



For Women to Lead, They Have to Stay in the Game

Why We Need Public Policy to Level the Playing Field

By Judith Warner December 2014

Center for American Progress



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Introduction and summary

The issue of women’s “leadership” is, at its core, about women’s economic empowerment and advancement: their ability to get into the workforce, stay in the workforce, and rise. At a time when roughly half of all American workers are women and two-thirds of families rely on a female breadwinner or co-breadwinner to make ends meet,¹ the ability of women to fully deploy their resources and work to the full extent of their capabilities is of urgent importance to family economic security—and to the fortunes of our nation as a whole.

And yet, the public conversation about women’s leadership in the United States—kick-started over the past 18 months by the colossal success of Sheryl Sandberg’s best-selling book, *Lean In*²—has been strikingly narrow. In the scope of the problem it depicts, the population of women it addresses, and the range of options it envisions as means for change, the discussion has been limited in ways that have left the vast majority of women out in the cold. Its thought leaders have been mostly white, wealthy, prestigiously educated business leaders, politicians, and media celebrities. And the solutions they have typically aired—from negotiating for better salaries to closing the “confidence gap”³ through self-improvement—have presupposed levels of choice, control, and empowerment far out of the reach of all but the most privileged.

The narrowness of the conversation is particularly striking because the problem is, in fact, so broad. Women have outnumbered men on college campuses since 1988.⁴ They hold almost 52 percent of all professional-level jobs.⁵ They have earned at least a third of law degrees since 1980,⁶ were fully a third of medical school students by 1990,⁷ and since 2002, have outnumbered men in earning undergraduate business degrees.⁸ And yet, in a broad range of fields, the presence of women in top leadership positions—as equity law partners, medical school deans, and corporate executive officers, for example—remains stuck at a mere 10 percent to 20 percent. (For more detail, please see “Women’s Leadership: What’s True, What’s False, and Why It Matters.”⁹)

A truly meaningful approach to addressing and closing the women's leadership gap has to involve all women. The social and economic realities of American life today require us to broaden the concept of leadership. Instead of focusing exclusively on rare, elite, top-of-the-pyramid hyper-achievers, we instead must look at how every woman—regardless of her background, education level, or professional status—can participate to the greatest extent possible in the public life of our society. That change of perspective means taking a very close look at the issues that cause women to stall out in the career pipeline or drop out altogether, as both high-level professional women and low-income women are too frequently compelled to do.¹⁰ Re-examining the issue of women's leadership through this lens means shifting the conversation away from what women can do for themselves and looking instead at the structural impediments that keep them from achieving their goals.

And that shift, this report argues, inevitably points to the need for public policy. Public policy directed at increasing women's leadership opportunities falls into two main categories. One set of measures directly aims to increase women's representation in politics and in top corporate leadership roles through mandated numerical targets or through "report or explain" provisions, which require companies to publicly disclose the percentage of women on their boards and executive committees.¹¹ The other category is work-family policy—measures such as paid family leave, paid sick days and vacation days, flexible work scheduling, subsidized child care, and part-time work with proportional pay and benefit parity. In addition to fostering more opportunities for women, these policies also serve a powerful symbolic function, signaling at every level of our society that women's economic empowerment and advancement is a public good.

Examples of such policies are detailed in this report, and include:

- Tax policies that encourage women's labor-force participation
- Policies that make high-quality, early childhood education accessible and affordable
- A national system of paid family leave
- Legislation guaranteeing all workers the right to request flexible work arrangements
- Laws that protect low-wage and hourly workers against abusive scheduling practices
- The use of existing anti-discrimination laws to pursue employers who stigmatize workers for taking leave
- Policies that incentivize companies to step up their efforts on behalf of women's advancement through better reporting and greater transparency

The need for public policy springs from the fact that relying upon employers to “do the right thing” for women just does not work. While employers are now greatly motivated to attract and retain top female talent—i.e., high-earning professionals—through programs and policies that aim to help these women stay in their jobs and thrive, they have few, if any, incentives to cultivate and invest in their lower-wage female workforce. Public policy can and must be used to help women who are not already part of the professional elite to integrate their work and family responsibilities, stay in the workforce, and rise above the “sticky floor” of low-wage, low-status employment. Without such a goal, the women’s leadership conversation will necessarily continue to exclude a great many women who could be the key decision makers of tomorrow.

