representatives and Robert Casey in the Senate. So far, New Hampshire is the only state where such legislation has been introduced.⁴⁶

Equal Rights in the Workplace

The foundation for equitable treatment at work in the United States is laid out in Title VII of the 1964 Civil Rights Act. As originally passed, Title VII protected individuals against

employment discrimination on the basis of sex, race, color, national origin, and religion; it has been amended to include pregnant women, and other legislation has expanded the rights of the disabled. Although the Civil Rights Act ensures that all employees have an equal opportunity within the existing workplace structure, it does not require an employer to make changes to the workplace to address specific protected class issues. And although having broad protections from unfair treatment certainly helps some caregivers address discrimination in the workplace, nevertheless, as Ann O'Leary and Karen Kornbluh note, "Equal protection laws are only as good as the nature and quantity of benefits the employer provides to other workers."⁴⁷

In 1978 the Pregnancy Discrimination Act amended Title VII to prohibit discrimination on the basis of pregnancy. The Pregnancy Discrimination Act has helped normalize a pregnant woman as a still-functioning employee,⁴⁸ but it does not mandate that employers take any specific positive actions; they must only offer pregnant women the same benefits that they offer any other worker.⁴⁹ For example, a company may fire an employee for breast feeding too often, making the argument that breast feeding is part of child care and not part of pregnancy.⁵⁰ The Patient Protection and Affordable Care Act of 2010 now requires employers with more than fifty employees to provide appropriate breaks and locations so that working mothers covered by FLSA can pump breast milk.⁵¹

The Americans with Disabilities Act (ADA) of 1990 prohibits discrimination on the basis of disability in employment, as well as in other areas such as public services, public accommodations, transportation,

and telecommunications.⁵² For employees with disabilities, the ADA provides workplace flexibility by requiring employers to provide "reasonable accommodations" that enable employees to perform their jobs. An employer is not required by the ADA to provide a reasonable accommodation if doing so would create an "undue hardship"—defined as "significant difficulty or expense." The ADA also covers caregivers for the disabled.

Evidence is growing that workers with care responsibilities experience discrimination in the workplace and that government policy has a role in ensuring workplace equity. Joan Williams, at the Center for WorkLife Law, has coined the phrase "family responsibility discrimination" to describe disparate treatment at work of "pregnant women, mothers and fathers of young children, and workers with aging parents or sick spouses or partners." She notes that these workers "may be rejected for hire, passed over for promotion, demoted, harassed, or terminated—despite good performance—simply because their employers make personnel decisions based on stereotypical notions of how they will or should act given their family responsibilities."⁵³ Sociologists Shelley Correll, Stephen Benard, and In Paik have found that among two groups of job candidates with identical credentials, the group identified as mothers was perceived to be less competent, less promotable, less likely to be recommended for management, and less likely to be recommended for hire, and that the mothers had lower recommended starting salaries than nonmothers.⁵⁴

Employment discrimination is particularly problematic in the United States, where most workers have no explicit employment contract and thus can be fired for any reason not explicitly prohibited through judicial or

statutory exceptions.⁵⁵ Workers with care responsibilities may need to request flexible work arrangements, but may have no job-protected mechanism even for asking their employer to help them resolve their work-family conflict.

New Ideas to Address Family Responsibilities Discrimination

In 2007, the Equal Employment Opportunity Commission (EEOC), the enforcement agency for the Civil Rights Act, laid out how the laws that establish workplace fairness also provide protections for workers with family responsibilities. Although no one law specifically addresses the dual role that most workers now play as workers and caregivers, a framework based on the growing body of case law is emerging. The EEOC's caregiver guidance outlines how, based on current law, workers cannot be subject to a hostile work environment or treated differently once they develop caregiver responsibilities, or be held to stricter standards (for example, about requesting leave or timeliness) than other workers. It also highlights difficulties in the workplace for women who are pregnant or have young children, as well as for men, when they request flexible schedules, and what treatment constitutes discrimination for them.⁵⁶ The guidance, however, does not provide a framework that would give workers the time and flexibility to take care of caregiving obligations and not be discriminated against as a result.

