
Chosen Family, Care, and the Workplace

Deborah A. Widiss

ABSTRACT. Although federal law offers, at best, unpaid time off work to care for family members with medical needs, recently enacted state laws guarantee paid leave. This Essay argues the laws are groundbreaking in their inclusion of nonmarital partners, extended family, and other chosen family, and it proposes strategies for effective implementation.

The wedding section in the *New York Times* recently published a feature on “platonic marriages” – best friends who marry as a commitment to being life partners but remain open to dating outside their marriage.¹ This practice simultaneously underscores and disrupts assumptions around the primacy of marriage as the principal marker of adult commitment. It also points toward a deeper truth: modern American families come in many different shapes and sizes.

Marriage rates are declining, while cohabitation rates are rising.² About a quarter of children live with a single parent, a significant share lives with cohabiting parents, and blended family households are increasingly common.³ There has been a marked growth in multigenerational households and in extended

-
1. See Danielle Braff, *From Best Friends to Platonic Spouses*, N.Y. TIMES (May 7, 2021), <https://www.nytimes.com/2021/05/01/fashion/weddings/from-best-friends-to-platonic-spouses.html> [<https://perma.cc/L9LN-SDVV>].
 2. See Juliana Menasce Horowitz, Nikki Graf & Gretchen Livingston, *Marriage and Cohabitation in the U.S.*, PEW RSCH. CTR. (Nov. 6, 2019), <https://www.pewresearch.org/social-trends/2019/11/06/the-landscape-of-marriage-and-cohabitation-in-the-u-s> [<https://perma.cc/W9UF-RCTK>] (noting that since 1995, the share of U.S. adults who are married has fallen from 58% to 53% and the share that are cohabiting has risen from 3% to 7%).
 3. See, e.g., *Parenting in America*, PEW RSCH. CTR. (Dec. 17, 2015), <https://www.pewresearch.org/social-trends/2015/12/17/parenting-in-america> [<https://perma.cc/QRD8-BWQ7>] (stating in the full report that 26% of children live with a single parent, 7% with cohabiting parents, and 15% with two parents in remarriage).

family members serving as caregivers for children living apart from their parents.⁴ Many adults – including about forty percent of adults over the age of sixty-five – live alone, typically relying on a combination of family and friends for help and companionship.⁵ Indeed, fewer than twenty percent of households consist of what many would consider the paradigmatic “family”: a married couple living together with their children.⁶

Given this variety of lived experiences, it is unsurprising that employees often request time off work to care for the medical needs of nonmarital partners and other loved ones who are part of their extended or chosen families.⁷ Employers sometimes grant their requests. But until recently, most employees would not have had any legal right to take such leave.⁸ As a threshold matter, many workers do not receive sick days or medical leave at all.⁹ But even in jurisdictions that mandate leave policies and specify that workers can take time off to care for their family members, the scope of eligible family is sometimes narrowly drawn to include only immediate family, defined as close blood relatives or a legal spouse.¹⁰

Recently enacted laws, mostly at the state and local level, take a dramatically different approach.¹¹ Several guarantee leave to care for intimate partners without requiring legal formalization of the relationship and cover a broad range of

4. See *infra* text accompanying notes 35-37, 42-43.

5. See Mark Mather, Linda A. Jacobsen, Beth Jarosz, Lillian Kilduff, Amanda Lee, Kelvin M. Pollard, Paola Scommegna & Alicia Vanorman, *America’s Changing Population: What to Expect in the 2020 Census*, 74 POPULATION BULL. 1, 13-15 (2019) (reporting that 28% of all American households, and 42% of households over age 65, consist of just one person).

6. See *id.* at 13 -14 (reporting 19% of households include a married couple with children). The share of households that consist solely of a traditional nuclear family – a married couple living together with their shared children – is even lower because the 19% figure includes married couples living with children of either spouse (i.e., stepchildren), and also households with additional extended family, such as grandparents.

7. In this Essay, I typically use “extended” family to refer to persons who are related by blood, marriage, or other legal status to an individual, but who are outside the individual’s “immediate” or “nuclear” family. I use “chosen” family to describe persons who have a closeness with an individual that is like a family relationship, but who are not related by blood or legal status, a category that can include nonmarital partners, relatives of nonmarital partners, and also close friends. See *infra* Part III. That said, “chosen” family can also encompass the more general idea that individuals “choose” whom they consider family, a category that can include immediate family, extended family, nonmarital partners and their relatives, and close friends. In titling this Essay, I am using “chosen” family in this broader sense.

8. See *infra* Part II.

9. *Id.*

10. See *infra* Part III.

11. *Id.*

extended family.¹² Some laws go further and apply to any individual who has a relationship with the employee that is “like” or “equivalent to” a family relationship.¹³ Still others employ a functional approach that simply asks whether a sick individual depends on the employee for care.¹⁴

These new provisions are transformative: They give employees the autonomy to define their *own* concept of families. However, such flexibility can pose administrative challenges.¹⁵ The laws will only achieve their purpose if both the public and private personnel implementing them understand the broad scope of coverage and ensure that employees whose families depart from traditional norms are protected from workplace discrimination.

