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Bread and Roses: *E.E.O.C. v. Bloomberg L.P.* and the Case for a Work-Life Balance

# BREAD AND ROSES: *E.E.O.C. v. BLOOMBERG L.P.* AND THE CASE FOR A WORK-LIFE BALANCE

By: Marissa N. Goldberg<sup>1</sup>

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*Our lives shall not be sweated from birth until life closes—Hearts starve as well as bodies:  
Give us Bread, but give us Roses.<sup>2</sup>*

James Oppenheim

## I. Introduction

With the increasing number of women in the workplace, and the increasing number of men as primary family caregivers, the tension between a successful career and family responsibilities has never been more pronounced.<sup>3</sup> Because women are biologically child-bearers and traditionally caregivers, women must generally sacrifice career goals in order to have a family.<sup>4</sup> Taking the opportunity to confront this ever-growing work-life balance issue, the court in *Equal Employment Opportunity Commission* (“E.E.O.C.”) *v. Bloomberg L.P.* (“Bloomberg L.P.”) directly addressed whether employers must provide employees with an adequate work-life balance.<sup>5</sup> In a strongly worded opinion, Chief Justice Loretta Preska of the Southern District of New York launched an assault on work-life balance, stating, “there’s no such thing as work-life balance. There are work-life choices, and you make them, and they have consequences”, and concluding that employers have no legal responsibility to provide employees with a work-life balance.<sup>6</sup>

After providing a brief overview of the *E.E.O.C. v. Bloomberg L.P.* decision, this article will discuss why Congress only partially intended the law, as written, to provide for a more sufficient work-life balance. It will then discuss why current regulations related to a work-life balance should be revised and expanded to better address the work-life balance concerns that female employees in today’s workforce face.<sup>7</sup> This article also suggests possible ways to accomplish this goal so that plaintiffs similarly

situated to those in *E.E.O.C. v. Bloomberg L.P.* will have a viable legal remedy.<sup>8</sup>

## II. Overview of *E.E.O.C. v. Bloomberg L.P.*

In *E.E.O.C. v. Bloomberg L.P.*, the E.E.O.C. filed suit on behalf of a class of pregnant women, alleging that Bloomberg L.P. “engaged in a pattern of discrimination against pregnant employees or those who ha[d] recently returned from maternity leave” in violation of Title VII of the Civil Rights Act.<sup>9</sup> Judge Preska determined that the E.E.O.C. lacked sufficient qualitative and quantitative evidence and granted summary judgment in favor of Bloomberg L.P.<sup>10</sup> After deciding the case on evidentiary grounds, Judge Preska proceeded to describe the E.E.O.C.’s claim as being, at its core, about Bloomberg L.P.’s failure to “provide its employee-mothers with sufficient work-life balance.”<sup>11</sup>

In her opinion, Judge Preska unequivocally states that the law, as written, does not mandate that employers provide employees with a work-life balance.<sup>12</sup> Specifically, Judge Preska maintained that

the law does not mandate ‘work-life balance’. It does not require companies to ignore employees’ work-family trade-offs . . . when deciding about employee pay and promotions. It does not require that companies treat pregnant women and mothers better or more leniently than others. All of these things

may be desirable . . . [b]ut they are not *required* by law.<sup>13</sup>

Despite sharp criticism from a range of sources,<sup>14</sup> Judge Preska's opinion in *E.E.O.C. v. Bloomberg L.P.* is quite accurate: there is currently no legal requirement for employers to provide a work-life balance under Title VII of the Civil Rights Act of 1964 ("Title VII") or under the Family Medical Leave Act ("FMLA").<sup>15</sup> A close reading of the FMLA, however, indicates that the legislature intended to address at least some work-life balance concerns through government regulation.<sup>16</sup>

### III. Work-Life Balance

#### *A. Title VII and Work-Life Balance*

Although Title VII has the indirect effect of providing a more satisfactory work-life balance, it was not intended to provide such balance.<sup>17</sup> Instead, Congress instituted Title VII to address employment discrimination more broadly.<sup>18</sup> Under Title VII, it is unlawful for an employer to "fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual . . . because of such individual's race, color, religion, sex, or national origin."<sup>19</sup> To satisfy his or her burden under Title VII, a claimant must demonstrate that an employer engaged in intentional discrimination because of the claimant's membership in a protected class, or that an employment practice resulted in a disparate impact on a protected class of which the claimant is a member.<sup>20</sup>

Notably, Title VII requires that a disparate impact complainant "demonstrate[e] that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent *fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity.*"<sup>21</sup> This provision provides employers with an explicit loophole for avoiding Title VII liability.<sup>22</sup> If, as in *Bloomberg L.P.*'s case, there is a legitimate business reason for policies that negatively affect females and their work-life balance, the employer has not committed a legal wrong under Title VII.<sup>23</sup> Although Title VII prohibits outright discrimination against certain protected classes, the "business necessity" clause allows employers to enact

policies that may disparately impact women.<sup>24</sup> In this way, Title VII does not actually provide for or protect work-life balance.<sup>25</sup> Employers may legally strike work-life balance in favor of work, so long as there is a legitimate business purpose.<sup>26</sup> In her ruling, Judge Preska determined that *Bloomberg L.P.* established a business necessity for its demanding policies that favor those without pressing personal obligations.<sup>27</sup> Specifically, Judge Preska implied that *Bloomberg L.P.* must implement policies that favor work over life to succeed in the competitive media market.<sup>28</sup> A recent article by the Careerist noted that, "[Judge Preska] says that basically, if a workplace culture is 24/7, then they have a right to have that type of culture," as long the employer bases that culture on business necessity.<sup>29</sup> The female employees who complain that *Bloomberg L.P.* fails to provide an adequate work-life balance have no remedy under Title VII.<sup>30</sup> Employee-mothers, however, are not without a legal remedy.<sup>31</sup>

#### *B. The Family and Medical Leave Act and Work-Life Balance*

Although Congress only intended Title VII to address workplace discrimination and not to provide a work-life balance, both the stated purpose of and President Clinton's statements regarding the FMLA demonstrate that Congress designed the FMLA to address growing concerns that employment demands were infringing on personal responsibilities.<sup>32</sup> The actual language of the FMLA supports this notion.<sup>33</sup> The official purpose of the FMLA is to "balance the demands of the workplace with the needs of families."<sup>34</sup> The comments made by President Bill Clinton on February 5, 1993 when he signed the FMLA into law further emphasize this purpose.<sup>35</sup> President Clinton stated, "I believe this legislation is a response to a compelling need—the need of the American family for flexibility in the workplace. American workers will no longer have to choose between the job they need and the family they love."<sup>36</sup> As codified, Congress found that "the lack of employment policies to accommodate working parents can force individuals to choose between job security and parenting."<sup>37</sup> Without a doubt, the intent behind passage of the FMLA was to address the growing concerns regarding work-life balance.<sup>38</sup> For a number of reasons, however, the FMLA has failed to meet this goal.<sup>39</sup>

#### IV. FMLA's Shortcomings

Congress clearly intended the FMLA to provide employees with safeguards against discrimination in the event of certain family-related leaves-of-absence and to assist working parents with their work and family responsibilities.<sup>40</sup> The FMLA, however, is far too limited in its scope to fully achieve this noble but challenging goal.<sup>41</sup> There are several reasons for the FMLA's shortcomings.