For the future, one possibility would be to transform the EEOC caregiver guidance into legislation. The Australian state of New South Wales has done something similar, implementing protection for employees against discrimination based on care responsibilities, and requiring employers to affirmatively provide reasonable, flexible work schedules

unless doing so would cause them undue hardship.⁵⁷

With a Job, but Needing Paid Time Off to Give Care

Because the vast majority of American families now have no one at home to provide care, workers occasionally need paid time off from work to tend to loved ones with serious illnesses or to bond with a new child. Most families receive the bulk of their income from employment, making access to paid time off critical for family economic well-being. U.S. social insurance programs provide income support when a family member cannot work because of retirement, unemployment, or disability, but they do not cover a worker's need for short-term or extended time off to provide care for a new child or a sick family member.

Two related, but conceptually separate, issues create work-family conflict in this area. The first is whether workers can take extended time off work to care for a seriously ill family member or to care for a new child. Such time off, which I call family and medical leave, can often but not always be planned in advance. The second issue is whether workers can miss up to a few days of work to care for a family member who has a relatively minor illness, such as a cold or flu. The need for this second type of leave, which I call sick days, is often unexpected.

Although few American workers have paid family and medical leave and paid sick days, most would like to have both. Nationwide, 77 percent of Americans believe that businesses should be required to provide paid family and medical leave for every worker who needs it. And support cuts across the political spectrum—including 64 percent of conservatives and 89 percent of liberals.⁵⁸ Support for paid sick

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days is also robust. In a nationally representative survey conducted in 2010 by the National Opinion Research Center, 75 percent of Americans voiced support for a law that would give all workers paid sick days.⁵⁹

The Social Security Act

The Social Security Act of 1935 established Old Age, Survivors, and Disability Insurance, commonly known as Social Security. The new law established social insurance, whereby workers pay into funds through payroll taxes and then, having demonstrated sufficient labor market attachment, become eligible for benefits upon retiring or becoming unemployed. The law also established a program of income support for women and children without a breadwinner. In 1954, the federal government added Social Security Disability Insurance for workers who become disabled; in 1972, it added Supplementary Security Income for disabled and blind people regardless of work history.⁶⁰ The income support program for women and children—called Aid to Dependent Families in the original legislation—was designed for widows who had lost their male breadwinner and needed funds to help them support their children. The program is means-tested—that is, available only to mothers with income up to a certain

limit—and reforms during the mid-1990s tied eligibility for benefits to work or job search activities.⁶¹

Some of the fundamental assumptions underlying the Social Security Act were that individuals were either caregivers or breadwinners, but not both; that married couples typically stayed married for life; and that most families had a stay-at-home parent, usually a mother, to provide care for children, the sick, and the elderly.

Eligibility for the retirement and disability benefits of Social Security depends on a history of employment and payment into the system by the recipient or his or her spouse. Social Security resembles insurance, because workers' income risks are pooled and payments into the system (that is, insurance premiums) are paid based on expected benefits.⁶² To qualify for retirement benefits, a worker must accumulate at least forty credits (approximately ten years of work).⁶³ Adults and younger people qualify for disability or survivor benefits with proportionally fewer credits appropriate to their age and potential labor market experience. Most Americans are eligible for both the retirement and disability benefits. In 2009, 89.7 percent of those aged sixty-five and older received Social Security benefits.⁶⁴ Caregivers, however, are less likely to be eligible for benefits in their own right, because they are likely to have spent less time in the workforce. Spousal benefits provide a married woman with as much as half of her husband's benefit if she has no work history. In 2008, 56 percent of women received Social Security benefits that depended wholly or in part on their husband's benefits.⁶⁵