What public policy could look like

While Americans in recent years have deftly applied themselves to making “women’s leadership” a growth industry of best-selling books, star-studded conferences, business consultants, and specialized coaches, other countries have taken concrete steps over the past several decades to target the barriers to women’s full participation in the public lives of their nations.

For a full description of these measures and a discussion of how they affect women’s status and advancement, please see Dalia Ben-Galim and Amna Silim’s report, “Can Public Policy Break the Glass Ceiling? Lessons from Abroad.”¹²

Public policy directed at increasing women’s leadership opportunities falls into two main categories: measures directly aimed at increasing women’s representation in politics and in top corporate leadership roles, and measures that seek to give women the chance to remain in the labor force and rise.

Quotas—absolute numerical hiring targets that dictate how many people of specified groups a company must hire, without taking into account the availability of other equally qualified or more qualified candidates from other groups—are not legally permissible in the United States¹³ and will not be discussed further here. There are, however, some existing models for reporting regulations in the United States that would increase pressure on both government agencies and private industry to step up efforts to promote women to top leadership positions. This report argues that these reporting mechanisms should be greatly expanded with an eye toward creating the utmost degree of transparency.

Work-family policies, which help employees to reconcile their breadwinning and caregiving responsibilities, have a proven track record of helping women stay in the workforce and, by extension, in the leadership pipeline.¹⁴ It is no accident that the top four countries in the World Economic Forum’s 2014 Global Gender Gap

Index—Iceland, Finland, Norway, and Sweden—offer a combination of use-it-or-lose-it paternity and maternity leave, federal paid parental leave benefits, tax policies that support child bearing, and post-maternity job re-entry programs that help women return to work after childbirth.¹⁵

In the United States, opportunities abound for developing and expanding work-family policies. In the face of enduring congressional inaction on the issue, a number of states and cities in recent years have taken the lead in bringing about such changes, with 16 cities and three states passing paid sick day ordinances,¹⁶ three states adopting paid family leave measures,¹⁷ and Vermont and San Francisco adopting measures that give workers the right to request flexible work arrangements.¹⁸

Such policy options are not only feasible on a national level, they are also necessary if American women—all American women, not solely the most fortunate—are to work and rise to the full extent of their talents and inclinations. These policies would foster more opportunities for women and would serve a powerful symbolic function, signaling at every level of our society that women's economic empowerment and advancement is a public good.

Why voluntary employer actions are not enough

Companies have learned the hard way how costly and inefficient it is to lose valued employees who either leave or greatly reduce their time commitments at work when they have children, as a considerable number of highly educated professional women now do. According to the Center for Work-Life Policy, roughly one-third of high-achieving women—those with graduate degrees or bachelor’s degrees with honors—leave their jobs to spend extended time at home, and 66 percent of such women at some point switch to a career-derailing part-time or flex-time schedule.¹⁹ The desire to avoid losing these women has proven a key motivator in driving companies to adopt policies that help employees integrate their work and home lives. Flexible work arrangements, for example, have become much more common in recent years: According to the Bureau of Labor Statistics’ Current Population Survey, the proportion of wage and salary workers with flexible work schedules—meaning the ability to vary their work hours to some degree—increased from 13.6 percent in 1985 to 29.6 percent in 2004—the last year for which data are available.²⁰ As of 2008, 79 percent of companies claimed they allowed some of their employees to have flexible work schedules, and 37 percent said they allowed all or most of their employees to do so.²¹

The discrepancy between “some” and “most” says it all. Access to paid leave and flexibility splits neatly by income level. Since employers are not required to offer all workers basic benefits such as sick pay, vacation time, health insurance, flexibility, or paid leave, many employers use them as perks to attract and retain “talent”—generally well-educated and well-paid professionals. More than 90 percent of high-wage employees report that their employers allow them to earn paid time off or to change their schedule if they have an urgent family issue. Less than half of private-sector workers in the bottom 25 percent of earners, however, can change their schedules under such circumstances, and only about half of middle-income workers have the right to these sorts of schedule changes.²²

The pattern holds steady for access to paid parental leave and paid sick days as well: 66.2 percent of high-wage workers have access to paid parental leave, compared with 10.8 percent of those who earn the lowest wages. Almost 80 percent of the highest-paid workers have access to earned sick time, but only 15.2 percent of the lowest-paid workers have the right to take paid time off if they or a family member get sick.²³