First, all workers are not automatically eligible for leave under FMLA.<sup>42</sup> To be eligible, an employee "must have been employed by a covered employer for at least twelve months and completed 1,250 hours of service in the twelve-month period prior to requesting leave."<sup>43</sup> This requirement immediately limits the application of FMLA, diluting its true potential.<sup>44</sup> Further, although the FMLA applies to all public sector employers, not all private sector employers are subject to FMLA's provisions.<sup>45</sup> The FMLA excludes employers that "emplo[y] fewer than fifty employees within a seventy-five mile radius of the employee's worksite."<sup>46</sup> As a result, less than eleven percent of private sector employees receive FMLA benefits.<sup>47</sup> Even after considering public sector employers, a mere 58.3 percent of all employees nationally receive coverage under FMLA.<sup>48</sup> This meager coverage is inadequate to achieve the stated purpose of the FMLA regulations.

Next, the FMLA only provides workers with the ability to take family or medical leave for limited purposes.<sup>49</sup> The FMLA only permits employees to take family leaves to care for a newborn child, to adopt a child, to transition a new foster care child, or to care for an immediate relative with a serious health condition.<sup>50</sup> Additionally, an employee may herself take a leave of absence for a serious health condition, including pregnancy.<sup>51</sup> These leaves are inadequate because as written, the FMLA covers only one event – birth (including pregnancy and adoption).<sup>52</sup> As written, a parent or adult child caregiver may be unable to use the FMLA to cover ordinary illnesses, doctors' visits, and other similar events.<sup>53</sup>

FMLA-mandated leave is not only limited in its application, but also in the length of leave permitted.<sup>54</sup> Under the FMLA, an employee may not take more than twelve weeks of unpaid leave per twelve-month period.<sup>55</sup> Because women are still

the primary caregivers, when a child becomes sick women are more vulnerable to losing their incomes under FMLA.<sup>56</sup> Again, the depth and breadth of the FMLA is clearly inadequate to provide employees with a true work-life balance.<sup>57</sup> Even with the FMLA in place, employees who needed leave rarely exercised the option.<sup>58</sup> One report found that 63.9 percent of employees could not monetarily afford to take advantage of the FMLA, 39.4 percent thought their work was too important to justify time off, and 29.2 percent were concerned that exercising their FMLA options might result in their losing their jobs.<sup>59</sup>

Lastly, the fact that men generally do not take FMLA leave as frequently as women do muddies the vision of gender equality in the workplace.<sup>60</sup> In addition to the practical inequality that results from FMLA application, some argue that the language of the statute itself perpetuates gender inequality because "policymakers failed to challenge the existing gendered stereotypes of social arrangements" and instead "created legislation intended to be used solely by women."<sup>61</sup>

Because the FMLA primarily applies to women as child-bearers and care-givers, the work-life balance that this policy affords is more of a mirage than a reality.<sup>62</sup> Succinctly stated,

A woman who has to 'divide her attention between family and career cannot compete effectively in the marketplace with men who are able to choose—without risk of social stigma—to devote the majority of their attention to their career.' As long as women are faced with the dual responsibilities of career and family, they will not succeed in a market system where unwavering dedication is required for success.<sup>63</sup>

Ultimately, even if women are able to take protected leave under FMLA, they will often miss key opportunities for career growth while they are away.<sup>64</sup>

Due to the clear shortcomings of FMLA, there is a pressing need for further government regulation.<sup>65</sup> Based on the current state of the law, Judge Preska's dicta in *E.E.O.C. v. Bloomberg L.P.* regarding the legal unenforceability of work-life balance is correct. Ultimately, however, government policies that support a work-life balance have both

social and economic advantages, and the most efficient and effective way to recognize those advantages is through government regulation.

## **V. Should the Law Provide Additional Regulations to Protect the Work-Life Balance?**

### *A. Social Advantages of Expanding Work-Life Balance Regulations*

With more women entering the workforce and more children growing up in households where both parents work, the United States must update and revise its government regulations to provide additional support for women, children, and families.<sup>66</sup> In addition to the number of built-in limitations of the FMLA,<sup>67</sup> the legislation fails to address many other employee concerns.<sup>68</sup> In particular, the FMLA does not confront the consequences that an employee may face when taking FMLA-provided leave, and it does not alleviate inherent gender inequalities built into the current system. Reformation and expansion of the FMLA, along with new legislation, may help to address these issues and provide a wider social benefit.

First, although the FMLA legally “entitle[s] employees to take reasonable leave,” it does not confront the indirect ramifications of taking such leave.<sup>69</sup> In a study of employees who took FMLA leave, the employees expressed worry that they might lose their jobs (26.9 percent), that they might be hurt in their job advancement (26.2 percent), that they might have their seniority affected (12.9 percent), or that they might not be able to pay for bills and other expenses (53.8 percent).<sup>70</sup> These concerns constructively counteract any benefits that the FMLA might have otherwise provided.

Further, although only a small percentage (6.5 percent) of employees who take leave under the FMLA actually lose some of their job benefits,<sup>71</sup> the fact that this result is a possibility at all is extremely disconcerting, and may be a factor considered by an employee when deciding whether or not to take leave for a family-related reason. Employees are also likely to consider the fact that the FMLA does not provide for paid leave. More than half of employees who took leave (58.2 percent) reported that it was either “somewhat difficult” or “very difficult” to make ends meet during their leave of absence.<sup>72</sup>

Although the FMLA is intended to allow employees to better balance their personal and professional responsibilities, it is difficult to see how it can ever be successfully implemented if employees are constantly concerned with the practical implications of taking advantage of leave under the FMLA.<sup>73</sup>

Similarly, Congress must expand the FMLA to help achieve actual gender equality.<sup>74</sup> As written, the FMLA provides only unpaid leave for employees.<sup>75</sup> Because of the current wage disparity between male and female employees, it is likely that the husband earns more than the female spouse.<sup>76</sup> Therefore, when a husband takes FMLA leave, his family will generally lose more income than it would if his wife were to take FMLA leave.<sup>77</sup> As a result, husbands will likely be discouraged from taking leave under the FMLA to avoid losing the added income. Reports that female employees are more likely to take advantage of FMLA leave provisions than their male counterparts verify this conclusion.<sup>78</sup> If Congress expanded FMLA to offer paid leave, it would incentivize the husband/father to take time off by removing income loss as a relevant consideration.<sup>79</sup> This, in turn, will allow wives/mothers to continue working and continue furthering their careers.<sup>80</sup> In addition to the benefits of allowing employees to better balance their families with their careers, employees with a strong work-life balance also tend to be more financially stable. Specifically, a work-life balance has been found to “increas[e] the long-term employment and earning prospects of working parents . . . thereby increasing job security and ensuring consistent income.”<sup>81</sup> This seemingly individualized economic benefit has the potential to exponentially increase the social welfare of families on a broad scale.

Finally, drawing a comparison between the movements for gender equality and racial equality, one can make a strong argument that legal reform is the best way to implement real social change. By failing to pass regulations which support a work-life balance, the United States government and court systems are perpetuating deeply rooted gender inequality; in this manner, parents are forced to make the difficult choice between their careers and their families.<sup>82</sup> Instead of standing idly by and allowing market forces to dictate employment policies that directly affect gender rights, legislators and justices should consider the legacy of the *Plessy v. Ferguson* and *Brown v. Board of Education* decisions.<sup>83</sup> Arguing that,

“legislation is powerless to eradicate racial instincts,” the court in *Plessy* affirmed the legality of separate but equal accommodations for black and white citizens.<sup>84</sup> The *Plessy* decision cemented racial inequality in the United States until the *Brown* decision came before the Supreme Court in 1954.<sup>85</sup> With the *Brown* decision, focusing on segregation in public education, the Supreme Court ruled that “separate educational facilities are inherently unequal” and that the plaintiffs were “deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment.”<sup>86</sup> Using its power and influence, the court in *Brown* paved the way for the successes of the Civil Rights movement.<sup>87</sup> This demonstrates that courts have the ability either to propagate social inequality or to encourage positive change.