The Social Security Act also established an unemployment insurance system that is administered by the states, but this system

too leaves out some workers with care responsibilities. Although all workers (except some domestic and agricultural workers) are covered by the program, eligibility depends on reaching certain thresholds of earnings and hours worked in the period preceding unemployment. Up until 2009, much of the nation's unemployment insurance system did not cover part-time workers and did not allow workers to receive unemployment benefits if they quit their job because of problems with child care or if they had to leave because their spouse found a job in another location. Such rules made it less likely that caregivers would be able to receive unemployment benefits if they lost their job. Some of these issues were addressed in the Unemployment Insurance Modernization Act, which was implemented as a part of the American Recovery and Reinvestment Act in 2009, but not all states have put the reforms into effect.⁶⁶

The Family and Medical Leave Act

By the 1980s, although increasingly fewer families had a stay-at-home caregiver, much of the social insurance infrastructure continued to assume that they did. In 1993, to address the issues of care and work, Congress passed and President Bill Clinton signed the Family and Medical Leave Act (FMLA), the first piece of legislation in U.S. history to give workers a right to job-protected leave for caregiving. The FMLA provides up to twelve weeks of unpaid leave a year for employees who need time off to care for a new child (newborn or adopted), to recover from a serious illness, or to care for a seriously ill family member. To be eligible for FMLA leave, an employee must put in at least 1,250 hours of work a year at a large company (one with fifty or more employees) and must have worked at that company for at least a year, although not necessarily consecutively.⁶⁷

The FMLA gave approximately 44 million workers (out of a workforce of more than 128 million) the right to job-protected unpaid family and medical leave.⁶⁸ Among all U.S. workers, 16.5 percent took FMLA leave between mid-1999 and 2000 (the latest survey data available). Of that total, 17.9 percent took leave to bond with or care for a new child, 7.8 percent took leave for maternity or disability, 47.2 percent for their own illness, and 27.1 percent to care for a seriously ill family member.⁶⁹

The FMLA, however, has two major shortcomings. The first is that the leave it provides is unpaid. Unlike programs that offer leave for other reasons, such as a short-term disability or unemployment, the FMLA is not a social insurance program; rather, it provides job protection when workers take the leave. Unpaid leave, however, is not adequate to the needs of low- and moderate-income families. For them, the right to job-protected leave is nice, but not enough.⁷⁰ The FMLA's second shortcoming is that it excludes about half the labor force, many of whom are the workers who may need coverage the most.

By covering only workers in firms with fifty or more employees, the law leaves out about a third of all U.S. workers—those who tend to earn less, and to be less likely to have access to paid benefits, than their counterparts in larger companies.⁷¹ Furthermore, even workers in covered establishments are eligible for FMLA leave only if they meet other requirements that fit the traditional model of employment—which no longer captures many of the realities of the modern workforce. Tying workers' eligibility to a minimum number of hours worked, for example, fails to acknowledge that many people work part time for caregiving reasons. And because part-time workers are more likely than

full-time workers to have more than one job, tying FMLA eligibility to time with a single employer limits their eligibility. Requiring workers to undergo a waiting period each time they switch jobs ignores the reality that young workers change jobs often during the first few years of their career and thus harms many young parents, disproportionately those of color. Among workers aged eighteen to twenty-five with a small child at home, 43.3 percent of women, 31.2 percent of men, 38.5 percent of whites, 48.0 percent of blacks, and 31.5 percent of Hispanics have been at their job less than a year.⁷² Finally FMLA eligibility requirements do not acknowledge the reality that workers today typically do not enjoy lifetime employment with a single employer, especially workers in emerging industries such as the technology sector. According to the Bureau of Labor Statistics, between 1979 and 2008, a typical worker aging from eighteen to forty-four held an average of 11.0 jobs and held more than two-thirds of those jobs (7.6) between the ages of eighteen and twenty-seven, the ages at which many workers start families.⁷³ Requiring workers to hold jobs for at least a year may also lead some workers to stay in unsuitable jobs to retain eligibility for benefits.