Making a “business case” for policies that keep women employed and help them thrive in the workforce has long been the preferred strategy for advocates of women’s economic empowerment and advancement. It is an argument that some highly visible business leaders such as Deloitte and McKinsey & Company are very publicly using as well. Offering flexible work arrangements is seen as an effective way to attract and retain valuable female professionals. Yet the majority of women do not have jobs in which they are considered the high-value “talent” that employers try to woo and cultivate. Sixty-two percent of employed women are hourly workers,²⁴ and a majority of minimum-wage workers in America are female.²⁵

Low-wage workers are routinely subjected to workplace practices that are rigidly inflexible for employees while offering optimal flexibility for employers—unpredictable scheduling, last-minute work assignments, being sent home on a moment’s notice when business is slow, last-minute required overtime, or the practice of putting employees “on call,” where they must commit to being available for a shift without any guarantees as to whether they will be asked to work during that shift. As a result, these employees are being pushed out of the workforce at the same or greater rates than the better-off women whose “opting out” stories receive the lion’s share of media attention.²⁶

The rate of employee turnover in hourly low-wage jobs is enormous.²⁷ Yet the “business case” for improving jobs for low-income and hourly paid women so they will stay the course—valid, solid, and long-established though its evidence base may be—has proven to have little or no real-world power.²⁸

Voluntary employer programs in the “era of financialization”

Susan J. Lambert, an associate professor in the School of Social Service Administration at the University of Chicago, has put forth a cogent and convincing argument as to why voluntary employer-provided benefit programs are not enough to bring workplace supports to the women who need them most. In an era of financialization, when companies are viewed as assets to be bought and sold and are judged for their value as investment vehicles, the goal is maximizing short-term profits largely by reducing the cost of doing business. Low-level employees are merely costs to be managed, and are seen as replaceable and interchangeable. Since there are no minimum hour requirements imposed on employers and no requirement that employers provide benefits to part-time workers, it is not costly for managers to keep people on payroll—to overhire so that there is a large pool to draw from at the last minute. Absenteeism and employee turnover are now considered an acceptable part of the price of doing business.²⁹

For all these reasons, Lambert makes clear, the argument that voluntary actions or market forces will eventually lead to job-quality improvements for low-wage or hourly workers is profoundly misguided. “There’s not enough data in the world to convince employers to provide employees with supportive policies in low-level hourly jobs,” she has said.³⁰

How public policy can boost women's leadership in the United States

Keeping women in the workforce

Evidence from other countries has long shown that measures such as advantageous tax policies for second earners, child care subsidies, and access to flexible work arrangements increase women's labor-force participation, which is a necessary precondition for their long-term career advancement.³¹ In the United States, the evidence base is much more narrow, as there are so few existing policies. Nonetheless, research in the United States has shown that parents who receive child care support are more likely to be employed and have greater work stability than those who do not receive aid. Single mothers who receive help with child care are nearly 40 percent more likely to retain employment over two years than those who lack it.³²

Paid family leave has also been proven to help promote women's workforce participation. A 2012 study conducted by the Center for Women and Work at Rutgers University found that women who used paid leave were much more likely to be working nine months to a year after a baby's birth than were those who did not take any leave. The study also found that women who took paid leave were 39 percent less likely to receive public assistance and 40 percent less likely to receive food stamps in the year after a child's birth.³³

Changing social norms

Employer-generated work-life policies can make a real difference in the landscape of opportunity that women—and men—encounter at work. But if these policies coexist with workplace norms and attitudes that cast aspersions on anyone who makes use of them, then their power to bring change disappears. This, unfortunately, has been the case in many American workplaces,³⁴ which now—perhaps more than ever—disproportionately reward those who put in

long hours and are willing and able to show 24/7 devotion to their jobs.³⁵ What University of California, Hastings College of the Law professor Joan Williams has called the “ideal worker” norm—the image of an employee, typically male, who can dedicate himself entirely to his job while his wife labors at home—has not changed with the times. If anything, in an economically insecure era, it has strengthened. One result of this phenomenon, Williams and others have argued, is that a harsh “flexibility stigma”³⁶ now attaches to people, male or female, who flout the norm by making use of work-family policies such as paid leave and flexible work arrangements.