This Essay provides the first detailed analysis of inclusive family definitions found in employment-leave laws. Part I uses census data and social-science research to illustrate the variety of families and support networks in contemporary America. It also employs an intersectional lens to emphasize why this broader conception of eligible family is particularly important for people of color and the LGBTQ+ community. Part II describes recently enacted laws that provide workers paid time off to help family members with their medical needs, and Part III details how the laws, and proposed federal legislation, define an eligible “family.” Finally, Part IV proposes strategies for effectively administering the family-care provisions in these new employment-leave laws.

A final introductory note: As this essay is being finalized, Congress is actively considering legislation that would guarantee paid family and medical leave for most workers.¹⁶ The draft language recommended by the relevant committee in the House adopts a flexible definition of family that would include extended and chosen family, and it emphasizes the need to ensure that policies are administered without discrimination.¹⁷ Federal legislation in this area is long overdue. However, a silver lining of Congress's failure to act sooner is that it can build on models enacted at the state level that appropriately recognize the variety of modern families.

12. *Id.*

13. *Id.*

14. *Id.*

15. *See infra* Part IV.

16. Paid family and medical leave are both part of a \$3.5 trillion social and environmental infrastructure plan that was approved by the House Committee on the Budget and that, as of October 2021, is pending before the House Committee of the Whole. *See* H.R. 5376, 117th Cong. (2021). Paid sick days are addressed by a different bill. *See* Healthy Families Act, H.R. 2465, S. 1195, 117th Cong. (2021). As of October 2021, the Healthy Families Act has not advanced out of committee.

17. *See* H.R. 5376 § 130001 (to be codified at 42 U.S.C. §§ 2202(c)(2)(A), 2206).

I. THE DIVERSITY OF MODERN FAMILIES

At various points in our lives, every one of us is sick or injured and needs care.¹⁸ When this happens, we typically turn to family, or friends who feel like family, for help.¹⁹ Young children and older adults are particularly likely to need support, but care needs can arise at any age. A victim in a car crash may require emergency surgery, and a cancer diagnosis can initiate a lengthy process of chemotherapy and radiation. Some people have chronic health conditions or disabilities that require care throughout their lives. While care needs are perennial, the range of “family” who might be called upon to meet those needs has changed dramatically in recent decades. Policies premised on the expectation that care will be provided within the traditional nuclear family are out of step with modern America.

First, the assumption that adults will have a spouse to support them is often incorrect. Approximately three in ten adults identify as single, and many are not interested in dating.²⁰ This includes adults of all ages, from young adults,²¹ who frequently live with their parents²² or roommates,²³ to a sizeable share of senior citizens.²⁴ Additionally, a wide spectrum of adult intimate relationships exists.

-
18. Cf. Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J.L. & FEMINISM 1 (2008) (developing a theory of equality premised on recognizing the universality of vulnerability and expecting the state to be responsive to vulnerable subjects).
 19. See, e.g., *Caregiving in the U.S.*, AARP 16 (May 2020), <https://www.aarp.org/content/dam/aarp/ppi/2020/05/full-report-caregiving-in-the-united-states.doi.10.26419-2Fppi.00103.001.pdf> [<https://perma.cc/QXD3-RRAN>] (concluding that approximately 90% of those caring for adults were relatives and 10% are friends, neighbors, or other nonrelatives).
 20. See Anna Brown, *Nearly Half of U.S. Adults Say Dating Has Gotten Harder for Most People in the Last 10 Years*, PEW RSCH. CTR. (Aug. 20, 2020), <https://www.pewresearch.org/social-trends/2020/08/20/a-profile-of-single-americans/#:~:text=While%20about%20three%2Din%2Dten,varies%20widely%20across%20demographic%20groups> [<https://perma.cc/XBY7-3ADD>]. In this study, “single” was defined as neither married nor in a committed nonmarital relationship. *Id.*
 21. *Id.* at 16 (reporting that 41% of people ages 18 to 29 are single).
 22. Even prior to the COVID-19 pandemic, roughly half of young adults aged 18 to 29 lived with a parent. See Richard Fry, Jeffrey S. Passel & D’vera Cohn, *A Majority of Young Adults in the U.S. Live with Their Parents for the First Time Since the Great Depression*, PEW RSCH. CTR. (Sept. 4, 2020), <https://www.pewresearch.org/fact-tank/2020/09/04/a-majority-of-young-adults-in-the-u-s-live-with-their-parents-for-the-first-time-since-the-great-depression> [<https://perma.cc/9U9A-N3M8>].
 23. See Mather et al., *supra* note 5, at 15 (reporting 33% of adults ages 18 to 25 and 9% of adults ages 25 to 44 live with nonfamily).
 24. See Brown, *supra* note 20, at 16 (reporting 36% of adults over the age of 65 are single, meaning that they are neither married nor in a committed nonmarital relationship).

