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To: President-Elect Barack Obama
CC: U.S. Congress
From: Shriver Center

In re: Antipoverty Recommendations

1. Strengthen Civil Rights
2. Reform Health Care
3. Fortify Safety Net
4. Solve Federal Fiscal Problem
5. Preserve Affordable Rental Housing
6. Exercise Executive Clemency
7. Foster Career Advancement
8. Link Economic and Workforce Development
9. Ensure Quality Child Care for Workers
10. Build and Protect Assets
11. Legalize Immigrants
12. Guarantee Leave Policies for Women



What's a Mother to Do?



Women, Low-Wage Employment, and Leave Policies

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In the United States most workplaces do not accommodate the everyday reality of workers' caregiving responsibilities.¹ Most workers, whether they are part of a married-couple family with children or some other variation of family or live alone, are faced with caregiving responsibilities for young or disabled children or a sick or elderly adult at some point during their working lives. Yet employers continue to implement workplace policies and practices as if workers never get sick themselves or do not have caregiving responsibilities at home, making work-family balance difficult if not impossible, and this may be discriminatory. These harmful policies and practices have a disproportionate impact on women. First, despite men assuming greater caregiving responsibilities, women still bear the primary responsibility for caregiving.² Second, women still earn only 77.8 cents for every dollar earned by men, are more likely to be poor than men, and tend to be clustered in low-wage occupations in which employers are least likely to offer any job flexibility or paid or unpaid leave.³ According to a 2008 report, even women who have earnings every year and do not take time off for caregiving are significantly more likely to have low earnings compared to men.⁴ The link between greater caregiving responsibilities, lower wag-

¹See Institute for Women's Policy Research, *Maternity Leave in the United States: Paid Parental Leave Is Still Not Standard, Even Among the Best U.S. Employers* (Aug. 2007), www.iwpr.org/pdf/parentalleaveA131.pdf (even among *Working Mother* magazine's list of the 100 family-friendliest companies in the United States, nearly half provide no paid leave for paternity or adoption).

²See FAMILIES AND WORK INSTITUTE, *GENERATION & GENDER IN THE WORKPLACE 4* (2002), <http://familiesandwork.org/site/research/reports/genandgender.pdf> (while working mothers today are spending the same amount of time caring for their children as they did twenty-five years ago, younger fathers are now spending more time with their children). In the labor force are 71 percent of American women with children under 18—77.2 percent of these women have children 6 to 17 years old, 63.3 percent of these women have children under 6, and 55.1 percent of these women have infants (under age 1) (Press Release, Bureau of Labor Statistics, U.S. Department of Labor, *Employment Characteristics of Families in 2007*, tbls. 5, 6 (May 30, 2008), www.bls.gov/news.release/pdf/famee.pdf). These percentages reflect only the number of women raising their own children, not those raising grandchildren and other children. Only 30.3 percent of married-couple families with children under 18 fit the traditional model of husband as sole breadwinner (*id.*, tbl. 4). See also *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721, 738 (2003) (citing a congressional report that working women provide two-thirds of the nonprofessional care for older, chronically ill, and disabled individuals).

³Institute on Women's Policy Research, *The Gender Wage Gap: 2007* (Aug. 2008), www.iwpr.org/pdf/C350.pdf; *id.*, *Still a Man's Labor Market: The Long-Term Earnings Gap: A Report on the Wage Gap and Its Implications for Women, Families, and the Labor Market 1-2* (Feb. 2008), www.iwpr.org/pdf/C366_RIB.pdf. The largest low-wage occupations include retail sales, janitorial services and cleaning, child care, and restaurant work (HEATHER BOUSHEY ET AL., *THE MOBILITY AGENDA, UNDERSTANDING LOW-WAGE WORK IN THE UNITED STATES 13-15* (March 2007), www.mobilityagenda.org-a-googlepages.com/lowwagework.pdf). And "[n]early one-third of low-income mothers (31 percent) work in service jobs that are concentrated in food services (e.g., waitresses or cooks), health services (e.g., nursing aides), and cleaning services (e.g., maids or janitors)" (INSTITUTE FOR WOMEN'S POLICY RESEARCH, *KEEPING MOMS ON THE JOB: THE IMPACTS OF HEALTH INSURANCE AND CHILD CARE ON JOB RETENTION AND MOBILITY AMONG LOW-INCOME MOTHERS 30* (2007), www.iwpr.org/pdf/C360KeepingMoms.pdf).