Public policy has the potential to address and reverse that stigma. It has a unique ability to do so because the force of law operates through dual functions. Laws concretely compel certain behaviors and suppress others, and they also symbolically express what society considers normative and desirable. As sociologist Shelley J. Correll, director of the Clayman Institute for Gender Research at Stanford University, has written, “laws imply a social consensus that a particular conduct is wrong or not wrong, and this implied consensus influences individual moral judgments and behaviors.”³⁷

How work-family policies can express social norms

In European countries with extremely long paid maternity leave policies and generous child subsidies, the norm of mothers staying home with their children has been expressed and strengthened by public policy. The result has been that women’s labor-force participation is lower and the motherhood pay penalty is higher.³⁸ Countries with highly developed subsidized child care systems, on the other hand, have sent the message that women should remain attached to the workforce, and such countries generally have higher female workforce participation.³⁹ The unintended traditionalist consequences of general maternal supports have pushed some progressive countries in recent decades to rethink their family policies so that they reinforce contemporary ideals of gender equality. Sweden, for example, has enforced a “use-it-or-lose-it” system for paid parental leave since 1995 to ensure that both fathers and mothers make use of the benefit. After it introduced that policy, more than 80 percent of fathers began to take advantage of their right to paid parental leave—a massive change in social behavior, which some view as a “catalyst to redefining masculinity,” as University of South Florida professor Joseph A. Vandello has said.⁴⁰

We do have an example in the United States of one piece of legislation that similarly changed norms in terms of gender and work roles: the Family and Medical Leave Act, or FMLA, of 1993, which granted workers who meet certain conditions the right to 12 weeks of unpaid, job-protected parental leave. However partial and insufficient that law may be, it has nonetheless sent a message that employers need to acknowledge and adapt to the fact that most workers today—fathers and mothers—must combine wage earning with family caregiving responsibilities.⁴¹ Former U.S. Supreme Court Chief Justice William H. Rehnquist, hardly a progressive, echoed that message loud and clear when he argued in a majority opinion in the 2003 case, *Nevada Department of Human Resources v. Hibbs*, that the FMLA expressed a new social consensus about gender norms aimed explicitly to fight bias against women. He wrote:

By creating an across-the-board, routine employment benefit for all eligible employees, Congress sought to ensure that family-care leave would no longer be stigmatized as an inordinate drain on the workplace caused by female employees, and that employers could not evade leave obligations simply by hiring men. By setting a minimum standard of family leave for all eligible employees, irrespective of gender, the Family and Medical Leave Act attacks the formerly state-sanctioned stereotype that only women are responsible for family caregiving, thereby reducing employers' incentives to engage in discrimination by basing hiring and promotion decisions on stereotypes.⁴²

Catherine Albiston, a professor of law and sociology at the University of California, Berkeley School of Law, has further theorized that the FMLA has had the power to change the meaning of leave-taking, so that instead of being viewed as proof of a worker's lack of dedication, it is instead the exercise of a fundamental right—and, by extension, an act that is socially approved. To test that theory, she, Correll, and colleagues ran an experiment to see whether people's awareness that the FMLA was in effect in a certain workplace was enough to change their attitudes toward people who took leave. Subjects in the experiment were told to formally evaluate three people at a firm, all of the same gender, one childless, one a parent who took family leave, and one a parent who did not. The subjects were given files for each employee in which, in the experimental condition, the description of the company's benefits included a paragraph stating clearly that the company was covered by the FMLA; in another condition, there was no mention of a leave policy; and in a third condition, there was mention that the company

had its own family leave policy. They found that when the subjects believed that the employees were covered by the FMLA, their biases against employees who took leave disappeared. Having a voluntary policy on the books helped eliminate bias, too, but not nearly as much.⁴³

Psychologists Laura G. Barron and Michelle Hebl have found a similar effect on attitudes and bias from sexual orientation anti-discrimination legislation. In three studies, combining phone surveys, field study, and lab work, they found that community awareness of sexual orientation anti-discrimination legislation led to reduced levels of actual interpersonal discrimination. They concluded that “the mere fact that discrimination is labeled as illegal (without the threat of enforcement) may be sufficient to create a symbolic effect in changing community norms regarding the acceptability of prejudice and discrimination.” Their research findings, they wrote, “provide evidence that such laws do affect true, underlying principles of community acceptance, and corresponding interpersonal behaviors in the employment sphere.”⁴⁴

If laws were in place to guarantee all workers access to supports such as paid family leave, paid sick days, and workplace flexibility, their existence would not only compel different employer behavior for fear of lawsuits; they would also send a symbolic message that our society believes that the ability to combine work and caretaking is a social good. Such an expression of social consensus could both reduce the stigma that now attaches to workers who do not devote themselves 24/7 to work and help normalize the notion that a good worker, male or female, is someone who knows when and how to detach from work and take time for life.

