

PANEL: LABOUR AND SOCIETY: THE MAINTENANCE OF FAMILY ECONOMIES AND THE MARKET PLACE

USING THE LAW TO PROMOTE WORK FAMILY RECONCILIATION

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The rising participation of women in paid employment outside the home has been one of the most dramatic social changes during the last three decades. Women's labor force participation has increased, while men's has fallen, making women's economic contribution increasingly important for sustaining families (ILO 2009; Hein 2005). Yet while women's formal economic activity has increased, change in their responsibilities for domestic and family care work has been much less dramatic. Women continue to perform the lion's share of unpaid family care work for children and the elderly, and this in turn creates barriers to their equal participation in employment. In the majority of countries women's employment patterns over their lifetimes continues to be characterized by more times out of the labor market, and fewer hours in work, than men's. Workplace norms continue to be based on an 'ideal worker', who is able to work full-time, year in-year out, unencumbered by childbirth, childcare, personal health issues or responsibilities for elderly relatives.¹ The consequences for the (predominantly female) workers who are unable to conform to this ideal (or are perceived as likely not to conform, irrespective of their actual performance and work patterns) are lower quality employment, less advancement and lower pay.

Against the context of falling fertility rates and rapidly aging populations in most OECD countries, policy makers have become more aware of the costs of the slow and haphazard adjustment of workplace practices to dual earner families in terms of lost human capital and reduced employment rates. As a result, work family reconciliation policies have been moved from the margins if not into the mainstream of social and economic policy at least into a position of elevated importance. All industrialized, and many developing and transition countries, provide some policies aimed at work-family reconciliation. Typically these include parental leave (with the notable exception of the United States all industrial countries and all but 3 developing countries provide some paid leave to new mothersⁱⁱ); some support for childcare; and a range of tax and social insurance payments. More recently policy makers have more directly turned to the law to enhance employees' access to alternative and flexible working practices.

Basic design principles of such policies are by now fairly well established, particularly in relation to parental leave policy designs. A particular concern is to address the risk of employment discrimination against women as the primary users of work-life reconciliation policies. The significant diversity in the design of leave policies – ranging from unpaid leave of 12 weeks in the United States to paid leave of 465 days in Sweden and three years job protected leave per child in Germany - has provided a natural testing ground for research on the effects of different leave designs on women's labor market outcomes and men's propensity to take up of leave. This research suggests that job

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protected leave – almost irrespective of length- increases the labor force attachment of individual women (compared to mothers without access to leave). Yet long leaves (of more than six months to nine months) are associated with lower employment rates for women overall and correlate with a fall in relative wages for women; recent discussion has also focused on their possible contribution to gender segregation in employment (although arguably, both in relation to gender segregation and relative wages, the jury is still out on the precise causal relationships, whether observed declines in real wage are a result of human capital depreciation, stereotyping and discrimination, undervaluation of work typically performed by women, or related to broader workplace arrangements, particularly in relation to working hours).

In the majority of OECD countries, with the exception of a brief reserved period for birth mothers, parental leave is open to both mothers and fathers. Yet formally making leave available to both men and women does little to increase the take up of leave by fathers. Policy evaluations suggest two preconditions for encouraging a greater sharing of early parental care between men and women: a high level of wage replacement during leave; and separate, non-transferable leave allocations for each parent. When it is up to parents to distribute leave entitlements between each other, in nine out of ten cases leave is taken by the mother; the experience from Iceland, Norway and Sweden suggests that providing some leave to fathers on a ‘use it or lose it’ basis (at high levels of wage replacement, as all parental leave in the Nordic countries) leads to high levels of leave taking among fathers. Research further suggests that fathers who take parental leave remain more involved in childcare tasks later on, thus contributing to a longer term shift in the gender division of unpaid labor.

Maternity, paternity and parental leaves play an important part in an overall package of work family supports, but need to be supplemented with childcare and other supports to enable parents to both work and care as their children grow up (OECD 2007). Childcare supports typically are not subject to employer mandates; in countries where such mandates are in place, for example in Chile and Egypt employers above a certain size have to provide workplace childcare facilities, the linking of such mandates to the employment of women, rather than employment levels overall, has increased rather than reduced barriers to women’s employment by increasing incentives for hiring discrimination.