Many adults live with an intimate partner without marrying.²⁵ Indeed, more adults under age forty-four have cohabited than been married.²⁶ Adults may also “live apart together,” identifying as part of a committed relationship but living separately from their partner.²⁷ Consensual nonmonogamous relationships, including stable polyamorous relationships, are also becoming more prevalent.²⁸

Nor is it realistic to expect that only a “parent” would care for a child. Fewer than half of all children live with two parents in their first marriage.²⁹ This is the result of a seismic growth in the nonmarital birth rate³⁰ and a relatively high divorce rate.³¹ It has become much more common for unmarried adults to live together with children, including children from prior relationships; often in this scenario, only one of the adults in the household is a legally recognized parent.³²

-
25. See Horowitz et al., *supra* note 2 (stating that 12% of adults under the age of 40, 9% of adults ages 30 to 49, and 4% of adults over the age of 50 are cohabiting).
 26. See *id.* (reporting 59% of adults ages 18 to 44 have cohabited and 50% have been married). That said, because marriages typically last considerably longer than cohabiting relationships, significantly more people are married at any given point in time. See *id.*
 27. See, e.g., Charles Q. Strohm, Judith A. Seltzer, Susan D. Cochran & Vickie M. Mays, “Living Apart Together” Relationships in the United States, 21 DEMOGRAPHIC RSCH. 177, 190 (2009) (finding that 7% of women and 6% of men report being in a “Living Apart Together” or “LAT” relationship, representing 35% of individuals who are not married or cohabiting). The data set used for this study is dated, but it is difficult to find a newer large-scale study. A smaller study conducted in 2016 found that between 9% and 12% of the adults surveyed reported being in a LAT relationship. See Cynthia Grant Bowman, *How Should the Law Treat Couples Who Live Apart Together*, 29 CHILD & FAM. L.Q. 335 (2017).
 28. See, e.g., M.L. Hauptert, Amanda N. Gesselman, Amy C. Moors, Helen E. Fisher & Justin R. Garcia, *Prevalence of Experiences with Consensual Nonmonogamous Relationships: Findings from Two National Samples of Single Americans*, 43 J. SEX & MARITAL THERAPY 424, 435-36 (2016) (reporting that 21% of single Americans report having engaged in consensual nonmonogamy); see also Kaiponanea T. Matsumura, *Beyond Polygamy* 7-12 (unpublished manuscript) (on file with author) (describing the range of polygynous and polyamorous relationships).
 29. See PEW, *supra* note 3, at 15.
 30. See Nat’l Ctr. for Health Stat., *Percentage of Births to Unmarried Mothers by State*, CTRS. FOR DISEASE CONTROL (Feb. 8, 2021), <https://www.cdc.gov/nchs/pressroom/sosmap/unmarried/unmarried.htm> [<https://perma.cc/Y5SM-HUX3>] (reporting approximately 40% of new mothers are unmarried); see also Deborah A. Widiss, *Equalizing Parental Leave*, 105 MINN. L. REV. 2175, 2192-93 (2021) (gathering studies on nonmarital births and cohabitation).
 31. See Paul R. Amato, *Interpreting Divorce Rates, Marriage Rates, and Data on the Percentage of Children with Single Parents*, NAT’L HEALTHY MARRIAGE RESOURCE CTR. (Dec. 2017) <https://www.healthymarriageinfo.org/wp-content/uploads/2017/12/Interpreting-Divorce-Rat.pdf> [<https://perma.cc/9SBE-UB5R>] (reporting that approximately 45% of marriages end in divorce).
 32. PEW, *supra* note 3, at 15 (reporting that 7% of children live with cohabiting parents).

Additionally, solo parents frequently live with their own parents.³³ Family structures are also often quite fluid. One study found that almost one in three children under the age of six will experience a major change in their household structure, such as divorce, separation, marriage, cohabitation, or death.³⁴

At any given time, a significant group of children—about 2.7 million, or around four percent of all children in the United States—are being cared for by extended family members or close family friends *without* a parent present.³⁵ Such “kinship care” typically takes the form of informal arrangements that do not involve the state foster-care system.³⁶ For example, a grandparent or an aunt might step in while a parent participates in a drug-rehabilitation program or serves a military deployment. That said, child-welfare agencies also routinely look to relatives to provide foster care for children who are removed from their parent’s home because of abuse or neglect.³⁷

Caregivers for the elderly vary widely as well. With baby boomers reaching retirement age,³⁸ Americans over age the age of sixty-five make up a rapidly growing share of the overall population.³⁹ Over eighty percent of senior citizens live on their own or only with a spouse or partner.⁴⁰ They often turn to their

33. See *America’s Families and Living Arrangements: 2020*, U.S. CENSUS BUREAU tbl.C-4 (2020), <https://www.census.gov/data/tables/2020/demo/families/cps-2020.html> [<https://perma.cc/VEG8-ZDXT>] (showing that approximately 17% of children living with one parent live with at least one grandparent as well).

34. See PEW, *supra* note 3, at 16.

35. See *Stepping Up for Kids: What Government and Communities Should Do to Support Kinship Families*, ANNIE E. CASEY FOUND. 2 (2012) [hereinafter *Stepping Up for Kids*]. This number remained relatively steady over the past ten years. See *Kids Count Datacenter*, ANNIE E. CASEY FOUND. (2021), <https://datacenter.kidscount.org> [<https://perma.cc/FH8X-2K53>] (to retrieve statistics showing the percentage of children in kinship care from 2012-2019, enter “kinship care” into the data center search function and select the relevant years).