Policy recommendations

Policies to address the women's leadership gap must operate on two levels: They must aim to keep women in the workforce in conditions that allow them to thrive, and they must send a symbolic message that combining wage earning and caregiving is a socially sanctioned, positive, and necessary activity for men and women alike.

Tax policies that encourage women's labor-force participation

Marriage penalties and other disincentives in the tax code can discourage women with caregiving responsibilities from working.⁴⁵ The Earned Income Tax Credit, or EITC—a fully refundable tax credit for low-income working families—has, however, been proven to encourage women's employment.⁴⁶ The improvements to the EITC that were included in the American Recovery and Reinvestment Act should also be made permanent in order to widen the benefits of the program.

The 21st Century Worker Tax Cut Act, introduced by Sen. Patty Murray (D-WA) in March 2014, is a new piece of proposed legislation that would encourage households to have two working parents by allowing a 20 percent deduction on a second income when both spouses are employed and there is a child under age 12 in the home.⁴⁷ Although it succeeds in sending a symbolic message about the need to enable rather than discourage the workforce participation of all adults in a family, the law is problematic. As a tax deduction rather than a tax credit, it delivers the largest benefit to upper-income taxpayers. The average tax cuts it provides for families in the second and middle quintile of the income distribution—\$413 and \$557, respectively—are not amounts that would meaningfully make a dent in significant expenses, such as child care, that accrue when both parents are employed.⁴⁸

A truly meaningful form of tax relief for working parents would need to be far more generous and more universally applicable.

Policies that make high-quality, early childhood education accessible and affordable

Our current child care policies are grossly insufficient to meet the needs of today's working families. The Child Care and Development Block Grant, or CCDBG, system provides vouchers to help only the nation's neediest families, and is so poorly funded that, in 2012, only one in six children eligible for assistance received it.⁴⁹ The Child and Dependent Care Tax Credit, which reimburses families for a percentage of their total child care costs, is not refundable, which means that low-income families, who do not owe income taxes, are not eligible to receive it.

The Child and Dependent Care Tax Credit would be a more meaningful way to help working families if it were made refundable. The total amount of the credit should also be augmented to help middle-class families more realistically address the true cost of high-quality child care. The Helping Working Families Afford Child Care Act—introduced in the Senate in July by Sens. Patty Murray, Barbara Boxer (D-CA), Jeanne Shaheen (D-NH), and Kirsten Gillibrand (D-NY)—addresses both these issues by increasing the size of the tax credit and making it fully refundable.⁵⁰

To bring universal access to pre-K to all 4 year olds, we also need legislation such as the Strong Start for America's Children Act, introduced in November 2013 by Sen. Tom Harkin (D-IA), Rep. Richard Hanna (R-NY), and Rep. George Miller (D-CA).⁵¹ This law would increase access to high-quality pre-school and early learning and child care programs for children under age 5 by instituting state and federal partnerships with funding targeted at families of 4 year olds with incomes at or below 200 percent of the federal poverty level.⁵² We also need to more generously fund Head Start and the Child Care and Development Block Grant program. In addition, we need to change the family eligibility requirements for the CCDBG program to allow children more security and stability with their caregivers, and we should require the states administering the grants to contract directly with high-quality child care providers, rather than providing vouchers directly to families.⁵³

A national system of paid family leave

The Family and Medical Insurance Leave Act, or FAMILY Act, is a proposal for paid family and medical leave introduced in late 2013 by Sen. Gillibrand and Rep. Rosa DeLauro (D-CT).⁵⁴ The legislation would provide up to 12 weeks of paid leave each year to qualifying workers for the birth or adoption of a new child, the serious illness of an immediate family member, or a worker's own medical condition. Workers would be eligible to collect benefits equal to 66 percent of their typical monthly wages, with a capped monthly maximum amount of \$1,000 per week.

There are a variety of possible methods for funding and administering a paid family leave insurance system, including public-private partnerships or a system in which the federal government would incentivize states to set up their own programs.⁵⁵ The Center for American Progress believes, however, that any paid family and medical leave insurance program must meet a set of minimum standards that include: universal coverage for all workers, guaranteed paid leave of equal length for both men and women, a comprehensive description of the reasons for taking time off that takes into account today's diverse families and care responsibilities, a level of wage reimbursement that allows employees to meet their basic needs, and protection for workers against discrimination or retaliation for needing or taking leave.