⁴Still a Man's Labor Market, *supra* note 3.

es, and more hours of work and women compared to men persists.⁵ In 2007 the poverty rate for women (12.7 percent) was 42 percent higher than the poverty rate for men (8.8 percent).⁶ The poverty rate for female-headed households with children was 37 percent, more than twice the rate of male-headed households with children (17.4 percent) and all families with children (15 percent).⁷ Women of all racial and ethnic groups experienced higher poverty rates and higher extreme poverty rates (income below 50 percent of the federal poverty line) than white, non-Hispanic men, and the poverty rate among women 65 and older was 12 percent, more than 80 percent higher than the poverty rate for men 65 and older (6.6 percent).⁸ A 2005 analysis of parental leave programs found that “[r]oughly two in five working parents with incomes below 200 percent of the federal poverty have no paid leave of any kind—no paid sick days, no paid vacation, and no paid personal days Sixty-seven percent of low-wage workers do not have a single day of paid sick leave.”⁹

Even among higher-educated, higher-income women, one-third lack access to any form of paid maternity leave, while 47 percent of women with less than a high school education are forced to take unpaid maternity leave.¹⁰ Only 39 percent of low-wage jobs offer any paid sick days for personal illness, only 51 percent of low-

wage jobs provide paid vacation days, and only 54 percent provide paid holidays.¹¹

Needed changes in workplace policies and practices include paid family and medical leave, paid sick days, greater flexibility, and scheduling predictability in the workplace. A wide assortment of legislation pending in Congress and in state legislatures would significantly improve the workplace for workers.¹² If legislative solutions are not found, litigation remains a viable option. Here I focus on family-and-medical-leave and sick-leave policies.

Family and Medical Leave

The passage of the Family and Medical Leave Act (FMLA) was a great step forward in government support of working families.¹³ The FMLA entitles eligible employees up to twelve weeks of unpaid leave during a twelve-month period for the birth of a child, placement for adoption or foster care of a child, care of a newborn or newly placed child, care of a spouse, parent, or child with a serious health condition, or when an employee cannot work due to the employee's own serious health condition.¹⁴ For a worker to be eligible for leave, the employer must have fifty or more employees, and employees must have worked for the employer for twelve months and have 1,250 hours of service within the previous year.¹⁵ Em-

⁵*Id.*

⁶National Women's Law Center, *Poverty Among Women and Families, 2000–2007: Getting Worse Even Before the Downturn 1–3* (Sept. 2008), www.nwlc.org/pdf/WomenPoverty2000-2007.pdf.

⁷*Id.*

⁸*Id.*

⁹NATIONAL PARTNERSHIP FOR WOMEN & FAMILIES, *EXPECTING BETTER: A STATE-BY-STATE ANALYSIS OF PARENTAL LEAVE PROGRAMS 10* (2005), www.nationalpartnership.org/site/DocServer/ParentalLeaveReportMay05.pdf?docID=1052.

¹⁰*Id.*

¹¹Families and Work Institute, *What Do We Know About Entry-Level, Hourly Employees? 7* (Nov. 2006), <http://familiesandwork.org/site/research/reports/brief1.pdf>.