36. See *Stepping Up for Kids*, *supra* note 35, at 1 (indicating that only 104,000 of the 2.7 million children in kinship care are placed formally as part of the state’s foster care system).

37. See *id.* (indicating that the 104,000 children formally placed by the state in kinship foster care represent one-quarter of all children placed in state custody).

38. Baby Boomers are typically defined as persons born between 1946 and 1964, meaning that in 2021, they are ages 57 to 75. See Richard Fry, *The Pace of Boomer Retirements Has Accelerated in the Past Year*, PEW RSCH. CTR. (Nov. 9, 2020), <https://www.pewresearch.org/fact-tank/2020/11/09/the-pace-of-boomer-retirements-has-accelerated-in-the-past-year> [<https://perma.cc/G275-B7PL>].

39. See Mather et al., *supra* note 5, at 15.

40. See *id.*

middle-aged children for support, many of whom are also raising their own children (and thus belong to the “sandwich” generation).⁴¹ It is also becoming increasingly common for three or more generations of a family to live together.⁴² Older adults also form nontraditional networks of support. This can include sharing space in one’s house with a nonrelative in exchange for caregiving or transportation, living in independent housing with shared communal spaces, relying on help from neighbors in a naturally occurring retirement community, or joining a communal “village” that relies on staff and volunteers to assist older residents.⁴³

There is significant class-based, as well as racial and ethnic, variation in family structures. The marriage rate is correlated with income⁴⁴ and education

-
41. See, e.g., Kim Parker & Eileen Patten, *The Sandwich Generation: Rising Financial Burdens for Middle-Aged Americans*, PEW RSCH. CTR. (Jan. 30, 2013), <https://www.pewresearch.org/social-trends/2013/01/30/the-sandwich-generation> [<https://perma.cc/6RQR-H8DH>] (reporting that a large share of adults in their 40s and 50s have a parent over the age of 65 for whom they provide support and are either raising young children or supporting a grown child).
42. See D’vera Cohn & Jeffrey S. Passel, *A Record 64 Million Americans Live in Multigenerational Households*, PEW RSCH. CTR. (Apr. 8, 2018), <https://www.pewresearch.org/fact-tank/2018/04/05/a-record-64-million-americans-live-in-multigenerational-households> [<https://perma.cc/62XM-NEG7>] (reporting a fifth of Americans now live in a household with three or more generations). COVID-19 accelerated this trend, and experts predict it will continue even as the pandemic recedes. GENERATIONS UNITED, *FAMILY MATTERS: MULTIGENERATIONAL LIVING IS ON THE RISE AND HERE TO STAY* 7 (2021).
43. See Naomi Cahn & Elizabeth Scott, *The 100-Year Life and the New Family Law*, COLUM. L. SCH. SCHOLARSHIP ARCHIVE 1, 4 (2021), https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=3740&context=faculty_scholarship [<https://perma.cc/7NVD-HRDC>]; Melissa Stanton, *6 Creative Housing Options*, AARP LIVABLE CMTYS., <https://www.aarp.org/livable-communities/info-2014/creative-age-friendly-housing-options.html> [<https://perma.cc/8QDN-6A3X>].
44. See, e.g., W. Bradford Wilcox & Wendy Wang, *The Marriage Divide: How and Why Working-Class Families Are More Fragile Today*, INST. FOR FAM. STUD. fig.1 (2017), <https://ifstudies.org/blog/the-marriage-divide-how-and-why-working-class-families-are-more-fragile-today> [<https://perma.cc/ZCN9-2DM4>] (showing that 26% of poor adults, 39% of working-class adults, and 56% of middle- and upper-class adults are married).

level;⁴⁵ the cohabitation rate,⁴⁶ nonmarital birthrate,⁴⁷ divorce rate,⁴⁸ and the likelihood of having children with multiple partners,⁴⁹ by contrast, are inversely related to education and income. There are considerable differences among racial and ethnic groups along many of these vectors as well.⁵⁰ Additionally, people of color are more likely than white people to live in households that include extended families.⁵¹ Even when living separately, cultural norms of multigenerational caregiving—both eldercare and childcare—are prevalent in Black and many immigrant communities.⁵² Thus, policies premised on the assumption that caregiving needs will be met exclusively within the traditional nuclear family can compound disadvantage for already marginalized groups.