The Market Response to the Need for Paid Time Off for Caregiving

Thus far, the market on its own has not filled the need for paid time off for caregiving. Employers do not typically offer extended leave to care for a new child or for an ill family member, and when they do, they tend to offer it only to higher-wage, higher-status workers, thus flying in the face of the compensating-wage model. And employers who do provide paid leave, unlike those who offer pensions and health insurance, face no government requirements that policy be uniform within the firm.⁷⁴ Thus, even within a

Employees least likely to get family and medical leave are low-wage workers who are most likely to need workplace flexibility because they cannot afford paid help to care for loved ones.

given firm, not all employees may have access to the same paid family and medical leave benefits.⁷⁵ Employees least likely to get family and medical leave are low-wage workers who are most likely to need workplace flexibility because they cannot afford paid help to care for loved ones.⁷⁶ The U.S. Census Bureau reports that 60 percent of new mothers with a bachelor's degree or higher received any kind of paid maternity leave, compared with only 22 percent of those without a high school degree.⁷⁷

Further, the leave that exists is a patchwork available to employees for their own illness or for childbirth with very little available for caregiving or bonding with a new child. About 40 percent of all workers are covered by private temporary disability insurance programs that provide benefits for maternity and an employee's own illness.⁷⁸ Such insurance, however, does not address the work-family conflicts that arise when no stay-at-home family member is available to provide care for others who are ill or for a new child. New fathers, who are ineligible for disability leave for childbirth, are typically offered little or no paid leave, and employees who have sick days and deplete them must hope that they—or their new children—do

not get sick later on. Further, because there is no government requirement that the programs be universally applied, many low-paid workers may not be offered the benefit even if higher-paid workers are.

New Ideas for Paid Time Off for Caregiving

Nearly every developed country in the world except the United States uses the social insurance model to provide extended time off for family and medical leave.⁷⁹ The American model—which is to rely on individual firms to pay for these leaves—disproportionately burdens firms that have staff who are prone to serious health problems, who have ailing family members who need their care, or who are of childbearing age.

There is no need, however, for the United States to set up a social insurance infrastructure to provide workers with paid sick days. The costs of sick day benefits are minimal and therefore should be borne by individual employers, who also stand to reap gains from not having workers with contagious diseases show up at work, make their colleagues ill, and reduce overall firm productivity. Paid sick days are now guaranteed by law in several U.S. localities—San Francisco, the District of Columbia, and Milwaukee—but not nationwide.

Building on State Temporary Disability Insurance Programs. Five states (California, Hawaii, New Jersey, New York, and Rhode Island) have long-standing Temporary Disability Insurance (TDI) programs that provide workers with coverage for non-work-related disabilities. Over the past decade, California and New Jersey have expanded their TDI programs to cover caregiver leave for new parents or for workers who need to care for a seriously ill family

member. In 2002 California extended its TDI program to offer six weeks of family leave (with only partial wage replacement), for which every private-sector California worker is eligible.⁸⁰ New Jersey passed similar legislation in 2008.⁸¹ In 2007, Washington became the first state to pass legislation establishing a new, stand-alone program for paid parental leave (although the financing mechanism remains to be worked out).⁸²

Of the three other states with TDI—Hawaii, New York, and Rhode Island—New York is actively considering expanding its program to include family leave.⁸³ The prospect of passage in the states without TDI programs may be limited, although Oregon and New Hampshire are looking into paid family and medical leave. Experimentation is important, and policy makers should support it. When states pass laws giving more generous benefits than federal laws provide, they can provide a model for an eventual federal law, as happened during the early decades of the twentieth century with minimum wage laws.