¹²See National Partnership for Women and Families, *110th Congress Work and Family Agenda*, www.nationalpartnership.org/site/DocServer/Work_and_Family_110th_Agenda_final_5_28_08.pdf?docID=3461; *id.*, *State and Local Action on Paid Family and Medical Leave: 2008 Outlook* (Oct. 9, 2008), www.nationalpartnership.org/site/DocServer/Paid_Leave_Tracking.pdf?docID=1921; *id.*, *State and Local Action on Paid Sick Days: 2008 Outlook*, www.nationalpartnership.org/site/DocServer/Paid_Sick_Days_Tracking.pdf?docID=1922.

¹³29 U.S.C. §§ 2601 *et seq.* (2006).

¹⁴*Id.* § 2612.

¹⁵*Id.* § 2611(2), (4).

ployers covered by the law must maintain for the employee any preexisting group health coverage during the period of the leave and, once the leave is concluded, reinstate the employee to the same or an equivalent job, equivalent benefits, pay, and other terms and conditions of employment.¹⁶

According to the National Partnership for Women and Families, workers have used the FMLA more than a hundred million times to take the unpaid time off since it was enacted in 1993.¹⁷ However, 78 percent of employees who have needed but not taken family or medical leave say that they cannot afford to take the leave, and nearly 40 percent of workers are not eligible for FMLA leave because they work for firms with fewer than fifty employees.¹⁸ In fact, the United States is the only industrialized country with no national program to ensure that workers are financially able to take leave when they have a new baby, need to care for an ill family member, or recover from an illness.¹⁹

Some states are leading the way on providing paid family and medical leave. Five states (California, Hawaii, New Jersey, New York, and Rhode Island) and Puerto Rico have state-administered temporary disability insurance programs. Delaware has a program for state employees. Three states (California, New Jersey, and Washington) have enacted paid family leave.²⁰

Public support for expanding the FMLA to offer paid leave is strong. In a survey conducted in 2007, three in four respondents favored paid family and medical

leave, with strong support among both women and men. Women with children are the strongest supporters, but support is high regardless of gender or parental status. Respondents under 50 are also strong supporters, particularly those 40 to 49 years old.²¹

In spite of public support, legislation introduced in Congress to improve the FMLA over the years has stalled. In the current session, pending legislation to amend the FMLA would provide paid leave. One bill that passed the House would provide paid parental leave for federal employees. Other bills would provide new definitions of “eligible employee” so that more employees, particularly part-time workers, would be eligible; expanded definitions of “family member” for whom an eligible employee may take leave to care for, including domestic partners; a lower firm-size threshold to fifteen employees (from the current fifty); and an expansion of permissible reasons for leave, such as to participate or attend a child’s school activities, attend court proceedings for survivors of violent crime and domestic violence, and respond to a crisis arising due to a family member being away on active military duty.²² This lack of success on the FMLA front has turned activists to another front in the struggle for work-family balance: the absence of paid sick days.

Sick Days

The right to paid sick leave does not exist in the United States, except in the city and

¹⁶*Id.* § 2614.

¹⁷*Writing the Next Chapter of the Family and Medical Leave Act—Building on a Fifteen[-]Year History of Support for Workers: Hearing Before the Subcomm. on Children and Families of the S. Comm. on Health, Education, Labor and Pensions, 110th Cong. 2 (2008)* (statement of Debra Ness, President, National Partnership for Women and Families), www.nationalpartnership.org/site/DocServer/DebraNess_WrittenTestimony_2-13-08.pdf?docID=2941.

¹⁸*Id.* at 4 (citing a U.S. Department of Labor report).

¹⁹Jody Heymann et al., Project on Global Working Families & Institute for Health and Social Policy, *The Work, Family, and Equity Index: How Does the United States Measure Up?* 1–2, www.mcgill.ca/files/hsp/WFEI2007.pdf (last visited Oct. 21, 2008).

²⁰See State and Local Action on Paid Family and Medical Leave, *supra* note 12; Jackson Lewis, Washington Enacts Paid Family Leave Law (May 15, 2007), www.jacksonlewis.com/legalupdates/article.cfm?aid=1116.