-
45. See, e.g., *Marriage and Divorce: Patterns by Gender, Race, and Educational Attainment*, U.S. BUREAU LAB. STAT. tbl.3 (Oct. 2013) <https://www.bls.gov/opub/mlr/2013/article/marriage-and-divorce-patterns-by-gender-race-and-educational-attainment.htm> [https://perma.cc/MC9J-6DHB] (showing that 81% of those lacking a high school degree had married by the age of 46 as compared to 89% of those with a bachelor's degree or higher).
 46. See Wilcox & Wang, *supra* note 44, at fig.2 (showing 13% of poor adults currently cohabiting, as compared to 10% of working class and 5% of middle- and upper-class adults).
 47. See Widiss, *supra* note 30, at 2191-92 (collecting studies showing the inverse relationship between class and education level and the rate of nonmarital childbearing); see also Wilcox & Wang, *supra* note 44, at fig.4 (finding similar results).
 48. See U.S. BUREAU LAB. STAT., *supra* note 45, at tbl.4 (reporting the divorce rate is almost twice as high for individuals with less than a high-school degree than those with a bachelor's degree or higher).
 49. See Lindsay M. Monte, *Multiple Partner Fertility in the United States: A Demographic Portrait*, U.S. CENSUS BUREAU 6-7 & tbls.3a & 3b (2017), <https://www.census.gov/content/dam/Census/library/publications/2017/demo/SEHSD-WP2017-45.pdf> [https://perma.cc/TZB9-CWYU] (showing that adults living in poverty and those with lower levels of education were more likely than higher-income and more highly-educated adults to have children with multiple partners).
 50. See, e.g., U.S. BUREAU LAB. STAT., *supra* note 45, at tbl.3 (showing that Blacks and Hispanics are less likely to marry and, of those married, more likely to divorce, than non-Black and non-Hispanic people); Monte, *supra* note 49, at 6-8 & tbls.3a & 5 (showing that a larger share of Black and Latino parents than white and Asian parents have children with multiple partners); Widiss, *supra* note 30, at 2192-93 (collecting studies showing approximately 70% of Black women and half of Latina women are unmarried when they give birth, as compared to 30% percent of white women); *id.* at 2195 (collecting studies showing differences in cohabitation rate of new parents based on race or ethnicity).
 51. See Michael Zonta, *Housing the Extended Family*, CTR. FOR AM. PROGRESS 16-17 (2016) (reporting that extended families tend to be more racially diverse than nuclear families).
 52. See generally, e.g., Jessica Dixon Weaver, *Grandma in the White House: Legal Support for Multigenerational Caregiving*, 43 SETON HALL L. REV. 1, 23-30 (2013) (describing how cultural norms of multigenerational living and multigenerational care are prevalent in Black, Latino, Asian, Middle Eastern, and Native American families).

The concept of "chosen family" – close friends who are not related by blood or marriage – was first developed in the LGBTQ+ community,⁵³ and a flexible and inclusive definition of family is particularly important for its members. Many older members were rejected by their birth families when they came out; even if their blood relatives were accepting, it is common for members of the LGBTQ+ community to move to more tolerant cities and form networks of informal kin.⁵⁴ These connections remain crucial. LGBTQ+ baby boomers are much more likely to be childless and living without a partner than non-LGBTQ+ baby boomers,⁵⁵ and they often turn to chosen family to provide care and support.⁵⁶ Although stigma is lessening in many communities, LGBTQ+ youth are still disproportionately represented in both the foster-care and homeless-youth populations.⁵⁷ Various facets of identity also intersect, multiplying disadvantage. For example, LGBTQ+ youth of color are disproportionately likely to be homeless and may ultimately be more likely to rely on informal networks of chosen family.⁵⁸

In short, modern American families are extraordinarily varied, and their configurations change over time. Thus, to be effective, family-care policies must be flexible enough to accommodate a wide range of caregiving relationships. Moreover, when a need for care arises, most people consider not just the markers of “closeness” that indicate family, but also the seriousness and duration of the medical need, geographic proximity, and the other demands on potential caregivers. That said, women are disproportionately more likely to provide care for both younger and older family members than men, and support for family caregivers is essential to promote sex equality more generally.⁵⁹

-
53. See generally KATH WESTON, *FAMILIES WE CHOOSE: LESBIANS, GAYS, KINSHIP* (1991) (describing the concept of chosen family as it originated in the LGBTQ+ community).
54. See Nancy J. Knauer, *LGBT Older Adults, Chosen Family, and Caregiving*, 31 *J.L. & RELIGION* 150, 153-54 (2016).
55. See Moira Bowman, Laura E. Durso, Sharita Gruberg, Marcella Kocolatos, Kalpana Krishnamurthy, Jared Make, Ashe McGovern & Katherine Gallagher Robbins, *Making Paid Leave Work for Every Family*, *CTR. FOR AM. PROGRESS* 7 (Dec. 2016), <https://cdn.americanprogress.org/content/uploads/2016/11/29082850/LGBTpaidLeave-report.pdf> [<https://perma.cc/D9R7-YHPA>].
56. See Knauer, *supra* note 54, at 158–59 (highlighting the central role that chosen families play in providing care for older LGBTQ+ adults).
57. See Bowman et al., *supra* note 55, at 6-7.
58. See, e.g., *id.* (noting that the high levels of homelessness may reflect economic and structural inequities rather than higher levels of bias by families of origin).
59. See, e.g., *The Female Face of Family Caregiving*, *NAT'L P'SHIP* 1 (Nov. 2018), <https://www.nationalpartnership.org/our-work/resources/economic-justice/female-face-family-caregiving>

Even individuals who seem to have a relatively traditional family structure may turn to extended or chosen family for help with medical needs. For example, a widow in her seventies who lives far from her adult children might ask a cousin or a friend to accompany her to an out-patient procedure at a hospital. But if she has more serious surgery, with a longer recuperation period, one or more of her adult children might travel to help her. The family and household patterns discussed above, however, indicate that people of color and members of the LGBTQ+ community are particularly likely to look to an unmarried partner or a member of their extended family or chosen family for help. The next two Parts discuss legislative developments that make it much easier for family—expansively defined—to provide such care.