There is widespread support for the notion that legal action, be it through court decisions, legislation, or otherwise, can bring about social change. One scholar, for instance, noted that the law “possess[es] a tremendous capacity for effecting change” under the appropriate circumstances.<sup>88</sup> Others tend to take a more moderate view, arguing that legal regulations can indirectly impact social change. For example, laws can be used to “subtly influence social interactions.”<sup>89</sup> The courts and other governing bodies can also encourage the adoption of reforms, “making some options seem more legitimate or feasible while discouraging others—thus affecting (if not necessarily dictating) social practices, customs and attitudes.”<sup>90</sup> Finally, “[e]ven when laws do not intend to create social change, change often occurs as a side effect of the pervasive connection of law to our social system . . . Thus, ‘the potential for law to be used to effect deliberate and calculated change is enormous.’”<sup>91</sup>

Following the precedent of the *Plessy* and *Brown* decisions, the courts and legislatures have the power and influence to implement work-life balance policies in order to level the playing field between female and male, and parent and non-parent employees.<sup>92</sup> Ideally, the enactment of work-life balance regulations will revolutionize the way women and parents are treated in the workplace over time.

For these reasons, as well as the economic benefits discussed below,<sup>93</sup> governing bodies should begin the process of expanding and reforming the current FMLA system. Additional safeguards are necessary to better support parents, to allow women

to reach their full potential at work without sacrificing their responsibilities to their families, and to address the gender inequalities between men and women.

### *B. Economic Advantages of Expanding Work-Life Balance Regulations*

In addition to promoting gender equality and bettering families and children, there is also overwhelming evidence of economic benefits that result from the implementation of work-life balance policies. Employers, as well as their individual employees, will benefit from these policies. Specifically, a recent White House report found that work-life balance policies overwhelmingly resulted in reduced absenteeism, lower employee turnover, improved worker health, and increased productivity.<sup>94</sup> Moreover, because work-life balance is a priority for employees, employers who wish to keep training costs low by retaining workers long-term should be encouraged to implement work-life balance policies.<sup>95</sup>

Employer-provided on-site child care programs serve as a perfect example of how work-life balance policies can provide benefits to employers, as well as employees.<sup>96</sup> Specifically, providing on-site childcare can be cheaper than providing subsidies to employees to find their own child care options, and studies show that this option increases employee productivity.<sup>97</sup> The results of a study conducted by Boston College and Bristol-Myers Squibb (“BMS”) to gauge the benefits of BMS-provided childcare centers for its employees strongly affirm these findings.<sup>98</sup> Employees in the study overwhelmingly reported that access to BMS childcare centers had either a “positive[]” or “very positive[]” impact on their productivity, their quality of work, their relationships with their supervisors, and their plans to stay with the company, among other benefits.<sup>99</sup> Therefore, implementing work-life balance policies like on-site, employer-provided childcare centers will likely result in more satisfied and productive employees.

In addition to improved employee morale and productivity, mother and women friendly policies lead to a variety of other business advantages. One study found that “firms with female representations on their board of directors are more likely to be highly attentive to corporate governance issues, which correlate with improved firm performance.”<sup>100</sup> Female involvement in management is also correlative

with fiscal success.<sup>101</sup> When a firm has strong female leadership on its board of directors, the firm's return on invested capital is sixty-six percent higher than firms with fewer females on their boards.<sup>102</sup> Currently, however, the lack of social support for working mothers prevents women from attaining positions on corporate boards, and other similarly demanding positions.<sup>103</sup> Women currently make up 46.4 percent of all employees at Fortune 500 companies, but hold just 15.7 percent of board seats, 14.4 percent of executive offices, 7.6 percent of top-earning executive offices, and 2.4 percent of chief executive offices.<sup>104</sup> For companies to see the financial benefits that accompany female involvement and leadership, they must implement policies that provide greater support for their employees' balance between work and home life.

In contrast with these statistics demonstrating that female involvement has a positive impact on a business' success, Judge Preska suggested that Bloomberg L.P. does not provide a work-life balance to its employees because the competitive nature of Bloomberg L.P.'s industry.<sup>105</sup> Her implication is that Bloomberg L.P. would not be as successful if it implemented work-life balance policies.<sup>106</sup> However, the experiences of other companies that have implemented work-life balance policies suggests otherwise.

Kraft Foods is a premier example of a company that balances corporate success and industry competitiveness with the successful implementation of work-life balance policies.<sup>107</sup> Kraft offers its employees a wealth of options to achieve a better balance between their careers and their families and at-home responsibilities.<sup>108</sup> Kraft employees can take advantage of telecommuting, flextime, job-sharing, and part-time options, as well as "new-mother phase in programs," a "backup dependent care program," and a variety of wellness programs for overall mental and physical health.<sup>109</sup> Contrary to Judge Preska's suggestion that work-life balance policies might negatively affect a company's success, Kraft Foods has enjoyed exceptional success.<sup>110</sup> Market Watch describes Kraft as a "global snacks powerhouse with an unrivaled portfolio of brands people love."<sup>111</sup> Kraft markets products in approximately 170 countries, and generated revenue of \$49.2 billion in 2010.<sup>112</sup>

Google provides further support that work-life balance policies and company success are indeed

compatible.<sup>113</sup> With the constant competition between search engines as internet technology evolves, and with the addition of Google's "Google+" social media network to challenge the well-established Facebook, Google exists in an increasingly cut-throat environment.<sup>114</sup> Despite the aggressive market Google operates in, spectators note that the company's policies encourage employee happiness, in part through work-life balance initiatives.<sup>115</sup> Most notably, Google goes beyond the requirements of FMLA to offer twelve weeks of maternity leave at approximately 100 percent pay, with employees being eligible for an additional six weeks if they have worked for Google for over a year.<sup>116</sup> Non-primary caregivers are also eligible for seven weeks of paid leave for the birth of a child.<sup>117</sup> Google has also implemented a number of unconventional support benefits. Among its wide array of options, Google reimburses employees up to \$500 for takeout food for the first four weeks at home after having a baby, provides company washers and dryers, including free detergent, to multi-task while at work, and employs five on-site doctors for free employee check-ups.<sup>118</sup> Google also provides adoption assistance, day care, and "Mother's Rooms."<sup>119</sup> Although unusual, these policies ultimately allow employees to better juggle their responsibilities.<sup>120</sup> In spite of the benefits Google offers its employees, Google is both an economically successful enterprise and a successful company in terms of usage and popularity.<sup>121</sup>

Additionally, a number of governments of economically successful countries have already mandated work-life balance policies similar to but more comprehensive and supportive than the FMLA.<sup>122</sup> For example, under the United States' FMLA, employees receive twelve weeks of unpaid leave for a few limited purposes, and not all employees are covered.<sup>123</sup> Comparatively, the German government mandated federal paid maternity leave of at least fourteen weeks in 1979, over a decade before the United States implemented the less-inclusive, less-supportive FMLA.<sup>124</sup> Despite this mandate, the German economy is currently the fifth largest in the world, with an estimated gross domestic product (GDP) of 3.085 trillion dollars in 2011.<sup>125</sup>

Similarly, the Japanese government has prioritized policies that support women in their efforts to balance workplace and family commitments.<sup>126</sup> Under the Child Care and Family Care Leave Law,



workers may “take child-care leave until their children reach the age of 1;” “take family-care leave for a period of up to three consecutive months;” and must be paid at least 25 percent of their wages while on leave, among other protections.<sup>127</sup> Unlike the FMLA, the Japanese Child Care and Family Care Leave Law applies to *all* private and public employees.<sup>128</sup> These policies have had encouraging results, as indicated in a case study where a “large-scale U.S. multinational financial-services corporation” operating in Tokyo, Japan attempted to abide by these work-life balance policies at its Japanese facilities.<sup>129</sup>

Despite some challenges as the American managers attempted to implement the new, more accommodating policies, these managers noted that the policies helped attract and retain talented female staff members who might have otherwise been disinterested in the corporation, demonstrating the economic benefits of work-balance policies in action.<sup>130</sup> Additionally, like Germany, Japan also has a thriving economy: Japan is the third largest economy in the world, with a GDP of 4.389 trillion dollars in 2011.<sup>131</sup>

From the experiences of successful companies such as Kraft and Google, and the economic benefits realized by countries with government-supported work-life balance policies, like Germany and Japan, it is evident that Judge Preska’s opinion about the unworkability of the work-life balance is erroneous. In fact, implementing more comprehensive work-life balance policies would greatly benefit both American companies and the United States.