²¹Lake Research Partners, National Partnership for Women and Families, Key Findings from Nationwide Polling on Paid Family and Medical Leave (Sept. 25, 2007), www.nationalpartnership.org/site/DocServer/Paid_Family_Leave_Poll_Results_2007.pdf?docID=2521.

²²See 110th Congress Work and Family Agenda, *supra* note 12.

county of San Francisco and in Washington, D.C.²³ The lack of access to paid sick days is recognized by the Centers for Disease Control and Prevention as a public health concern.²⁴ Only 57 percent of all workers in private industry receive a paid sick-day benefit, with only 44 percent of workers earning less than \$15 per hour having access to paid sick days.²⁵ Half of working mothers and 75 percent of low-income working mothers lose pay when they stay home with their sick children. Of the lowest-paid workers, 79 percent have no paid sick leave at all.²⁶ As with the lack of family and medical leave, the lack of adequate sick pay puts workers in an untenable position if they get sick or need to take care of a sick child or elderly parent—stay at work when you should not or lose a day of pay, and possibly even your job, if you stay home.²⁷

Internationally, at least 145 countries provide paid sick days for short- or long-term illnesses, with more than eighty-one countries providing twenty-six weeks of leave or until the worker recovers. The

United States requires employers to provide only unpaid leave for serious illnesses.²⁸ But an overwhelming majority of Americans (86 percent) believe that employers should be required by law to provide paid sick days to workers: 85 percent endorse a plan that would require a minimum of seven paid sick days a year, 79 percent back a plan requiring a minimum of nine days, and 82 percent favor giving part-time workers sick days proportional to their hours.²⁹ And, while people are sensitive to the burdens of smaller employers, most favor requiring smaller employers to provide paid sick leave—either the same or a fewer number of sick days as larger employers.³⁰

Paid-sick-leave legislation has been introduced in Congress and in state legislatures.³¹ The Healthy Families Act (H.R. 1542, S. 910) was introduced in 2007, and committees in both the House and the Senate held hearings on the Act. The Healthy Families Act would provide full-time employees (working thirty or more hours a week) with seven paid sick days

²³S.F., CAL., MUN. CODE, ch. 12W: Sick Leave (2006), www.municode.com/content/4201/14131/HTML/ch012w.html. The ordinance went into effect on Feb. 5, 2007. For every thirty hours worked, an employee accrues one hour of paid sick leave. All employers are covered regardless of size, although a lower cap of accrued leave is for employers with fewer than ten employees (forty hours), compared with employers with eleven or more employees (seventy-two hours). The only exception is when employees covered by a bona fide collective bargaining agreement expressly waive the law's requirements. Employees may use paid sick leave not only when they are ill, are injured, or receive medical care, treatment, or diagnosis but also to aid or care for a family member who may be a domestic partner. If an employee has no spouse or registered domestic partner, the employee may designate one person for whom the employee may use paid sick leave to provide aid or care. The Washington, D.C., city council passed the Accrued Sick and Safe Leave Act (B17-0197) on March 4, 2008. The Act went into effect in November 2008. The law provides between three and seven paid sick and safe days depending on the number of employees in a firm. Leave may be taken to recover from illness, care for a sick family member, or seek services related to domestic violence (see the D.C. Employment Justice Center at www.dcejc.org).

²⁴HEATHER BOUSHEY ET AL., *THE MOBILITY AGENDA, WORK-LIFE POLICIES FOR THE TWENTY-FIRST CENTURY ECONOMY* 7 (May 2008), <http://7396096717873222575-a-mobilityagenda-org-s-sites.googlegroups.com/a/mobilityagenda.org/mobility-agenda-staff/Home/Work-Life.pdf?attredirects=0>.

²⁵BUREAU OF LABOR STATISTICS, U.S. DEPARTMENT OF LABOR, NATIONAL COMPENSATION SURVEY: EMPLOYEE BENEFITS IN PRIVATE INDUSTRY IN THE UNITED STATES, MARCH 2007, at 28, tbl. 19 (2007), www.bls.gov/ncs/ebs/sp/ebsm0006.pdf.