So far, the experimentation at the state level shows that paid family and medical leave can be a successful policy for both employers and employees. Eileen Appelbaum and Ruth Milkman's evaluation of California's family leave insurance program found that, contrary to opponents' warnings, it was not a "job killer" and in fact had no discernible effect on overall employment. Their survey of employers found that the program had either no effect or positive effects; 89 percent of employers said it had no effect or a positive effect on productivity and 87 percent reported no increase in their costs. The survey of employees also revealed positive effects. It found that 26 percent of paid family leave claims are now filed by fathers who wish to bond with a new child, up from

17 percent when the program first began in 2004. And 82.7 percent of workers in low-quality jobs who used the leave returned to their jobs, compared with 73.9 percent of those who did not use the leave.⁸⁴ (Individuals may not have used leave because they either did not know they were eligible or did not want to risk losing their job because the leave is paid, but not job-protected, for all workers.)

Congress and the Obama administration have recently advanced proposals that support such state experimentation. The Family Income to Respond to Significant Transitions Act (H.R. 2339), sponsored by Representative Lynn Woolsey (D-CA), would provide start-up funds to states that want to implement paid family leave programs. Similarly, President Barack Obama's fiscal year 2011 budget included \$50 million to help states set up their own paid family and medical leave programs. Congress is also considering a bill to provide paid family and medical leave. The Family Leave Insurance Act (H.R. 5873), introduced recently by Representative Pete Stark (D-CA), and a companion bill introduced during the last Congress by Senator Christopher Dodd (D-CT) would establish a national family leave insurance program.

Another approach is to implement paid family and medical leave nationwide and administer it through the Social Security Administration,⁸⁵ with individuals paying into a new trust fund that would support paid family and medical leaves. Such an approach would resemble the extensions to Social Security for long-term disabilities implemented during the 1950s. The approach has a variety of advantages: it would reduce start-up costs for a new program; everyone would be covered because Social Security coverage is now nearly

universal; and the lifetime employment rules of Disability Insurance could be used to determine adequate employment history and benefit level, thus covering young and intermittent workers.

Paid Sick Days. The market has not on its own developed an effective system of paid sick days to provide care for a sick child or family member. In a recent National Opinion Research Center poll, 64 percent of workers said they could access paid sick time for their own illness, while 47 percent said they had paid sick days that they could use both when they were ill and when they needed to care for a sick family member.⁸⁶ Some observers have argued that workers who have paid vacation or other personal leave are really "covered" for sick time, but many workers cannot take such leave without giving their employer advance notice, making it impossible to use when a child wakes up with the flu or other urgent care needs arise.⁸⁷ Other research found that nearly two-thirds (63 percent) of workers (both full time and part time) do not have access to paid sick leave to care for a sick child.⁸⁸ The share of employees without paid leave for their own or a child's illness rises to 84 percent in construction and nondurable manufacturing and to 94 percent in accommodations and food services, an industry that disproportionately employs women.⁸⁹

Advocates are conducting active campaigns for paid sick days at both the federal and state level. As of 2010, workers have the right to job-protected paid sick leave in only two places: San Francisco (as of 2007) and Washington, D.C. (as of 2008). Voters in Milwaukee passed a paid-sick-days ballot initiative in 2008, but it is being held up by a court injunction. The Healthy Families Act, sponsored in the House by Representative Rosa DeLauro, which would give workers the

Having access to affordable child care and, increasingly, help with elder care, is important to Americans, most of whom agree that the government or businesses should provide more funding for child care to support parents who work.

right to earn up to seven paid sick days a year, has been introduced, but not acted on, in the past few Congresses.

Caring While Working

Working families need access to safe, affordable, and enriching care for children, the elderly, and the ill while family members are at work. Workers cannot be in two places at once, and the decline in the number of stay-at-home parents has been matched by a decline in the share of adults who have the time to care for an ailing family member, whether on a day-to-day basis or occasionally helping drive an elder to the doctor or deal with a health emergency. More than 15.3 million U.S. children under age six need care while their parents are at work, and some 9 million Americans over age sixty-five, a number that is projected to grow to 12 million by 2020, need long-term care.⁹⁰ Women continue to care for family members more than men do, and, because of changing demographics, those caring for elderly parents are more likely to be working and caring for children at the same time.⁹¹

The challenge for many families is twofold: finding safe and enriching care and being able to afford it. Care work is by definition done by people, and, even if the ratio of caregivers to those being cared for is relatively high, the reality is that without subsidies of some kind most families cannot afford to pay reasonable salaries for such workers. Most families need care support for finite periods when their children are young and when a family member is elderly or ailing, but the high cost over even a few years can be out of reach, especially for young workers in their early earning years. A clear role for government policy is to smooth the costs of that care across workers and across workers' lifetimes, as government already does with the public school system.