## VI. Moving Towards Reform and Expansion

In light of the many social and economic benefits that will ultimately result from employees having a better work-life balance, the court system and the legislature need to either expand the FMLA and/or create new legal protections for working parents. Mother-employees like those in *E.E.O.C. v. Bloomberg L.P.* should have some remedy for their claims, and there are several options available.<sup>132</sup>

First, it is important to note there has been some progress in making the law more supportive of working parents and mothers. For instance, defining what qualifies as a “serious health condition” under

FMLA, the courts have consistently interpreted the requirement broadly, thereby expanding coverage.<sup>133</sup>

In *Caldwell v. Holland of Texas, Inc.*, the court examined whether an employee’s son’s ear infection qualified as a “serious health condition” under FMLA.<sup>134</sup> Juanita Caldwell’s employer fired her after Caldwell missed a shift in order to seek medical attention for her son.<sup>135</sup> The employer argued that the termination did not violate the FMLA because the FMLA only provides employees with leave for “serious health conditions that afflict their immediate family members.”<sup>136</sup> After reiterating that the “FMLA’s purpose is to help working men and women balance the conflicting demands of work and personal life,” the court went on to determine that the ear infection, which was acute in nature, qualified for FMLA leave.<sup>137</sup> Similarly, in *Miller v. AT&T*, the employer denied FMLA leave to a mother because, in the employer’s opinion, her influenza was not a sufficiently serious illness to be covered under the Act.<sup>138</sup> Even though the regulatory language of the FMLA states that, “[o]rordinarily, unless complications arise, the common cold, *the flu*, ear aches, [and] upset stomach. . . are examples of conditions that do not meet the definition of a serious health condition and do not qualify for FMLA leave,” the court in this case determined that her flu, which lasted for several days and required multiple treatments, was sufficiently serious to warrant coverage under FMLA.<sup>139</sup> This interpretation of the “serious health condition” requirement will ultimately provide more relief for employees.<sup>140</sup> These court-driven expansions convey not only that “the American government was serious about implementing the FMLA,” but also that the FMLA needs to be construed leniently to have its intended positive affect on employment equality and the work-life balance.<sup>141</sup> However, the court’s interpretations in *Caldwell* and *Miller* are insufficient expansions, in light of the many issues still plaguing the current work-life balance situation.<sup>142</sup>

Similarly insufficient are the efforts by the government to support mother-employees in legislation beyond the FMLA. For instance, recent revisions to the Patient Protection and Affordable Care Act now require employers to provide “reasonable break time for an employee to express breast milk for her nursing child for 1 year after the child’s birth each time such employee has need to express the milk.”<sup>143</sup> Although this is an extremely

useful addition to this legislation, employers are not required to compensate nursing mothers for the breaks they take in accordance with this provision, unless they use their normally compensated lunch breaks or other breaks to perform this task.<sup>144</sup> For mothers living on the poverty line, making the choice between thirty minutes to pump breast milk or thirty additional minutes of paid labor may be difficult to make.<sup>145</sup> As the law currently stands, “[n]o federal statute expressly prohibits discrimination based on family responsibilities . . . most caregiver cases are brought using a patchwork of claims.”<sup>146</sup> With several impressive options available for providing additional support for a work-life balance, there is no reason for the state of the law to be so dismal.

#### *A. Paid Leave under the FMLA*

Despite being a progressive leader in equal opportunity employment protections, the United States has fallen embarrassingly behind in the work-life balance arena.<sup>147</sup> A recent study of 173 countries revealed that 169 countries provide guaranteed leave with income for pregnant women and new mothers.<sup>148</sup> The United States is not one of those 169 countries.<sup>149</sup> Further, of the 173 countries, 66 countries provide paid leave to new parents, both female and male.<sup>150</sup> Again, the United States is not among those 66 countries.<sup>151</sup> Reforming the FMLA to provide paid leave is a perfect starting place to address the current lack of a work-life balance.

In addition to catching the United States up with the work-life balance standards across the globe, paid leave has numerous other benefits. A report by Human Rights Watch found that the failure of FMLA to provide paid leave “fuels postpartum depression, causes mothers to give up breast feeding early, [and] forces families into debt and onto welfare.”<sup>152</sup> There is also a correlation between paid parental leave and improved child health.<sup>153</sup> Further, paid leave is something American workers want: 78 percent of adults in the United States ranked family and maternity leave with pay as a “very important” labor standard.<sup>154</sup>

Providing paid family leave is a change to the FMLA legislation that would fundamentally alter the way employees and employers view the work-life balance. Parents would be able to better attend to the needs of their families without having to

constantly worry about the negative effect of their lost paycheck.<sup>155</sup> This is an important first step towards ensuring a more adequate work-life balance for employees; however, to reach their full potential, such a step must be accompanied by other changes as well.

#### *B. Creating a Cause of Action for “Family Responsibilities Discrimination”*

A recent study by the Center for WorkLife Law at the University of California, Hastings College of Law reported on a new phenomenon in discrimination lawsuits that provides the second option for legally instituting a work-life balance.<sup>156</sup> Family Responsibilities Discrimination (“FRD”) is “discrimination against employees based on their responsibilities to care for family members.”<sup>157</sup> To date, only 63 local governments scattered throughout twenty-two states have instituted FRD laws to provide employees with families additional protection.<sup>158</sup>

The bill proposed by New York City serves as a noteworthy example of FRD legislation. The bill defines caregiver broadly, including within its scope parents, as well as any “person who is a contributor to the ongoing care of a child for whom the person has assumed parental responsibility or of a person or persons in a dependent relationship with the caregiver and who suffer from a disability.”<sup>159</sup> The bill requires employers to make reasonable accommodations for the needs of caregivers and, as a result, prohibits discrimination against caregivers.<sup>160</sup> Although still in its early stages of development, New York’s FRD regulation can serve as a model for legislation at the federal and state levels, and may help to alleviate some of the current work-balance issues that plague parent-employees.<sup>161</sup>

#### *C. Legally Mandating Workplace Flexibility Policies*

A final option for addressing the lack of a legally enforceable work-life balance for employees is to mandate workplace flexibility policies. Workplace flexibility policies, also known as flexible work arrangements, allow employees to change the time, location, and manner in which they work, while still meeting the demands of their employment responsibilities.<sup>162</sup> Flexible work arrangements can include the ability to control and choose shifts, the

ability to work a compressed workweek, and the ability to work from home, among other possibilities.<sup>163</sup>

Although the percentage of workers with flexible schedules has steadily increased,<sup>164</sup> flexible work arrangements are still private matters requiring negotiation and agreement between employees and employers.<sup>165</sup> Yet, like paid family leave and FRD protection, flexible work arrangements have several benefits, both for employees seeking a better work-life balance, and for employers seeking a more productive and lucrative work environment. Employees with flexible workplaces reported improved mental well-being and less “negative spillover” from job to home and vice versa.<sup>166</sup> Those same employees report being more satisfied with their jobs and that they intend to stay with their companies longer – benefits which any employer should welcome.<sup>167</sup> Private companies and the government, therefore, should be interested in capitalizing on these benefits by making workplace flexibility policies mandatory.