II. LEAVE FOR MEDICAL CAREGIVING

The COVID-19 pandemic dramatically highlighted a preexisting problem: many American workers risk being fired if they take time off work to care for their own medical needs or those of their loved ones. Fortunately, recently enacted laws, mostly at the state and local level, offer workers new important protections. This Part briefly discusses the general contours of discretionary employer policies and relevant legislation.

A. Employer Policies

American employers have wide latitude in structuring workplace absence policies. Outside the legislative mandates discussed in the following Section, employers generally have the discretion to offer employees very little or no time off for health conditions.⁶⁰ To the extent employer policies *do* address these needs, they usually adopt a two-tiered approach. Short-term absences are typically covered by “sick day” policies.⁶¹ Longer-term absences for more serious medical

.pdf [<https://perma.cc/USF3-9P6Z>] (reporting that 60% of caregivers for adult family members are women); Widiss, *supra* note 30, at 2200-03 (collecting studies showing that women continue to perform a disproportionate share of childcare).

60. There are some exceptions to this general statement. For example, federal disability law allows employees to seek reasonable accommodations—including leave—for health conditions of their *own* that qualify as disabilities. See generally *Employer-Provided Leave and the Americans with Disabilities Act*, EEOC (May 9, 2016), <https://www.eeoc.gov/laws/guidance/employer-provided-leave-and-americans-disabilities-act> [<https://perma.cc/R4DP-LU88>]. Although disability law protects against discrimination based on association with an individual with a disability, it does not provide a right to seek leave to assist family members with disabilities.

61. See, e.g., U.S. BUREAU OF LAB. STAT., BULL. NO. 2793, NATIONAL COMPENSATION SURVEY: EMPLOYEE BENEFITS IN THE UNITED STATES, MARCH 2020 tbl.34 (2020), <https://www.bls.gov/ncs>

needs are generally covered by policies known as “family and medical leave,” named after the federal legislation that sometimes requires such leave.⁶² In designing such policies, employers balance the costs associated with providing leave with the competitive advantage such policies can offer in attracting, supporting, and retaining employees.⁶³

There are significant disparities in access to paid time off under employers’ discretionary policies. Most full-time employees receive a week or two of paid sick days each year.⁶⁴ However, fewer than half of part-time employees receive any paid sick leave.⁶⁵ Additionally, employers can choose whether to allow employees to use sick days to care for family members or only their own medical needs, and how broadly or narrowly to define eligible families.

Access to paid leave for longer-term absences to care for family members with more serious health conditions is rare, even for full-time workers.⁶⁶ Just one in four full-time workers receive this benefit, with higher earners being more likely to receive it; virtually no part-time workers receive paid family or medical leave.⁶⁷ Larger employers are required to offer some employees *unpaid* leave for such needs;⁶⁸ this sets a soft norm followed by many businesses.⁶⁹ Thus, most

/ebs/benefits/2020/employee-benefits-in-the-united-states-march-2020.pdf [https://perma.cc/7Y92-VLJU] (reporting that the mean number of sick days employees receive is 8 days).

62. 29 U.S.C. § 2612(a)(1) (2018); *see also infra* text accompanying notes 84-86 (explaining the limitations on the scope of coverage under the Family Medical Leave Act (FMLA)). Extended employee absences for their own health conditions may also be covered by short-term disability policies, which typically offer partial-salary replacement during an absence from work of weeks or months. However, such policies generally do not cover time off to care for family members.
63. *See, e.g., How to Develop and Administer Paid-Leave Programs*, SOC’Y HUM. RES. MGMT., <https://www.shrm.org/resourcesandtools/tools-and-samples/how-to-guides/pages/how-to-develop-and-administer-paid-leave-programs.aspx> [https://perma.cc/2WRL-2BKC].
64. *See* U.S. BUREAU OF LAB. STAT., *supra* note 61, at tbl.31 (2020), (reporting that 88% of full-time civilian workers receive paid sick days); *id.* at tbl.34 (reporting a mean of 8 days and a median of 7 days for civilian workers who receive sick days).
65. *See id.* at tbl.31 (reporting that 45% of part-time civilian workers receive paid sick days).
66. Under the Bureau of Labor Statistics, this leave is classified as “paid family leave,” whereas time off for a worker’s own health condition would more typically be covered under a short-term disability policy. *See National Compensation Survey: Glossary of Employee Benefit Terms*, U.S. BUREAU LAB. STAT. (Sept. 2020), https://www.bls.gov/ncs/ebs/national-compensation-survey-glossary-of-employee-benefit-terms.htm#paid_leave [https://perma.cc/G79T-ESC6].
67. *See* U.S. BUREAU OF LAB. STAT., *supra* note 61, at tbl.31 (reporting that 25% of full-time civilian employees and 8% of part-time employees receive this benefit).
68. *See infra* text accompanying notes 83-86.
69. *See* U.S. BUREAU OF LAB. STAT., *supra* note 61, at tbl.31 (reporting that 92% of full-time civilian employees and 80% of part-time employees receive *unpaid* family leave as a workplace benefit).