Having access to affordable child care and, increasingly, help with elder care, is important to Americans, most of whom—68 percent—agree that the government or businesses should provide more funding for child care to support parents who work. Support is weaker among conservatives, at 50 percent, than among liberals, at 85 percent.⁹² In qualitative research about what families would like to see to help them with elder care, respondents reported that they wanted a “more user-friendly and easily navigable health care system, especially with respect to managing cost and insurance issues.”⁹³

The model for government assistance in this area has involved assistance of two kinds: helping families reduce the cost of providing care to dependents through tax credits and providing direct care for poor and low-income families.

Tax Relief

Families typically rely on a variety of child- and elder-care options. Roughly one-third

of both low- and middle-income families—34 percent and 30 percent, respectively—and one-quarter, or 24 percent, of professional-managerial families rely primarily on relatives other than the parents themselves for child care. Among higher-income families, 37 percent rely on child-care centers, as do 30 percent of low- and middle-income families. Low-income families are more likely to rely on the parents themselves for child care—26 percent, compared with 20 percent of middle-income families and 14 percent of professional families. Less than 4 percent of families in all three groups rely on sitters or nannies.⁹⁴

Care for elders is equally varied. According to the Department of Health and Human Services, 70 percent of the elderly receive all of their care from family and friends, rather than professionals.⁹⁵ A 2010 survey by the Families and Work Institute found that 17 percent of workers were providing elder care and that those caregivers were employed forty-five hours a week on average on top of caregiving, an hour more each week than noncaregivers.⁹⁶

Both child and elder care are quite expensive. The Department of Health and Human Services advises families to spend no more than 10 percent of their income on child care, but many families do. In 2009, a year of full-time center-based care for a four-year-old ranged from an average of \$4,056 in Mississippi to \$13,158 in Massachusetts.⁹⁷ Not surprisingly, lower-income families spend a far higher share of their income on care than do higher-income families. An analysis that I conducted with Joan Williams found that, in March 2009 dollars, low-income families pay around \$2,300 a year in care for each child under age six—about 14 percent of their income. Families in the middle average

\$3,500 a year—6 percent to 9 percent of their income. Professional families pay about \$4,800 a year—3 percent to 7 percent of income.⁹⁸ Among working elder-caregivers, almost half helped cover the cost of caring for a parent; of those, nearly half (44 percent) reported that their financial contributions were at least “somewhat” burdensome.⁹⁹

Two types of tax relief are available to families for care-related expenses. The Child and Dependent Care Tax Credit is a nonrefundable credit of up to 35 percent of qualifying expenses to tax filers to help cover the cost of child or dependent care.¹⁰⁰ The care must be for a child under the age of thirteen or for a mentally or physically handicapped spouse or dependent.¹⁰¹ The requirement that the person in care be a dependent of the person taking the tax credit puts the deduction out of reach of the millions of families who provide occasional support to an ailing or elder family member who is not a dependent, as well as extended families who share the financial and emotional costs of caring for an ailing family member, but cannot share the credit. Some employees also have access to Flexible Spending Accounts for Dependent Care to set aside up to \$5,000 pre-tax dollars a year to pay for child or dependent care. Families can choose whether to use the tax credit or the flexible spending account; they cannot use both.