## VII. Conclusion

The *E.E.O.C. v. Bloomberg L.P.* decision has opened the door for a wider discussion about the plight of mothers in the workplace.<sup>168</sup> Because the plaintiffs brought the claim under Title VII, Judge Preska was undoubtedly accurate in her holding and in her description of the work-life balance under Title VII.<sup>169</sup> Her harsh critique of the work-life balance, however, indicates a broader issue that must be addressed in the coming years.<sup>170</sup> The plaintiff-mothers in this case were without a remedy: they had to choose between their careers and their families – a choice contrary to the intention of FLMA.<sup>171</sup> The FMLA was intended to alleviate this pressure and allow mothers and parents to balance it all. With a variety of appealing options available to employers, legislators, and policymakers alike that would provide working parents with legally mandated support for balancing their careers with other responsibilities, and in light of the social and economic benefits that would accompany such support, there is no reason for this group to still be struggling.

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## (Endnotes)

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<sup>2</sup> James Oppenheim, *Bread and Roses*, 73 *American Magazine*, Dec. 1911, at 214.

<sup>3</sup> See, e.g., Brad Harrington et al., *The New Dad: Caring, Committed and Conflicted* 3, 12 (Boston College Center for Work & Family 2011), <http://www.bc.edu/content/dam/files/centers/cwf/pdf/FH-Study-Web-2.pdf> (finding that women now make up slightly more than 50 percent of the workforce in the United States, and finding that most men now feel that their responsibilities include caring for their children and earning money, rather than just earning money). *But see* U.S. Dep’t of Labor, *Women’s Employment During the Recovery* 1 (2011), available at [http://www.dol.gov/\\_sec/media/reports/FemaleLaborForce/FemaleLaborForce.pdf](http://www.dol.gov/_sec/media/reports/FemaleLaborForce/FemaleLaborForce.pdf). (relating that, in 2010, women represented 46.7 percent of the workforce in the United States).

<sup>4</sup> *E.E.O.C. v. Bloomberg L.P.*, 778 F. Supp. 2d 458, 485 (S.D.N.Y. 2011).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> Exec. Office of the President, Council of Econ. Advisers, *Work-Life Balance and the Economics of Workplace Flexibility* 2 (2010), <http://www.whitehouse.gov/files/documents/100331-cea-economics-workplace-flexibility.pdf> [hereinafter *The Economics of Workplace Flexibility*](reporting that the percentage of children “raised in households in which all parents work in the labor market” has nearly doubled between 1968 and 2008, demonstrating the need for more flexible work policies).

<sup>8</sup> This article focuses on changing the law to provide a better work-life balance and to allow women to be more successful in the workplace. Sheryl Sandberg, the chief operating officer of Facebook, emphasizes that activists for change in this arena need to work both at this front and changing the “internal barriers” blocking women from gaining power in the work place. Sheryl Sandberg with Nell Scovell, *Lean In: Women Work, and the Will To Lead* 8 (Alfred A. Knopf, New York 2013). Her book offers the counterpoint to this article’s discussion on the institutional barriers. *Id.*

<sup>9</sup> *E.E.O.C.*, 778 F. Supp. 2d at 461.

<sup>10</sup> *Id.* at 462.

<sup>11</sup> *Id.* at 485.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> See e.g., Michelle Gerdes, *Bloomberg Case: Tough Luck for Working Moms*, *Wall St. J.* (Aug. 18, 2011, 12:32 PM), <http://blogs.wsj.com/juggle/2011/08/18/bloomberg-case-tough-luck->

for-working-moms/ (“By Judge Preska’s logic, even the most dedicated, career-driven mother is going to be penalized for taking time away from work to have a baby.”); Elissa Gootman, *Bloomberg L.P. Ruling: Seeing Scorn for Working Mothers, or a Shot of Reality*, NY Times A18 (Aug. 19, 2011)(describing the disapproval from the New York chapter of the National Organization for Women and the New York Civil Liberties Union over the *Bloomberg* decision, but also citing Debra L. Raskin, a partner at Vladeck, Waldman, Elias & Engelhard, affirming that, [T]here is no duty, unfortunately, to accommodate people’s children or child-care needs other than unpaid leave under the FMLA . . . This is not France, with two years of maternity leave and the right to go back to your job . . . It’s American individualism. If an employer says I want you to work 90 hours a week, as long as they comply with overtime requirements, it’s perfectly kosher).

<sup>15</sup> 42 U.S.C. § 2000e-2 (2011), 29 U.S.C. § 2601 (2011). See, e.g., Work Life Law, UC Hastings College of Law, Issue Brief: Caregiver Discrimination under Title VII (June 2011), available at <http://www.worklifelaw.org/pubs/FRDUnderTitleVIIBrief.pdf> (describing how, for example, Title VII can be used for caregiver discrimination suits based on sex discrimination).

<sup>16</sup> 29 U.S.C. § 2601 (2011).

<sup>17</sup> 42 U.S.C. 2000e-2 (2011).

<sup>18</sup> Lenora M. Lapidus et al., *The Rights of Women: The Authoritative ACLU Guide to Women’s Rights* 25 (4th ed. 2009) (“When it was passed, one of the goals of Title VII . . . was to eliminate [the] pervasive employment discrimination against women.”).

<sup>19</sup> 42 U.S.C. § 2000e-2(a) (2011).

<sup>20</sup> 42 U.S.C. § 2000e-2(a), (k) (2011).

<sup>21</sup> 42 U.S.C. § 2000e-2(k)(i) (2011)(emphasis added).

<sup>22</sup> See e.g., Susan S. Grover, *The Business Necessity Defense in Disparate Impact Discrimination Cases*, 30 Ga. L. Rev. 387, 387 (Winter 1996)(“When an employer’s facially neutral practice disproportionately harms minority or women workers, the workers may sue for disparate impact discrimination under Title VII. An employer whose practice is found to have such an impact may avoid liability by proving that the challenged discriminatory practice is required by ‘business necessity’”).

<sup>23</sup> *Id.*; *E.E.O.C.*, 778 F. Supp. 2d at 486 (arguing that the demanding industry at Bloomberg calls for a more intensive commitment from employees).

<sup>24</sup> 42 U.S.C. § 2000e-2 (2011).

<sup>25</sup> 42 U.S.C. § 2000e-2 (2011).

<sup>26</sup> 42 U.S.C. § 2000e-2 (2011).

<sup>27</sup> *E.E.O.C.*, 778 F. Supp. 2d at 462-63 (describing the need for competitiveness at Bloomberg, an international financial and media company that maintains a website, television and radio stations, and a 24-hour global news service, and recognizing that the demanding culture may disadvantage “women who take maternity leave, work fewer hours, and demand more scheduling flexibility”).

<sup>28</sup> *Id.*

<sup>29</sup> Vivia Chen, *Bloomberg Judge Hostile to Work/Life Balance?*, Careerist (Aug. 24, 2011, 1:21:03 PM), <http://thecareerist.typepad.com/thecareerist/2011/08/judge-preska-hostile-to->

[worklife-balance.html](http://worklife-balance.html) (quoting Sonia Ossorio, the Executive Director of the National Organization for Women).

<sup>30</sup> *E.E.O.C.*, 778 F. Supp. 2d at 485-86.

<sup>31</sup> 29 U.S.C. § 2601 (2011).