²⁶*The Healthy Families Act: Impacts on Workers, Businesses, the Economy, and Public Health: Hearing Before the S. Committee on Health, Education, Labor, and Pensions on the Healthy Families Act: Safeguarding Americans' Livelihood, Families and Health with Paid Sick Days*, 110th Cong. 6 (tbl. 3), 7, 10 (2007) (statement of Heidi I. Hartmann, President, Institute for Women's Policy Research), www.iwpr.org/pdf/Hartmann_HFA_testimony021307.pdf.

²⁷Tom W. Smith, Public Welfare Foundation, *Paid Sick Days: A Basic Labor Standard for the 21st Century* 6–7, 37 tbl. 20 (2008), www.norc.uchicago.edu/NR/rdonlyres/D1391669-A1EA-4CF4-9B36-5FB1C1B595AA/0/PaidSickDaysReport.pdf (about 17 percent of employees have been fired or told they would be fired for taking time off due to personal or family illness).

²⁸Heymann et al., *supra* note 19, at 5–6.

²⁹Smith, *supra* note 27, at 7.

³⁰*Id.*

³¹See State and Local Action on Paid Sick Days, *supra* note 12.

per year and a prorated amount for part-time employees who work an average of at least twenty hours a week or 1,500 hours per year. A worker could use the leave to recover from illness, care for a sick family member (including a child, a parent, a spouse, or any other individual related by blood or affinity whose close association with the employee is the equivalent of a family relationship), or for routine medical care. Employers with fifteen or more employees would be required to provide the paid sick days.³² The National Partnership on Women and Families is spearheading the national campaign for paid sick days. To learn more about this effort and to get involved, visit the partnership's website at www.national-partnership.org. If legislative relief is not forthcoming, litigation based on discrimination against caregivers remains an option.

Family Responsibilities Discrimination

Workplaces that accommodate all workers and their caregiving responsibilities are necessary and beneficial for women and men. "Family responsibilities discrimination," or FRD, is based on the theory that anyone who plays a certain

sex role, such as a caregiver, will be penalized whether they are male or female. Therefore, workplaces designed around the traditional "ideal worker"—a man who has little or no caregiving responsibilities—must change as a minimum requirement for gender equality.³³

No one law makes illegal family responsibilities discrimination. Instead a variety of legal theories and federal and state statutes exist to challenge such discrimination. These include

- Title VII disparate treatment;³⁴
- Title VII disparate impact;³⁵
- Title VII hostile work environment and constructive discharge;
- Title VII retaliation, the Equal Pay Act;³⁶
- the Family and Medical Leave Act;³⁷
- the American with Disabilities Act;³⁸
- Section 1983;³⁹
- state statutes protecting workers with family responsibilities;⁴⁰
- state common-law actions based on violations of public policy; and

³²Healthy Families Act, H.R. 1542, 110th Cong. (2007), <http://thomas.loc.gov>.

³³Joan C. Williams & Nancy Segal, *Beyond the Maternal Wall: Relief for Family Caregivers Who Are Discriminated Against on the Job*, 26 HARVARD WOMEN'S LAW JOURNAL 77 (2003), www.law.harvard.edu/students/orgs/jlg/vol26/williams.pdf. For more information on family responsibilities discrimination, see the WorkLife Law Center website, www.worklifelaw.org.

³⁴Equal Employment Opportunity Commission Notice, No. 915.002, Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities (May 23, 2007), www.eeoc.gov/policy/docs/caregiving.html (the document is intended to assist in determining if a particular employment decision affecting a caregiver might unlawfully discriminate on the basis of prohibited characteristics under Title VII of the Civil Rights Act of 1964 or the prohibition under the Americans with Disabilities Act of 1990 against discrimination based on a worker's association with an individual with a disability).