Legislation guaranteeing all workers the right to request flexible work arrangements

“Right-to-request” legislation is a “soft” approach to workplace flexibility that has been adopted in the United Kingdom,⁵⁶ Australia,⁵⁷ and New Zealand.⁵⁸ Under such laws, employees are granted the right to request flexible work arrangements, and employers are required to seriously consider these requests and provide justification if they are rejected. In the United Kingdom, which in 2003 became the first country to pass a right-to-request law, surveys have shown the measure to have considerable success: In 2011, approximately 79 percent of employee requests for flexible work arrangements were granted fully or in part.⁵⁹

San Francisco and Vermont are the first city and state to have adopted such laws in the United States. The San Francisco ordinance requires employers to respond in writing to an employee's request for flexible work arrangements or predictable scheduling within six weeks, and to provide a “bona fide business reason”

if the request is denied.⁶⁰ Vermont’s statute, contained in the state’s recent equal pay legislation, requires employers to consider such requests twice in a calendar year but does not specify a time frame for responding. It also denies employees a private right of action if their flexibility requests are denied.⁶¹ The most recent proposal for federal legislation of this type, the Schedules that Work Act, was introduced in July by Reps. George Miller and Rosa DeLauro. The bill would protect all employees from retaliation for making a request for a more flexible, predictable, or stable schedule. It would also require employers to provide a bona fide business reason for refusing such requests from employees who ask for schedule changes because of caregiving duties or health conditions, or to meet the demands of a second job or an education or training program.⁶² Ideally, any future legislation will contain strong provisions to combat noncompliance, discrimination, and retaliation.⁶³

Laws that protect low-wage and hourly workers against abusive scheduling practices

We also need legislation to protect vulnerable workers against practices such as on-call scheduling. In other countries, these protections are often achieved on a large scale through collective bargaining, but in the United States—where only 6.7 percent of private industry workers and 11.3 percent of workers overall are covered by collective bargaining agreements—this is not a possibility.⁶⁴

The San Francisco right-to-request legislation states that employees have the right to ask for predictability, as well as flexibility, in their scheduling.⁶⁵ Critics note, however, that the likelihood of low-income, low-status, hourly workers succeeding with such requests is not great. There are some states in which some protections do exist for vulnerable hourly workers. California, Connecticut, Washington, D.C., Massachusetts, New Hampshire, New Jersey, New York, Oregon, and Rhode Island all have some reporting-time-pay legislation, under which employees are paid for a minimum number of hours in cases where they show up for their scheduled shift and are sent home because the employer feels they are not needed. However, the Center for Law and Social Policy notes that these laws are not always well enforced or well known and pose a significant burden of risk on employees for the promise of generally “paltry damages awards.”⁶⁶

The Schedules that Work Act of 2014 contains provisions to protect workers against abusive scheduling practices. It would guarantee that a minimum level of compensation be provided for retail, food service, and cleaning workers if they report to work when scheduled and are sent home early. It would also require employers to inform these employees of their work schedules at least two weeks in advance, and would provide workers with one hour of extra compensation if their schedules are changed at the last minute or if they are required to work split shifts, or nonconsecutive shifts within a single day.⁶⁷ Some experts, such as Susan Lambert of the University of Chicago, further propose providing benefit parity for part-time and full-time workers alike, as is required in the European Union, where part-timers are guaranteed access to pro-rated full-time benefits—all with the goal of increasing the fixed costs of labor in hourly jobs so that employers are motivated to invest in employees in ways that enhance their productivity and reduce turnover.⁶⁸

Such far-reaching changes to our nation's basic labor standards are unlikely to be realized anytime soon. But there are government actions that can at least begin to raise public awareness of the problem of unpredictable scheduling and prepare the terrain for more far-reaching public policy reforms in the future. As the Center for American Progress has previously recommended, Congress should, for example, hold hearings on the practice of mandatory overtime to determine whether the Fair Labor Standards Act should be amended to prohibit the practice. Congress should also hold hearings that explore how the government might most effectively incentivize the business community to implement predictable scheduling solutions—such as using technology—to give workers more control over their own schedules and permitting them to work out scheduling changes with other employees.⁶⁹

The use of existing anti-discrimination laws to pursue employers who stigmatize workers for taking leave