<sup>32</sup> Lapidus, *supra* note 18, at 54 (“The Family and Medical Leave Act of 1993 . . . was designed to ‘help employees balance their work and family responsibilities’ . . .”).

<sup>33</sup> 29 U.S.C. § 2601 (2011).

<sup>34</sup> 29 U.S.C. §2601(b)(1) (2011).

<sup>35</sup> Presidential Statement on Signing the Family Medical Leave Act of 1993, 29 Weekly Comp. Pres. Doc. 115, 144 (Feb. 5, 1993).

<sup>36</sup> *Id.*

<sup>37</sup> 29 U.S.C. §2601(a)(3) (2011).

<sup>38</sup> 29 U.S.C. § 2601 (2011).

<sup>39</sup> See *infra* Part IV.

<sup>40</sup> 29 U.S.C. § 2601 (2011).

<sup>41</sup> Lapidus, *supra* note 18, at 54.

<sup>42</sup> Joseph Willis, *The Family and Medical Leave Act of 1993: A Progress Report*, 36 Brandeis J. Fam. L. 95, 97 (1997-1998).

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

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

<sup>45</sup> *Id.*

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

<sup>47</sup> David Cantor, et al., U.S. Dept’t of Labor, *Balancing the Needs of Families and Employers: Family and Medical Leave Surveys: Women’s Employment During the Recovery* 3-3 (2000), <http://www.dol.gov/whd/fmla/chapter3.pdf> (finding that 10.8 percent of private sector employers are “FMLA-covered establishments”).

<sup>48</sup> *Id.* (noting that 58.3 percent of employees are employed at “FMLA-covered establishments”).

<sup>49</sup> Lapidus, *supra* note 18, at 54.

<sup>50</sup> *Id.* at 54-55.

<sup>51</sup> *Id.* at 55.

<sup>52</sup> Katharine B. Silbaugh, *Is the Work-Family Conflict Pathological or Normal under FMLA? The Potential of the FMLA to Cover Ordinary Work-Family Conflicts*, 15 Wash. U. J. L. Pol’y 193, 205 (2004).

<sup>53</sup> *Id.* (“The other events, medical crises of a parent or child, are represented as extraordinary hard-luck events (in other words, as events that are exceptional and disruptive, not ordinary).”).

<sup>54</sup> Lapidus, *supra* note 18, at 54.

<sup>55</sup> *Id.*

<sup>56</sup> Staff of J. Econ. Comm., 111th Cong., *Invest in Women, Invest in America: A Comprehensive Review of Women in the U.S. Economy* 7 (Comm. Print 2010)[hereinafter *Invest in Women*](finding that a wife’s paycheck now represents 36 percent of the family’s income, making “[w]omen’s earnings . . . critical for families’ economic well-being.”).

<sup>57</sup> Lisa Bornstein, *Inclusions and Exclusion in Work-Family Policy: The Public Values And Moral Code Embedded in the Family and Medical Leave Act*, 10 Colum. J. Gender & L. 77, 87 (2000-2001) (“Because eligibility and coverage requirements are strict, and because the leave is unpaid, many people who need the Act cannot use it”).

<sup>58</sup> Willis, *supra* note 42, at 99.

<sup>59</sup> *Id.*

<sup>60</sup> Joanna L. Grossman, *Job Security Without Equality: The Family and Medical Leave Act of 1993*, 15 Wash. U. J. L. Pol’y 17, 18 (2004). See also Harrington, *supra* note 3, at 12, 15 (finding that although fathers are generally seeing their familial roles as shifting from breadwinner to breadwinner and caregivers, more than three-quarters of fathers surveyed took one week or less off from work following the birth of their most recent child, and sixteen percent did not take any time off from work).

<sup>61</sup> Bornstein, *supra* note 57, at 89 (“Because eligibility and coverage requirements are strict, and because the leave is unpaid, many people who need the Act cannot use it”). See also Lisa M. Keels, *Family and Medical Leave Act*, 7 Geo. J. Gender & L. 1043, 1049 (2006) (“To the extent that the FMLA was intended to combat gender stereotypes and reduce discrimination against women, it has not accomplished these goals”).

<sup>62</sup> Bornstein, *supra* note 57, at 89. See also Grossman, *supra* note 60, at 18 (“The FMLA thus promotes motherhood without promoting equal parenthood and promotes mothers’ working without promoting equality for working women.”).

<sup>63</sup> Bornstein, *supra* note 57, at 89.

<sup>64</sup> *Id.*

<sup>65</sup> Keels, *supra* note 61, at 1049 (recommending that FMLA be expanded to enforce paid leave or to establish incentives for men to take family-related leave).

<sup>66</sup> The Economics of Workplace Flexibility, *supra* note 7, at 2.  
<sup>67</sup> See *supra* Part IV.

<sup>68</sup> Cantor et al., *supra* note 47, at 4-2.

<sup>69</sup> 29 U.S.C. § 2601(2) (2011).

<sup>70</sup> Cantor et al., *supra* note 47, at 4-2.

<sup>71</sup> *Id.* at 4-3.

<sup>72</sup> *Id.* at 4-8, Fig. 4.2.

<sup>73</sup> 29 U.S.C. § 2601(3) (2011); Cantor et al., *supra* note 47 at 4-2.

<sup>74</sup> Keels, *supra* note 61, at 1052 (emphasizing that the FMLA “fails to conceal that the basic pattern for taking leave has hardly changed,” and that women are still disproportionately burdened by family responsibilities).

<sup>75</sup> 29 U.S.C. § 2601 (2011).

<sup>76</sup> Grossman, *supra* note 60, at 38 (“[T]here exists a clear incentive for a couple to prefer maternal leave over paternal leave, given the likelihood that a husband out-earns his wife.”).

<sup>77</sup> *Id.* at 18.

<sup>78</sup> Cantor et al., *supra* note 47, at 2-8.

<sup>79</sup> Grossman, *supra* note 60, at 18.

<sup>80</sup> *Id.*

<sup>81</sup> Jody Heymann et al., The Institute for Health and Social Policy at McGill University, *The Work, Family and Equity Index: How Does the United States Measure Up?* 6 (2007), available at <http://www.mcgill.ca/files/ihsp/WFEI2007.pdf>.

<sup>82</sup> Becky Pettit & Jennifer Hook, *Gendered Tradeoffs: Family, Social Policy, and Economic Inequality in Twenty-One Countries* 167 (The Russell Sage Foundation, 2009) (“Inequality between women and men in the workplace is rooted in societal conceptions of gender and family obligations, and it is institutionalized

through social policies and employment conditions that regulate, routinize, and reinforce gender differences . . .”).

<sup>83</sup> *Plessy v. Ferguson*, 163 U.S. 537 (1896); *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

<sup>84</sup> *Plessy v. Ferguson*, 163 U.S. 537, 551 (1896).

<sup>85</sup> Mark Rathbone, *School Segregation in the USA*, 68 Hist. Rev. 1, 1 (Dec. 2010) (noting that the *Plessy v. Ferguson* decision, endorsing segregation, was finally overturned after fifty-eight years by the *Brown v. Board of Education* decision). See also Gerald N. Rosenberg, *Hollow Hope: Can Courts Bring About Social Change?* 39 (University of Chicago Press, 1993) (“*Brown* overturned nearly sixty years of Court-sanctioned segregation, effectively reversing the infamous separate but equal doctrine . . .”).

<sup>86</sup> *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954).

<sup>87</sup> Rathbone, *supra* note 85, at 1 (“If [Brown] had not legally redefined equal protection, the subsequent triumphs of the Civil Rights movement, such as the Montgomery bus boycott, might have failed”). See also Rosenberg, *supra* note 85, at 41 (describing how the *Brown* decision may have set the national policy agenda towards racial equality, ultimately leading to the 1964 Civil Rights Act, the 1965 Voting Rights Act, and the 1968 Housing Act). Rosenberg also notes that despite the seemingly monumental impact of *Brown*, “public schools in the South remained pristinely white, with only one in a hundred black children in elementary and secondary school with whites by 1964, a decade after the ruling.” Rosenberg, *supra* note 85, at 74.