More portent in terms of employer mandates is working time flexibility, rights for individual employees to adjust their working time (and place in some countries) arrangements in response to caregiving requirements. During the last decade there has been a rapid increase in the number of countries that have turned to employment mandates to speed up the pace of workplace change. Our review of statutes in 21 OECD countriesⁱⁱⁱ found that 18 of 21 countries gave employees some right to alternative work arrangements to care for their children (most recently such laws came into force in Australia). Rights to alternative work arrangements for employees with dependent children are sometimes introduced as part of parental leave- making it possible to use paid leave time as a means of reducing hours at work when children are young. Other statutes provide such rights as a complement to paid leave; this is the case in Sweden, the

first country to introduce, in 1978, a mandate on employers to allow a reduction of working hours by 25% of normal working time for parents of children less than 8 years of age, and in various transmutations in several countries subsequently. Yet it is perhaps important to note that while rights to adjustments for childcare reasons are most common, rights to working time adjustments to facilitate a return to vocational training and education were introduced earlier, are in place in 12 out of 21 countries, and, to some extent just as care giving flexibility, are being rediscovered and re-invented to respond to the imperative for lifelong learning in the global knowledge economy. Adjustment in work arrangements as part of gradual retirement, in place in 11 out of 21 OECD countries, as measures to enhance return to education, were frequently introduced during recessionary times, as a means of work sharing and response to unemployment. But they too are being re-embraced to respond to changing demographics and expectations of lengthening working lives. The important point in relation to gender equality is that this diversity of motivations for access to working time adjustments may reduce the potential disadvantage and stigma attached to alternative working practice if these were limited to working mothers.

An important difference between flexible working statutes and paid leave statutes is recognition of employers' business prerogatives. An employer has no powers to legally veto the right of a pregnant woman to take leave and return to her job afterwards, as long as tenure requirements are fulfilled. When it comes to adjustments in individual working time arrangements, however, employers typically are able to cite business costs or organizational problems as reasons for rejecting requests for change. This approach is most explicitly anchored in the UK Right to Request, and Duty to Consider, Flexible Working; (a similar approach was subsequently adopted also in New Zealand and Australia). Employers are obliged to formally consider requests for alternative work arrangements (regarding number of hours, scheduling and location of work) but are able to refuse requests if, in their opinion, they would lead to business or organizational costs (the UK law provides seven broad reasons for refusal; there is no external appeal against an employer's decision). Yet even though elsewhere employees can externally appeal employers' business justifications, employers are able to deny changed requests for alternative work arrangements for business reasons. In other words, rights to flexible and alternative work arrangements are framed within a context of business compatibility, with an explicit objective of contributing "to the flexible organization of working time in a manner which takes account of the needs of employers and workers."^{iv}

In European Union member states and Australia, laws targeted at increasing work family compatibility build on important precedents resulting from litigation under both sex discrimination and equal pay statutes, successfully arguing that withholding alternative work arrangements (particularly though not solely part-time work) from women with primary care giving responsibility constitutes indirect sex discrimination (or disparate impact) and that less advantageous terms and conditions for (female) part-time workers constitutes pay discrimination. The United States is an exception among developed nations by neither providing direct labor rights in terms of working time adjustments for family care reasons; nor having a reasonably established tradition of disparate impact litigation as a route to alternative working patterns. Recent guidance on Caregiver

Discrimination issued by the American Equal Employment Opportunities Commission suggests that discrimination faced by employees with family care giving responsibilities is beginning to receive more attention in the United States, too.^v

Whereas there is a considerable body of research on the impact of parental leave or childcare availability on women's labour market and gender equality outcomes, evaluations of the impact of rights to working time adjustments are still less established. While it is clear that lack of flexibility creates barriers to employment, it is probably too early to judge whether positive rights to flexibility reduce such barriers, create new ones or do both. Yet initial evidence suggests that broader approaches to flexibility, beyond an emphasis on part-time work, are particularly successful in reducing the gender imbalance in the take up of flexibility and may contribute to a reduction in the gender pay gap by opening up higher paid occupations on a reduced hours basis..

ⁱ As developed in Williams, Joan. 1999. *Unbending Gender: Why Family and Work Conflict and What to Do About It*; Oxford University Press

ⁱⁱ See Heymann, Jody and Alison Earle. 2009: *Raising the Global Floor: Dismantling the Myth That We Can't Afford Good Working Conditions for Everyone*. Stanford: Stanford University Press

ⁱⁱⁱ See Janet Gornick and Ariane Hegewisch. 2008. *Statutory routes to workplace flexibility in cross national perspective*. Washington, D.C.: Institute for Women's Policy Research

^{iv} Preamble of the *Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC*; Official Journal of the European Communities, 20.01.1998, L14/9

^v See EEOC: Enforcement guidance: Unlawful disparate treatment of workers with caregiving responsibilities. May 23, 2007 <http://www.eeoc.gov/policy/docs/caregiving.html>