



June 30, 2009

Via Electronic Mail

Bipartisan U.S. Senate Workplace Flexibility Study Group
c/o Ben Portis (Senator Lincoln) & Molly Giammarco (Senator Crapo)

To the Members of the Senate Workplace Flexibility Study Group:

I am writing on behalf of the Center for WorkLife Law (WLL), a nonprofit research and advocacy group based at the University of California, Hastings College of the Law. WLL's central tenet is that a wide range of groups have a role to play in reshaping workplaces to better fit the reality and values of those who work there—who overwhelmingly have family responsibilities they must juggle with work. WLL works to address work/family issues with six key stakeholders, groups usually not found at the same table: employees, employers, plaintiff-side employment lawyers, management-side employment lawyers, unions, and public policymakers. WLL also works with social scientists to spark interdisciplinary studies of bias against caregivers and with the press.

WLL is the nation's go-to resource on the issue of employment discrimination against workers with family responsibilities. WLL has also undertaken a first-of-its kind project to document and address the bias against workers who seek or work flexible schedules—what we call the “flexibility stigma.” WLL submits this policy statement to the Study Group based on extensive research and work with varied stakeholders on issues of caregiver discrimination, workplace flexibility, and work/family balance.

Our key priority for policy efforts to address workplace flexibility is that they include measures to address caregiver bias. We respectfully submit that any policies designed to increase flexibility in the workplace—including rights or incentives to encourage flexible work hours or to expand paid or unpaid leave—will have limited effectiveness unless such measures also control bias against caregivers.

Flexible work arrangements (FWA) were introduced in the early 1970s and have been gradually gaining traction since then—very gradually. A key stumbling block to the success of FWAs is that employees often encounter bias and marginalization when they try to work part-time or flexibly. This “flexibility stigma” stems from outdated workplace norms that are unrealistic in today's workplace. Today's workplaces still are perfectly designed for the workforce of the 1950s, reflecting an “ideal worker” who works full-time, full force, for 40 years straight while someone else takes care of domestic responsibilities.¹ Today, women comprise nearly half of the U.S. workforce (46.5%),² and the vast majority of American women (81%) have children by age 44.³ In nearly 70% of families with children, all adults participate in the labor force,⁴ and one in four working men and women has elder care responsibilities.⁵

WLL's current efforts on the flexibility stigma have grown out of more than a decade of work to identify, prevent, and eliminate family responsibilities discrimination (“FRD”)—employment discrimination against workers based on their family caregiving responsibilities. Pregnant women, mothers and fathers of young

¹ Joan Williams, *Unbending Gender* 1-3 (2000).

² U.S. Dep't of Labor, Women's Bureau, *Quick Facts on Women in the Labor Force in 2008*, <http://www.dol.gov/wb/factsheets/Qf-laborforce-08.htm> (last visited June 15, 2009).

³ Jane Lawler Dye, *Fertility of American Women: June 2004*, Population Characteristics 2 (U.S. Census Bureau, Dec. 2005), available at <http://www.census.gov/prod/2005pubs/p20-555.pdf> (stating that 19.3% of women aged 40 to 44 had no children).

⁴ Karen Kornbluh, *The Parent Trap*, *The Atlantic Monthly*, Feb. 1, 2003, at 111.

⁵ Jody Levin-Epstein, *Getting Punched: The Job and Family Clock*, Center for Law and Social Policy 3 (July 2006), available at http://www.clasp.org/publications/getting_punched_fullnotes.pdf.

children, and employees with aging parents or sick spouses or partners from across the income spectrum and in every industry may encounter FRD. Workers may be rejected for hire, passed over for promotion, demoted, harassed, or terminated—despite good performance—when employers make personnel decisions based on stereotypical notions of how caregivers will or should act given their family responsibilities. The most common form of caregiver stereotyping is “maternal wall” bias—stereotypes that mothers are less reliable, less competent, or less committed to the job. Maternal wall bias is triggered when an employee’s motherhood becomes salient—when she announces she is pregnant, returns from maternity leave, or adopts an FWA. Men can also experience gender bias when they take a more active role in caregiving than is seen as appropriate for men.

Because the common perception is that most employees who seek FWAs do so for family caregiving reasons, employees who work flexibly can trigger in supervisors and employers (whether consciously or not) stereotypes like those experienced by working mothers—i.e., that they are less reliable, less competent, or less committed to the job. As a result, those who work flexibly may be marginalized (“mommy tracked”), given less important assignments, passed over for key opportunities or promotions. Though research shows the bottom-line business benefits of flexibility without stigma, it also has documented negative consequences for employees who use workplace flexibility policies.⁶ Without addressing these negative consequences, employees will be deterred from using even the most generous FWAs.

Flexibility stigma can play out in the context of leaves as well as flexible working. Although it is illegal to interfere with workers’ rights to take FMLA leave to which they are legally entitled, discouraging workers from taking leave is, unfortunately, commonplace. Equally illegal, and equally commonplace, is the practice of retaliating against workers who take leave. Sometimes these negative job actions stem from true burdens placed on co-workers or employers caused by leaves, but often these negative job consequences stem from flexibility stigma.

WLL is currently working with two groups to further explore the connection between FRD and the flexibility stigma. WLL’s Flexibility Stigma Working group is comprised of social scientists and employment attorneys, whose end goal is to develop a literature to document and address the flexibility stigma. WLL has also formed a working group of management-side employment lawyers, whose end goal is to develop a series of best practices and tools to enhance the use and success of FWAs by eliminating the flexibility stigma and preventing FRD in the workplace.

Based on our research and expertise, we cannot stress enough the need to incorporate a discussion of the flexibility stigma and bias against caregivers into your efforts—issues we believe have not received enough attention in discussions of family leaves and workplace flexibility. Unless public policy or best practices aimed at expanding workplace flexibility address this bias and offer practical solutions for eliminating its impact, the results of these efforts will be limited at best.

We would welcome the opportunity to further discuss these issues with the members of the Study Group. Thank you for your consideration of our input.

Sincerely,



Joan C. Williams

Distinguished Professor of Law & Director, Center for WorkLife Law

⁶ For examples, see Lotte Bailyn, *Breaking the Mold: Redesigning Work for Productive and Satisfying Lives*, 2nd Ed. (2006); Jennifer Glass, *Blessing or Curse?: Work-Family Policies and Mothers’ Wage Growth Over Time*, 31 *Work and Occupations* 367 (2004); Cynthia A. Thompson et al., *When Work-Family Benefits Are Not Enough: The Influence of Work-Family Culture on Benefit Utilization, Organizational Attachment, and Work-Family Conflict*, 54 *J. of Vocational Behavior* 392 (1999); Leslie Perlow, *Finding Time: How Corporations, Individuals, and Families Can Benefit from New Work Practices* (1997).