<sup>88</sup> Kerri Harper, Note, *Stereotypes, Childcare, and Social Change: How the Failure to Provide Childcare Perpetuates the Public Perception of Welfare Mothers*, 4 N.Y.U. J. Legis. & Pub. Pol’y 387, 387 (2000-2001).

<sup>89</sup> Christopher Schmidt, *Freedom Comes Only From The Law: The Debate Over Law’s Capacity and the Making of Brown v. Board of Education*, 4 Utah L. Rev. 1494, 1558 (1998).

<sup>90</sup> *Id.* See also David Tajgman & Evance Kalula, *Analysis of the Legal Framework for Gender Equality in Employment: Lesotho, a Case Study*, in *Promoting Gender Equality at Work: Turning Vision into Reality* 173, 173 (Eugenia Date-Bah ed., 1997) (“Law gives effect to policy, provided law is given effect. This simple proposition pronounces the relationship between a policy promoting gender equality in employment and provisions that must be made in the law of a country if this policy is to become a reality.”).

<sup>91</sup> Harper, *supra* note 88, at 393.

<sup>92</sup> But see Thomas H. Barnard, *Pregnant Employees, Working Mothers and the Workplace—Legislation, Social Change and Where We Are Today*, 22 J.L. & Health 197, 231 (noting that although Title VII’s equal-opportunity mandate was established decades ago, “the gender composition of the highest-ranking professional boardrooms remains strikingly unchanged”). Barnard also states that “although federal legislation such as Title VII and the [Pregnancy Discrimination Act] opened the door to female entry into the workforce, the retention of female workers and their ability to advance their careers is influenced by factors beyond legislative control.” *Id.* at 233.

<sup>93</sup> See *infra* Part V.b.

<sup>94</sup> The Economics of Workplace Flexibility, *supra* note 7, at 3. See also Maegan Lindsey, *The Family and Medical Leave Act: Who Really Cares?*, 50 S. Tex. L. Rev. 559, 563 (2008-2009) (citing proponents of the FMLA policy as finding a “direct correlation between stability in the family and productivity in the workplace”). But see *Proposed FMLA Expansion Limits Flexibility, Increases Burdens*, Nat’l Fed’n Indep. Bus., <http://www.nfib.com/issues-elections/issues-elections-item?cmsid=518> (last visited Dec. 16, 2011) (“Expansion of the FMLA would create considerable burdens on small businesses . . . Government mandates take away small employers’ and employees’ freedom to negotiate the benefits package that best meets their mutual needs.”).

<sup>95</sup> *The Increasing Call for Work-Life Balance: Work-Life Balance is Now the Second Most Important Driver of Employee Attraction and Commitment*, Bloomberg Business Week (Mar. 27, 2009), [http://www.businessweek.com/managing/content/mar2009/ca20090327\\_734197.htm](http://www.businessweek.com/managing/content/mar2009/ca20090327_734197.htm). See also Barnard, *supra* note 92, at 234 (“Family-responsive policies hold the promise to save money by decreasing the costs associated with attrition, absenteeism, recruiting, quality control, and productivity”).

<sup>96</sup> *How Providing Child Care Can Benefit Your Company As Well As Your Employees*, Workplace Insights: A North Carolina Employer’s Handbook (Sept. 7, 2010), <http://blog.capital.org/how-providing-child-care-can-benefit-your-company-as-well-as-your-employees/>.

<sup>97</sup> *Id.* (reporting that in a study of three workplaces, the two workplaces that provided on-site child care saved more money than the third workplace that provided subsidies to employees, and finding that because workers often have to leave work to address child-care issues, having on-site child care results in less absenteeism). One public comment on this report reads, “If my company paid my current wages plus child care and paid maternity leave . . . then I would stay with them forever and could go years without a raise,” further emphasizing the positive results of employment benefits that financially support a work-life balance. *Id.*

<sup>98</sup> Boston College Center For Work & Family, Bristol-Myers Squibb On-Site Child Care Center Assessment: Final Report 6 (2001), available at [https://workfamily.sas.upenn.edu/sites/workfamily.sas.upenn.edu/files/imported/pdfs/BMS\\_Onsite\\_Childcare.pdf](https://workfamily.sas.upenn.edu/sites/workfamily.sas.upenn.edu/files/imported/pdfs/BMS_Onsite_Childcare.pdf).

<sup>99</sup> *Id.* at 10, tbl. 2.

<sup>100</sup> Invest in Women, *supra* note 56, at 7

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

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 8.

<sup>104</sup> *Id.* at 11.

<sup>105</sup> *E.E.O.C.*, 778 F. Supp. 2d at 462-63.

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

<sup>107</sup> *Kraft Foods is Employer of Choice For Working Mothers: Company Recognized as One of Working Mother’s ‘100 Best’ for Sixth Year in a Row*, Market Watch (Sept. 15, 2011), <http://www.marketwatch.com/story/kraft-foods-is-employer-of-choice-for-working-mothers-2011-09-15>. Kraft’s website notes that in addition to the “Working Mother” distinction, the company has also been named to several other “best” lists. *Corporate Awards*,

*Kraft Foods*, <http://www.kraftfoodscompany.com/MediaCenter/corporate-awards/index.aspx> (last visited Mar. 25, 2012).

<sup>108</sup> *Kraft Foods is Employer of Choice*, *supra* note 107.

<sup>109</sup> *Id.*

<sup>110</sup> *E.E.O.C.*, 778 F. Supp. 2d at 462-63; *Kraft Foods is Employer of Choice*, *supra* note 107.

<sup>111</sup> *Kraft Foods is Employer of Choice*, *supra* note 107.

<sup>112</sup> *Id.*

<sup>113</sup> *100 Best Companies to Work For*, CNN Money (2009), <http://money.cnn.com/magazines/fortune/bestcompanies/2009/snapshots/4.html> (reporting that Google fell to the number four spot on the list in 2009 after maintaining the number one spot in 2007 and 2008); Adam Lashinsky, *The Perks of Being a Googler*, CNN Money (2007), [http://money.cnn.com/galleries/2007/fortune/0701/gallery.Google\\_perks/index.html](http://money.cnn.com/galleries/2007/fortune/0701/gallery.Google_perks/index.html).

<sup>114</sup> Byron Acohido, *Google’s New Look Amps Up Search-Engine Competition*, USA Today (May 5, 2010, 9:14PM), [http://www.usatoday.com/tech/news/2010-05-05-google-new-tools\\_N.htm](http://www.usatoday.com/tech/news/2010-05-05-google-new-tools_N.htm); Miguel Helft & Jessi Hempel, *Facebook vs. Google: The Battle For the Future of the Web*, Fortune Magazine (Nov. 3, 2011), [http://money.cnn.com/2011/11/03/technology/facebook\\_google\\_fight.fortune/index.htm](http://money.cnn.com/2011/11/03/technology/facebook_google_fight.fortune/index.htm).

<sup>115</sup> Lashinsky, *supra* note 113. But see James Manyika, *Google’s View on the Future of Business: An Interview with CEO Eric Schmidt*, McKinsey Q. (Sept. 2008) (discussing Schmidt’s view that senior executives of global companies are required to sacrifice a balanced life because of the demands required at that level of leadership).

<sup>116</sup> *Benefits*, Google Jobs, <http://www.google.com/intl/en/jobs/lifeatgoogle/benefits/index.html> (last visited Mar. 25, 2012).