Both of these tax benefits disproportionately benefit higher-income families. As is common with nonrefundable tax credits, the tax credit goes primarily to middle- and higher-income workers and families because it is available only to families in which parents—both parents if it is a married couple—have earnings, are in school, or are disabled. Further, because the tax credit is nonrefundable, low-income families who do not earn enough to

pay taxes cannot receive the credit. Flexible Spending Accounts must be set up by employers and thus mostly go to professional-managerial families.¹⁰² Although both these tax benefits certainly help some families, they provide fairly small benefits relative to the cost of care and do not touch many of the neediest families.¹⁰³

The tax-based programs, which assume that the market provides sufficient options for families to find adequate—ideally, safe and enriching—care, have no direct effect on the quality of care available. Yet high-quality and affordable care seems to be in short supply. In addition to providing tax relief for higher-income workers, the government also, as I note in the next section, provides some direct subsidies to lower-income workers. What it does not provide is any national public program, either for child care or for elder care.

Direct Subsidies to Care Providers

The federal government provides direct subsidies for some lower-income families to make child care more affordable through the Child Care Development Block Grant Fund and also provides funds for child care from the Temporary Assistance for Needy Families program. States also help families with child-care expenses.¹⁰⁴ In addition, Head Start programs often are incorporated into child-care programs, although because the goal of the former is primarily educational, the care provided does not necessarily fit with a parent's work schedule. The American Recovery and Reinvestment Act pumped an additional \$2 billion into the Child Care Development Block Grant Fund on top of the \$2.1 billion of discretionary funding for 2009 authorized by the regular federal budget appropriations process, but these extra dollars were temporary.¹⁰⁵

Child Care Development Block Grant funds are targeted to low-income families and administered by the states, which have considerable leeway in setting provider payment levels, parent co-payment levels, and income eligibility requirements, and also in regulating the programs. Typically, for a family to be eligible for child-care subsidies, its earnings must fall below the state's median income, but the threshold varies widely.¹⁰⁶ An analysis of eligibility rules in ten states found that in Texas the income of a single-parent family with two children could not exceed 85 percent of the federal policy threshold, or about \$1,176 a month, while in the District of Columbia a family's income could reach 250 percent of that threshold, or \$3,458 a month. Most families who are eligible do not receive the benefit. In the same ten-state analysis, in no state did more than half of those eligible receive the subsidy.¹⁰⁷ Subsidies, then, are available only for low-income families and are scarce and sporadic even for them. About 30 percent of low-income families using center-based care and 16 percent using an in-home care center for a child under age six receive subsidies, while the share of middle-income families receiving subsidies is negligible—about 3 percent for an in-home care center.¹⁰⁸

Unlike families needing care for small children, most families with elder-caregiving needs do not receive services from a paid caregiver. According to the Families and Work Institute, a paid caregiver helps a quarter of family caregivers with a significant amount of daily care.¹⁰⁹ Medicare—which provides health insurance coverage for more than 46 million Americans, including people sixty-five and older, some people with disabilities, and people with end-stage renal disease—covers skilled nursing home expenses for up to 100 days, as well as assistance for those who need part-time

health services and are homebound. It does not cover help with activities of daily living.¹¹⁰ Medicaid provides insurance for those with limited finances and are sixty-five or older or disabled; it can be used to help pay for residential or nursing home care for elderly people who meet income and asset requirements set by the program.¹¹¹ The Families and Work Institute survey on elder care reports that most (60 percent) of the funding for costs associated with elder care comes from Medicare, followed by private medical insurance (44 percent), elders themselves (34 percent), and Medicaid (8 percent).¹¹²

Because of increasing demand by workers who need help with care of children and ailing family members, the Bureau of Labor Statistics predicts that employment will grow faster in the care sector than in most other occupations. The Bureau of Labor Statistics predicts that the number of home health aides will rise by 50 percent between 2008 and 2018, while the number of child-care workers will rise by 10.9 percent.¹¹³ The low subsidy levels for both child and elder care, however, limit not only the availability of affordable care options for families, but also the pay and benefits of the care providers. These jobs, held disproportionately by women and often women of color, typically pay relatively low wages.¹¹⁴

