

## **Are Your Parental-Leave Policies Legal?**

By Joan Williams

How to find a balance between work and family When my daughter was born in the mid-1980s, I was offered a semester of leave to accommodate my October 1 due date. I got six weeks' salary, and used most of it to pay for my health insurance. Since I "wasn't working," my university had stopped contributing to my health benefits.

In fact, I was working. I finished up the final footnotes of an article in the hour after my water broke. At the time I thought my situation funny, especially when two high-prestige institutions pursued me in response to the article I wrote while I was "not working." It was funny, in a poignant sort of way.

It also was illegal. Illegal, first, to limit me to six weeks of salary when other workers on temporary disability faced no such limits. And illegal to cut me off from my health benefits - again unlike colleagues on temporarily disability for other reasons. Both practices, however, remain common today.

One in three academic institutions have parental-leave policies that violate federal antidiscrimination law, according to a recent study by Saranna R. Thornton, a professor of economics at Hampden-Sydney College, in Virginia. Either the policies treat pregnant women worse than others, typically by imposing conditions not imposed on other temporarily disabled workers, or else they treat pregnant women better, typically by giving mothers, but not fathers, time off after the arrival of a child. Both approaches violate the Pregnancy Discrimination Act, which requires employers to treat pregnant women "the same" as everyone else.

For 20 years colleges have been trying to design a policy that avoids both of those pitfalls. Now there is one, and it's in place at Harvard Law School. Most of the kinks have been ironed out, and the integrated policy for childbirth, child rearing, and other family care giving deserves to be adopted widely.

Childbirth leave exists at most institutions, but it is often offered with conditions that are not attached to other types of temporary disability. Employers cannot legally place arbitrary six- or eight-week limits, require stricter notification periods, or offer less pay and less teaching relief for pregnancy than for other temporarily disabling conditions.

In short, the key to designing a good childbirth-leave plan is to treat pregnancy the same as any other temporary disability, both in terms of written policy and in terms of practice.

Child-rearing leave must be offered on equal terms to men and women. But sometimes such a policy can produce resentment from people who take the time off to care for their children against colleagues who use the leave to get a leg up on their research or take off for Mardi Gras. (No kidding, that really happened.)

In my view, the best model is the policy developed for Harvard Law, which grants a paid

leave to any faculty member who is "the sole caretaker of his or her newborn or newly adopted child at least 20 hours per week, from Monday through Friday, between the hours of 9 a.m. and 5 p.m." Any mother or father can qualify. When requesting the leave, a parent asserts that he or she will be the "sole caregiver" for the requisite period.

That policy deftly avoids the well-documented pitfall of extending benefits to men without requiring that they take on the role of primary caregiver, a role that has traditionally disadvantaged women. It also avoids the pitfall of confusing gender stereotypes with biological sex, as when child-rearing leaves are offered only to women.

As a result, the Harvard policy protects mothers while encouraging fathers to engage in equal parenting, and for good reason. The professor who came up with the policy, Christine Jolls, and her husband both worked flexible hours for several months after the birth of each of their two children. Her husband's company "was great about it," she said. "He worked half time for three or four months ... and I never recall his having to go in on his days off."

Jolls was offered a leave when each of her children was born, but she refused it because at the time the de facto approach was to offer child-rearing leaves only to women. "I felt it was contributing a little bit to what I perceived as a mommy track," she said.

So instead of taking leave, Jolls solved the problem the only way she could: She temporarily "redistributed" the time she would have spent writing to meet her teaching obligations. For her it worked. She got tenure a couple of weeks after the birth of her second child. But the experience motivated her to create a more equitable solution, which became Harvard Law's policy.

Jolls said her family feels a long-term impact from her husband's time as primary caregiver. "When people share it equally at the beginning, each knows how to comfort the baby," she pointed out. Studies in Sweden have confirmed that when fathers take parental leave, they establish closer relationships with their children that persist long after they have returned to work.

The Harvard Law policy is an improvement over the old-fashioned approach of providing leave only for the "primary caregiver," which, sad to say, has proved to be a recipe for creating a mommy track. It also is an improvement over policies that provide leave to "primary or co-equal caregivers," for a subtle reason.

What constitutes "co-equal"? The Harvard policy does not leave that to the imagination. That's important because studies show that men tend to assess their contribution as "equal" even when objective measures show that they are doing nowhere near half the household work.

A Doonesbury cartoon helps explain why. It shows a married couple, Joanie Caucus and Rick Redfern, in bed. Joanie can't sleep because she is distraught about not spending enough time with their son. She knows that Rick loves their son as much as she does but can't understand why he doesn't feel torn. "Well," he answers, "it may be because I'm

spending a whole lot more time on family than my father did, and you're spending far less time than your mother did. Consequently, you feel incredibly guilty while I naturally feel pretty proud of myself." That guilty/smug gender gulf highlights the importance of an objective measure of "co-equal."

At Harvard Law School, the leave is paid. Obviously, that is desirable, and, according to Thornton, not necessarily expensive. Often a professor can be given a semester off for the price of a \$2,000 to \$6,000 adjunct to replace a single required course.

That is not to endorse the exploitation of adjuncts. I don't. But if ever there was a good reason to hire adjuncts on a temporary basis, it's to preserve tenure-track opportunities for women. The common practice now of asking a new parent's colleagues to "volunteer" to teach more simply means that many women, and virtually all men, will "choose" not to take child-rearing leave for fear of alienating their fellow faculty members.

What if it's just not possible to provide paid leave, particularly in state universities in these days of tight budgets?

One option -- first proposed by Robert Drago, a professor of labor studies at Pennsylvania State University, in a slightly different context -- is to set aside a fund to provide paid leaves at least for single parents. Otherwise very, very few single parents will be able to take leaves, and the alternative of having a single-parent professor holding down a full-time job while nursing a newborn every two hours, night and day, is not pretty.

Studies by Jane Waldfogel, a professor of social work at Columbia University, confirm that women who are offered a parental leave end up earning more than other women because they are considerably more likely to remain with their employers after their children are born.

Academic institutions are far behind businesses in the implementation of family-responsive policies. Colleges need to recognize that it is often in their economic self-interest to retain existing faculty members, particularly in the sciences, where laboratory start-up costs can run into the hundreds of thousands of dollars.

Well-designed childbirth and child-rearing leave policies can save money in another way. Thornton's findings highlight that many institutions are sitting ducks for a protracted, embarrassing, and potentially expensive lawsuit challenging their policies.

The final element of a best-practices policy is to deal with elder and partner care at the same time as child care. That is required under a third federal law, the Family and Medical Leave Act.

Why bother restating it? In a profession where only 38 percent of tenured women and 61 percent of men have children, a backlash against family-responsive policies is inevitable unless an institution signals, early and often, that it recognizes that families have responsibilities for elder care and partner care as well as child care. That's why a best-

practices policy should go beyond childbearing and child-rearing leaves. Unpaid time off for seriously ill children, partners, and parents is required anyway under the Family and Medical Leave Act.

It makes no sense to protect someone caring for a child but to leave someone caring for an ailing parent or partner out in the cold. Academe is an environment ripe for backlash because of its high percentage of childfree workers who are cultural entrepreneurs inventing a new vision of a full adult life without children, and the high percentage of childless women who have regretfully sacrificed having kids to the greedy demands of a "vocation" invented by cloistered monks, which still enshrines an Ideal Worker dedicated to the glory of work, not family.

*~Joan C. Williams is a professor of law at American University and director of its Program on WorkLife Law.*