Discrimination against workers—usually, though not exclusively, women who make use of their companies' family leave or work flexibility policies—is widespread and insidious.⁷⁰ Such caregiver discrimination, experts argue, is a proxy for gender bias and as a result is grounds for legal action under Title VII of the Civil Rights Act of 1964, which prohibits discrimination based on sex. “Women who request or adopt a flexible work schedule engage in stereotype-consistent and devalued behavior, while men who take leave or adopt a flexible schedule engage in stereotype-inconsistent and counter-normative behavior,” Stephanie Bornstein explained in a 2013 journal article, continuing to say that “the penalties that both encounter as a result are based on impermissible gender-stereotypical beliefs.”⁷¹

In line with this reasoning, the Equal Employment Opportunity Commission has issued guidance on how to use anti-discrimination laws, including Title VII, to combat discrimination against workers with caregiving responsibilities.⁷² This legal strategy has proven highly challenging, however, raising the question of whether more comprehensive protections are needed to guarantee protection against such discrimination. A more promising avenue may lie in passing legislation that explicitly prohibits discrimination based on family responsibilities, or parenthood, as the state of Alaska has done, along with the District of Columbia and a number of other U.S. cities and counties.⁷³ The Center for WorkLife Law at the University of California, Hastings College of the Law notes as well that an executive order prohibits discrimination against federal government employees based on “status as a parent.”⁷⁴

Policies that incentivize companies to step up their efforts on behalf of women’s advancement through better reporting and greater transparency⁷⁵

The federal government can create incentives for companies to do a better job in tracking their hiring and promotion of women. A strong example of this type of legislation exists in Australia, where the 2012 Workplace Gender Equality Act now requires non-public-sector organizations with 100 or more employees to annually report their progress on six measures of gender equality, including the gender composition of their workforce, gender composition of their governing bodies, equal pay between men and women, and the availability and use of flexible work arrangements and other supports for employees with caretaking responsibilities.⁷⁶ The law also requires employers to notify shareholders when they have submitted those reports to the government and to provide shareholders with access to them.⁷⁷ Australia’s Workplace Gender Equality Agency will aggregate the data and develop benchmarks to allow investors to determine how a company’s gender-equality efforts compare to those of its competitors.⁷⁸ Starting this year, the government will also give a citation to employers who can particularly prove they “equally support women and men to reach their full potential.”⁷⁹

In addition, the ASX Group, which runs the Australian Securities Exchange, adopted a “comply or explain” disclosure rule in 2010, requiring companies to develop policies to improve their gender diversity or explain why they have chosen not to. Popularly called the “if not, why not rule,” this regulation—which went into effect in 2012—specifies that companies must disclose the percentage of women on their

boards and in senior management and provide progress reports on meeting other gender-equity goals.⁸⁰ In combination with a new mentoring and sponsorship program for female board members that was put into place by the nonprofit Australian Institute of Company Directors in 2010, the number of women sitting on boards has greatly increased. Women went from being 5 percent of all new board appointments in 2009 to 28 percent in 2011.⁸¹ Overall, the percentage of women board directors increased from 8.5 percent in April 2010 to 13.8 percent in March 2012.⁸²

In the United States, there are two current government regulations that aim to increase the representation of women in top corporate positions. In 2009, the Securities and Exchange Commission, or SEC, adopted a rule that requires publicly held companies to disclose in their annual proxy and information statements their “consideration of diversity” in selecting board members and show how effective those considerations have been.⁸³ In 2010, Section 342—the so-called “Diversity Clause” of the Dodd-Frank Wall Street Reform and Consumer Protection Act—created 20 Offices of Minority and Women Inclusion at various agencies that regulate the financial services industry and charged them with assessing and monitoring diversity practices at the agencies, among their contractors or subcontractors, and in the entities they regulate.⁸⁴ Critics have assailed both measures as largely ineffectual.⁸⁵ Unhelpfully, the SEC was one of the last agencies covered by the law to hire a director for its Office of Minority and Women Inclusion.⁸⁶

In a March 2013 public statement, SEC Commissioner Luis A. Aguilar noted:

There are many that believe that to truly meet the needs of investors, a proxy statement would need to state the gender and racial or ethnic background of incumbent directors and nominees, and whether or not the board or nominating committee takes such aspects of diversity into account in identifying and/or evaluating potential board candidates. The proxy statement should disclose how the board defines diversity. If a company has no women or persons of color on its board, it should state whether or not it has considered addressing this lack of diversity—and if not, why.⁸⁷