employees technically have a right to take unpaid leave for family health conditions.⁷⁰ However, few workers can afford to go very long without a pay check. This is especially true for workers of color, given stark racial disparities in wealth.⁷¹

In the absence of a formal leave policy, missing even a few days of work can lead to job loss. Low-wage jobs, in particular, frequently operate under draconian absence policies: workers are penalized with a “point” for any unplanned absence, regardless of the reason, and even a few points can be grounds for discipline or termination.⁷² Accordingly, when family members need care for injuries or illnesses, many workers, especially low-wage and part-time workers, are left with no good options. If they stay home to provide help, they risk being fired—a potentially devastating outcome if they also face significant medical expenses.

Changes in workplace policies in the wake of COVID-19 may alter this dynamic, but in ways that benefit certain workers while exacerbating preexisting disparities. During the pandemic, large sectors of the economy shifted online, and many employers have announced that they do not expect office workers to ever return full time to in-person offices.⁷³ If remote work remains common, it

70. See *id.*

71. See, e.g., Emanuel Nieves & Dedrick Asante-Muhammad, *Running in Place: Why the Racial Wealth Divide Keeps Black and Latino Families from Achieving Economic Security*, PROSPERITY NOW 10 (2018), https://prosperitynow.org/sites/default/files/resources/Running_in_Place_FINAL_3.2018.pdf [<https://perma.cc/8D3F-SWVM>] (reporting the average white family has \$140,500 in wealth (defined as assets minus debts), as compared to \$6,300 for the average Latino family and \$3,400 for the average Black family).

72. See generally Dina Bakst, Elizabeth Gedmark & Christine Dinan, *Misled & Misinformed: How Some U.S. Employers Use “No Fault” Attendance Policies to Trample on Workers’ Rights (and Get Away with It)*, BETTER BALANCE (2020), https://www.abetterbalance.org/wp-content/uploads/2020/06/Misled_and_Misinformed_A_Better_Balance-1-1.pdf [<https://perma.cc/75SM-BHR8>] (describing the prevalence of no-fault attendance policies). As these authors point out, such policies can violate applicable federal or state laws, including the laws discussed in the text of this Essay.

73. See, e.g., Samantha Subin, *The New Negotiation over Job Benefits and Perks in Post-COVID Hybrid Work*, CNBC (Apr. 23, 2021), <https://www.cnbc.com/2021/04/23/how-post-covid-hybrid-work-will-change-job-benefits-perks.html> [<https://perma.cc/Q2N3-AVPY>] (discussing negotiations over remote work policies post-pandemic).

will help many employees who need to care for family members: They can provide support without necessarily taking a day off work.⁷⁴ But white-collar workers, particularly highly paid skilled workers, are more likely to be able to take advantage of this option because they are more likely to retain discretion over where they work.⁷⁵ By contrast, workers in jobs that require in-person presence – many of which are low-wage service jobs that are disproportionately filled by women of color⁷⁶ – will generally need to take time off work every time a child stays home from school or an elderly parent needs assistance getting to and from a medical appointment. Low-wage workers were already less likely than higher paid workers to receive paid leave; they will now be more likely to need to miss work, and potentially face job loss, when family members are sick.

B. Paid Sick Day and Paid Family Leave Laws

Employers' discretionary policies are clearly inadequate, and existing federal law provides, at best, unpaid leave for some workers. However, a rapidly growing number of states have enacted laws guaranteeing paid sick days and paid family leave, and there is new momentum for comparable federal legislation.

Although federal law currently does not require employers to provide paid sick days, as of October 2021, sixteen states and the District of Columbia, as well as many large cities, guarantee this basic workplace right.⁷⁷ These reforms happened exceptionally quickly, with virtually all of the laws being passed in the last

74. I do not mean to suggest that such workers would necessarily be unfair to their employers. Depending on the family member's needs and the nature of the job, it might be perfectly possible for an employee to meet their regular work responsibilities, while taking breaks as necessary to provide care.

75. See Susan Lund, Anu Madgavkar, James Manyika & Sven Smit, *What's Next for Remote Work: An Analysis of 2,000 Tasks, 800 Jobs, and Nine Countries*, MCKINSEY & CO. (Nov. 23, 2020), <https://www.mckinsey.com/featured-insights/future-of-work/whats-next-for-remote-work-an-analysis-of-2000-tasks-800-jobs-and-nine-countries> [https://perma.cc/MNB5-AXFG] (concluding that remote work will persist mostly for a highly educated, well-paid minority of the workplace).