New Ideas for Access to Care

It has been decades since the United States had a national conversation about universal access to child care, and the nation is just barely beginning a national conversation on elder care and caring for ailing family members. In 1971, Congress passed the nation's first and only comprehensive child-care legislation. The Comprehensive Child Development Act provided every child with access to child care, with a priority given to

those with the greatest economic or social need. The bill laid out federal standards for quality control, staff training, and securing facilities. And it set child-care fees on a sliding scale according to income. President Richard Nixon, however, vetoed the bill, arguing that "federally-supported, institutional child care would undermine the family by encouraging mothers with young children to go out to work."¹¹⁵ Despite the veto, however, women went to work. During the early 1970s, the participation of U.S. women in the labor force began a rapid rise. Today, forty years later, that national child-care conversation has still not resumed, even though most American adults are now employed outside the home.

States are experimenting with universal prekindergarten programs, which help families manage work-family conflict by offering safe, enriching, and affordable—and most often free—care for pre-K children, typically aged three and four. The state programs take a variety of forms. For example, half (53 percent) of Georgia's four-year-olds participate in state-funded pre-K, at a cost of \$4,234 for each child, supported through a state lottery. Oklahoma enrolls 71 percent of its four-year-olds, the highest share in the nation, in publicly funded pre-K; as of 2008, 99 percent of its school districts offered pre-K programs. Research at Georgetown University found that "Tulsa's pre-K program produced substantial academic benefits for all children in the program, regardless of race or ethnicity."¹¹⁶ Oklahoma funds its program through a state aid formula that provides grants to school districts regardless of income. West Virginia folds its pre-K funding into its public schools funding formula and has seen a 65 percent increase in four-year-olds' participation since 2002.¹¹⁷ The National Institute for Early Education

Research, however, has found that only sixteen of the thirty-eight statewide universal pre-K programs have sufficient funding to meet all of their benchmarks for quality standards.¹¹⁸

In the areas of elder care, the federal government has been working to make it easier for families to acquire long-term-care insurance to defray costs for services that traditional medical insurance does not cover, such as help with activities of daily living or institutional care. The 2010 Patient Protection and Affordable Care Act included provisions from the Community Living Assistance Services and Support Act, a consumer-financed program administered by the government that allows people to purchase insurance for community living assistance and supports. The insurance is explicitly designed to help alleviate the burden on friends and family who have been acting as caregivers.¹¹⁹ Although Medicaid and Medicare benefits often do not pay for long-term care in people's homes, the Community Living Assistance Services and Support Act provides a daily cash benefit to those who need support in activities of daily living, which can help family caregivers.¹²⁰

The Way Forward

Crafting a comprehensive government policy to ease work-family conflict requires rethinking the basic labor standards and social insurance models that the United States has had in place since the 1930s, when Frances Perkins presented President Franklin Roosevelt with the ideas that became the Fair Labor Standards Act and the Social Security Act. Her dual vision for workers included ensuring fair treatment for workers at work and ensuring income support, based on insurance principles, for workers when they could not work or find work.¹²¹ In developing these cornerstone pieces of legislation, Perkins did not foresee that just over half a century later, most American mothers would be either breadwinners or cobreadwinners and that most American families would need income support and flexibility when a family member needed to provide care. Updating the nation's basic labor standards and social insurance to address conflicts that arise between work and family today is the next step.

Endnotes

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35. Under the flexible work schedule, employees must work certain core hours and days. Beyond these designated times, employees may structure their schedule to accommodate their personal needs. Under a compressed work schedule, an employee's basic biweekly eighty-hour work requirement is scheduled within less than the traditional ten workdays. Federal employees are not exempt from the FLSA, although individuals may still be exempt based on whether they have a managerial or other exempt job. With respect to both programs, if employees are unionized, then the collective bargaining agreement must include language that allows the alternative work schedule program.
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43. Jodie Levin-Epstein, *How to Exercise Flexible Work: Take Steps with a "Soft Touch" Law* (Washington: Center for Law and Social Policy), p. 8.
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