³⁵Civil Rights Act of 1964, 42 U.S.C. §§ 2000e–2000e-16 (2006). See, e.g., *Phillips v. Martin Marietta Corporation*, 400 U.S. 542 (1971) (per curiam) (in the absence of business necessity, an employer may not refuse to hire women with pre-school-age children while hiring men with such children). But see Ann O'Leary, *How Family Leave Laws Left Out Low-Income Workers*, 28 BERKELEY JOURNAL OF EMPLOYMENT AND LABOR LAW 1, 13 (2007) ("there is little reason to believe that a theory already limited in the case of pregnancy can be extended to cover caregivers").

³⁶Equal Pay Act of 1963, 29 U.S.C. § 206(d)(1) (2006).

³⁷Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2601–2654 (2006).

³⁸Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101–12117, 12201–12213 (2006).

³⁹42 U.S.C. § 1983 (2006); see also *Back v. Hastings on Hudson Union Free School District*, 365 F.3d 107, 121 (2d Cir. 2004) (in a sex discrimination claim under 42 U.S.C. § 1983, the court stated that, "where stereotypes are considered, the notions that mothers are insufficiently devoted to work, and that work and motherhood are incompatible, are properly considered to be, themselves, gender-based").

⁴⁰For a list of states and localities that have explicitly included family responsibilities in their laws prohibiting employment discrimination, see the WorkLife Law Center website, www.worklifelaw.org/FRD.html.

■ actions based on employment contracts, handbooks, and collective bargaining agreements.⁴¹

The Pregnancy Discrimination Act of 1978 (PDA) is often mentioned separately, even though it is part of Title VII. The PDA amended the Civil Rights Act of 1964 to clarify that the prohibition on sex discrimination in employment includes discrimination on the basis of pregnancy, childbirth, and related medical conditions.⁴²

There are limitations to family responsibilities discrimination. First, not all cases of bad treatment of caregivers are illegal. For example, if an employer implements a policy that has a negative impact on both mothers and fathers of young children equally, there is no discrimination. Second, family responsibilities discrimination covers only cases that already are illegal under existing law. Third, litigation can be costly and lengthy, with a decision long after the immediate need. And, fourth, the impact is usually limited to one workplace. However, in addition to the benefit of a favorable decision for

an individual worker and coworkers, the advantage of pursuing family responsibilities discrimination, as with the pursuit of any social change through litigation, is that a crescendo of individual cases can contribute to the inevitability of change.



Workers and employers alike deserve to have caregiving responsibilities recognized and accommodated and would greatly benefit from the enactment of paid family and medical leave and paid sick days as a matter of national policy and practice. Workers would no longer have to choose between work and caregiving responsibilities, between work and health, or between work and economic insecurity. Low-income women and their families would benefit the most, since low-income women are the ones who now experience the greatest economic, social, and health-related harm from their employers not having adequate leave policies. It is time to pass a comprehensive paid family and medical leave act and a paid sick day's act.

⁴¹Equal Employment Opportunity Commission Notice, *supra* note 34; see *supra* notes 35–40. For an analysis of using these laws and theories for family responsibilities discrimination cases, see Williams & Segal, *supra* note 33, at 122–23 (from cases based on federal and state statutes, state public policies, and constitutional rights, viable legal theories emerged); see also Mary C. Still, Center for WorkLife Law, University of California Hastings College of Law, *Litigating the Maternal Wall: U.S. Lawsuits Charging Discrimination against Workers with Family Responsibilities* (2006), www.worklife.org/pubs/FRDreport.pdf.

⁴²U.S.C. § 2000e (k) (2006); see *California Federal Savings and Loan Association v. Guerra*, 479 U.S. 272, 289, 292 (1987) (The Court quotes Sen. Harrison A. Williams (D-N.J.), a bill sponsor, stating that the Pregnancy Discrimination Act guarantees the right of women “to participate fully and equally in the workforce without denying them the fundamental right to full participation in family life.” The Court goes on to hold that “in enacting the [Pregnancy Discrimination Act] Congress did not intend to prohibit all favorable treatment of pregnancy....”).

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