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

<sup>118</sup> Lashinsky, *supra* note 113.

<sup>119</sup> *Diversity in Our Culture and Workplace*, Google, <http://www.google.com/diversity/culture.html#eo> (last visited Dec. 15, 2011).

<sup>120</sup> Lashinsky, *supra* note 113.

<sup>121</sup> Julianne Pepitone, *Google Revenue Soars, While G+ Network Grows to 40 Million*, CNN Money (Oct. 13, 2011, 5:22 PM), [http://money.cnn.com/2011/10/13/technology/google\\_earnings/index.htm](http://money.cnn.com/2011/10/13/technology/google_earnings/index.htm) (reporting that in the third-quarter, Google earned \$9.72 per share, \$7.5 billion in revenue, added 30 million users to Google+, and increased user-ship of the “Google Chrome” internet browser to 200 million people worldwide).

<sup>122</sup> Donna S. Lero et al., *The Canadian Association of Administrators of Labour Legislation, Cost-Benefit Review of Work-Life Balance Practices 20-28* (2009), available at <http://www.caall-acalo.org/docs/Cost-Benefit%20Review.pdf>.

<sup>123</sup> Pettit & Hook, *supra* note 82, at 2.

<sup>124</sup> *Id.*

<sup>125</sup> *Germany*, CIA World Fact Book, <https://www.cia.gov/library/publications/the-world-factbook/geos/gm.html> (last visited May 23, 2012) (World economy ranking and GDP are based on purchasing power parity).

<sup>126</sup> Graeme Russell, *The Center for Work & Family*, Boston College, *Work and Family Issues in Japan and the Republic of Korea: Expanding Our Understanding of Work and Family*

Experiences in North Asia 40 (2000), *available at* [http://www.bc.edu/content/dam/files/centers/cwf/research/publications/pdf/Work\\_and\\_Family\\_Issues\\_in\\_Japan\\_and\\_the\\_Republic\\_of\\_Korea.pdf](http://www.bc.edu/content/dam/files/centers/cwf/research/publications/pdf/Work_and_Family_Issues_in_Japan_and_the_Republic_of_Korea.pdf).

<sup>127</sup> *Id.* at 43-44.

<sup>128</sup> *Id.* at 43-44.

<sup>129</sup> Glenda S. Roberts, *Globalization and Work/Life Balance: Gendered Implications of New Initiatives at a U.S. Multinational in Japan*, in *Equity in the Workplace: Gendering Workplace Policy Analysis*, 305, 305, 311 (Heidi Gottfried & Laura Reese ed., 2004).

<sup>130</sup> *Id.* at 311-13 (Because of time constraints, the author was unable to conclude whether the flexible work arrangements ultimately positively or negatively affected the company in question).

<sup>131</sup> *Japan*, CIA World Fact Book, <https://www.cia.gov/library/publications/the-world-factbook/geos/ja.html> (last visited on May 23, 2012)(World economy ranking and GDP are based on purchasing power parity).

<sup>132</sup> *E.E.O.C.*, 778 F. Supp. 2d at 486.

<sup>133</sup> 29 U.S.C. § 2601 (2011).

<sup>134</sup> *Caldwell v. Holland of Texas, Inc.*, 208 F.3d 671, 672 (8th Cir. 2000).

<sup>135</sup> *Id.* at 673.

<sup>136</sup> *Id.* at 674.

<sup>137</sup> *Id.* at 676-77.

<sup>138</sup> *Miller v. AT&T Corp.*, 250 F.3d 820, 829 (4th Cir. 2001).

<sup>139</sup> *Id.* at 831-32.

<sup>140</sup> 29 U.S.C. § 2601 (2011).

<sup>141</sup> Keels, *supra* note 61, at 1050.

<sup>142</sup> *See* Part VI.

<sup>143</sup> U.S. Department of Labor, Fact Sheet #73: Break Time for Nursing Mothers Under the FLSA (Dec. 2010), *available at* <http://www.dol.gov/whd/regs/compliance/whdfs73.htm>.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> Cynthia Thomas Calvert, The Center for WorkLife Law, Family Responsibilities and Discrimination: Litigation Update 2010 11 (2010)

*available at* <http://www.worklifelaw.org/pubs/FRDupdate.pdf>.

<sup>147</sup> Lew Daly, *The Case for Paid Family Leave*, Newsweek, Aug 2, 2009, *available at* <http://www.thedailybeast.com/newsweek/2009/08/03/the-case-for-paid-family-leave.html>. *See also* Heymann, *supra* note 81 at 1 (finding that “[t]he U.S. performs well in having policies that ensure an equitable right to work for all racial and ethnic groups, regardless of gender, age or disability,” but that “many U.S. public policies still lag dramatically behind all high-income countries, as well as many middle- and low-income countries.”).

<sup>148</sup> Heymann, *supra* note 81, at 1.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* at 2.

<sup>151</sup> *Id.*

<sup>152</sup> David Crary, *Paid Parental Leave Lacking in U.S.*, The Huffington Post (Feb. 22, 2011), [http://www.huffingtonpost.com/2011/02/23/paid-parental-leave\\_n\\_826996.html](http://www.huffingtonpost.com/2011/02/23/paid-parental-leave_n_826996.html).

<sup>153</sup> The National Partnership for Women and Families, *The Case for Paid Family and Medical Leave: Fact Sheet 1* (June 2011), *available at* [http://www.nationalpartnership.org/site/DocServer/PFML\\_The\\_Case\\_FINAL.pdf?docID=7848](http://www.nationalpartnership.org/site/DocServer/PFML_The_Case_FINAL.pdf?docID=7848).

<sup>154</sup> *Id.*

<sup>155</sup> Cantor, *supra* note 47, at 4-8, Fig. 4.2.

<sup>156</sup> Stephanie Bornstein & Robert J. Rathmell, The Center for WorkLife Law at the University of California, Hastings College of Law, *Caregivers as a Protected Class?: The Growth of State and Local Laws Prohibiting Family Responsibilities Discrimination 1* (2009), *available at* <http://www.worklifelaw.org/pubs/LocalFRDLawsReport.pdf>

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* at 2.

<sup>159</sup> Steven Locke, *Family Responsibilities Discrimination and the New York Model: A Map For Future Legislation*, 51 S. Tex. L. Rev. 19, 35 (Fall 2009).

<sup>160</sup> *Id.*

<sup>161</sup> *Id.* at 36.

<sup>162</sup> *What is Workplace Flexibility?*, The Sloan Center on Center Aging and Work at Boston College, <http://workplaceflexibility.bc.edu/workFlex> (last visited Mar. 24, 2011).

<sup>163</sup> James T. Bond et al., Families and Work Institute, 2005 National Study of Employers 6, *available at* <http://familiesandwork.org/site/research/reports/2005nse.pdf>.

<sup>164</sup> *Incidence of Flexible Work Schedules Increases*, U.S. Dep’t of Labor, Bureau of Labor Statistics (Sept. 30, 1999), <http://www.bls.gov/opub/ted/1999/Sept/wk5/art04.htm> (“From 1991 to 1997, the percent of full-time wage and salary workers with flexible work schedules on their principal job increased from 15.1 percent to 27.6 percent.”).

<sup>165</sup> *Work Hours: Flexible Schedules*, U.S. Dep’t of Labor, <http://www.dol.gov/dol/topic/workhours/flexibleschedules.htm> (last visited Mar. 24, 2012).

<sup>166</sup> Bond, *supra* note 163, at 2.

<sup>167</sup> *Id.*

<sup>168</sup> *E.E.O.C. v. Bloomberg L.P.*, 778 F. Supp. 2d at 485.

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Id.* at 486.