He praised public companies that make diversity disclosures beyond what SEC rules now require and called upon others to “do better,” taking pains to highlight in some detail the work of groups involved in efforts to promote diversity in the boardroom. Formalizing the commissioner’s enthusiasm in new SEC rules would be the most effective way to make such disclosures standard practice.⁸⁸

There also now exist some model programs that attempt to create greater transparency in the area of equal pay that could perhaps be expanded to cover other gender-equity measures. New Mexico, for example, has since 2010 required all companies seeking to contract with the state to provide basic pay-equity reports—a measure meant as an incentive to companies to examine and correct gender pay gaps.⁸⁹ And a public-private partnership announced in Boston in 2013 called “100% Talent: The Boston Women’s Compact,” had by early this year united 50 businesses, including Blue Cross Blue Shield of Massachusetts, to sign a pledge agreeing to self-assess their wage data to examine their records on pay equity and to anonymously share their wage data with a third party every two years.⁹⁰ While these initiatives are new and very partial, their mere existence may begin to erode business opposition to the notion of disclosure and may provide the start of a roadmap for how more substantive reporting might work.

At the White House Summit on Working Families in June, President Barack Obama sent a powerful message both about the need for new norms in the American workplace and about the government’s power to direct widespread behavioral and attitude change. He directed federal agencies to greatly increase their efforts to expand flexible workplace policies, review their flexibility programs, and report back both best practices and barriers to their use. In addition, he established a job-protected right to request flexible work arrangements for federal workers and directed agencies to establish procedures for addressing these requests.⁹¹

In the future, the president and his administration could do even more. Because more than one-fifth of the American workforce is employed by companies that have contracts with the federal government, policies that nudge contractors to increase the hiring, promotion, and retention of women would have an outsized effect on the American labor market.⁹² Federal contractors are subject to Executive Order 11246, which prohibits sex and race discrimination in the federal contractor workforce and requires federal contractors to put in place affirmative action programs to improve the recruitment and retention of minorities and women.⁹³ The Department of Labor’s Office of Federal Contract Compliance Programs enforces Executive Order 11246 by requiring self-monitoring on the part of contractors and conducting systematic reviews of contractors’ employment practices to look for evidence of discrimination.⁹⁴

Moving forward, the government could:

- Supply the Office of Federal Contract Compliance Programs with additional resources to reinvigorate their “gender equality audits” of federal contractors, and consider expanding those audits from their traditional “glass ceiling” focus on executive women to focus on the retention and advancement of women in nonexecutive positions⁹⁵
- Instruct the Department of Labor to include evidence of caregiver discrimination as a factor in its gender bias audits and provide technical assistance to federal contractors in examining their workplace policies with regard to caregiver discrimination⁹⁶
- Reward potential contractors in competitively bid contracts by providing additional points to those employers who provide paid family leave and flexibility to their employees and who take active steps to discourage caregiver discrimination⁹⁷

Conclusion

When the discussion of women’s leadership is expanded to include the vast majority of women, rather than just those who are already the most successful, it becomes much more complex. The reason is simple: There is a wide experiential gap that divides the most well-off Americans, men and women alike, from all others in our society.

Low-income women are struggling to succeed and survive in a work culture in which they are not valued, much less cultivated as workers. These women would be the greatest direct beneficiaries of public policies such as tax relief, child care supports, paid family leave, and flexibility legislation that includes measures to promote predictable scheduling. Upper-income women mostly have access to such policies through their employers. Their challenges are largely cultural: pressures and attitudes, both from their workplaces and to a certain extent from within themselves, that make a life of high-level work achievement and satisfying family connection extremely difficult. Middle-class women are caught in between these two worlds, though in their lack of policy supports, they have more in common with low-income women than is commonly recognized.

Even though well-off women would not, by and large, be the chief beneficiaries of public policy, as they already, disproportionately, have access to work-family supports through their employers, the indirect effects of policy—the symbolic and expressive effects of law—would be equally powerful for all. The women’s leadership gap, based so greatly on structural factors and attitudes that push women down and out, will not close until we reach a new social consensus about how we work and how we want to live our lives.

For now, public opinion—which overwhelmingly favors policies such as affordable child care, paid family leave, and workplace flexibility—is far ahead of our laws. The price of this disconnect is paid, every day, by every working family in our nation.

About the author

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