76. See, e.g., Jocelyn Frye, *On the Frontline at Work and at Home: The Disproportionate Economic Effects of the Coronavirus Pandemic on Women of Color*, CTR. FOR AM. PROGRESS 5 (2020) (“[W]omen of color disproportionately comprise workers in jobs such as maids and house-keeping cleaners, nursing assistants, personal care aids, and home health aides.”).

77. See *Overview of Paid Sick Time Laws in the United States*, BETTER BALANCE (Oct. 18, 2021), <https://www.abetterbalance.org/paid-sick-time-laws/?export> [https://perma.cc/77A4-3HZM]. This includes fourteen states with paid sick-leave laws, and two states that guarantee more general paid time off. See *id.* Some are not yet effective.

ten years.⁷⁸ Most of them are structured so that both part-time and full-time employees accrue paid time off based on hours worked.⁷⁹ Typically, covered employers must allow workers to accrue at least forty hours of paid time off annually; larger employers are sometimes required to allow workers to accrue sixty-four or seventy-two hours.⁸⁰ Workers are paid directly by their employers (in contrast to the state-sponsored paid family- and medical-leave programs, discussed below), and they receive their full regular wages or salaries.

Sick-day laws generally provide time off for a wide range of health conditions and medical needs, as well as preventive care such as routine visits to a doctor. Most also cover the time off an employee might need to take in response to domestic violence, sexual assault, or stalking.⁸¹ Most importantly for this Essay, all of the state sick-day laws currently enacted cover not only the employee's *own* needs, but also time off to care for a family member with medical needs.⁸² That said, the scope of eligible "family" differs across each law, as discussed in Part III.

Federal and state legislation sometimes also guarantees job-protected leave for longer-term absences for more serious medical conditions. Federal law currently provides only a right to *unpaid* leave, under the Family and Medical Leave Act (FMLA).⁸³ The FMLA allows some workers to take up to twelve weeks off for their own or a family member's "serious health condition."⁸⁴ The FMLA only applies to workplaces with at least fifty employees, and within those workplaces, covers only workers who have been employed for at least one year at close to a full-time schedule.⁸⁵ Collectively, these requirements exclude about forty percent of the private workforce.⁸⁶ However, some states have enacted laws that,

78. In 2011, as far as state laws, there was only a limited law in Connecticut. See *Paid Sick Leave*, NAT'L CONF. STATE LEGISLATORS, <https://www.ncsl.org/research/labor-and-employment/paid-sick-leave.aspx> [<https://perma.cc/7PNK-95Q7>].

79. See BETTER BALANCE, *supra* note 77 (showing most of the laws require that workers earn one hour of paid leave for every thirty hours worked, up to at least the minimum annual accruals specified in the laws).

80. See *id.* Some exempt small employers entirely. See *id.*

81. See *id.* (showing virtually all cover time off for employees who are victims of sexual violence and many also cover time off for an employee who might need to help family members who have been victims of sexual violence).

82. See *id.*; see also *infra* Part III (discussing different family definitions employed in the laws).

83. 29 U.S.C. § 2612(a)(1) (2018).

84. *Id.* "Serious health condition" is defined as requiring an overnight stay in a hospital or a condition that causes incapacity for at least three days and requires ongoing medical treatment. *Id.* § 2611(11).

85. See *id.* § 2611(2), (4).

86. See Widiss, *supra* note 30, at 2205 (gathering studies).

like the FMLA, mandate unpaid leave but apply to smaller employers,⁸⁷ and, as noted above, many employers opt to provide unpaid leave, even if not required to do so.⁸⁸ However, few workers can afford to take an extended unpaid leave.

As of October 2021, nine states and the District of Columbia have passed laws that guarantee workers *paid* time off for more extended medical-related absences.⁸⁹ Seven of these laws have been passed since 2016, and the new laws are more generous than the older ones, suggesting growing support.⁹⁰ They typically provide between two-thirds and full wages or salary, up to a cap set around the median wage.⁹¹ This means that low-wage workers receive a larger proportion of their regular income than higher-paid workers.⁹² The length of leave for family care varies from four to twelve weeks, with most allowing twelve weeks.⁹³

In stark contrast to the FMLA, these laws cover employers of all sizes, and many allow independent contractors—a category that includes many workers in the gig economy—to opt in.⁹⁴ States use an insurance model, funded by a very small payroll tax, to provide the benefits; this structure spreads costs so that small employers are not unduly burdened.⁹⁵ Eligible workers receive the benefits from the state, rather than from their individual employers.⁹⁶ Many of the laws

87. See, e.g., VT. STAT. ANN. tit. 21, §§ 470-474 (West 2021) (requiring employers with at least fifteen employees to provide family leave); see also *Family Medical Leave*, NAT'L CONF. STATE LEGISLATORS, <https://www.ncsl.org/research/labor-and-employment/state-family-and-medical-leave-laws.aspx> [<https://perma.cc/3L2G-NNPS>] (providing a chart and an interactive map showing the range of state family-leave laws).

88. See *supra* note 69.

89. See *Comparative Chart of Paid Family and Medical Leave Laws in the United States*, BETTER BALANCE (Oct. 5, 2021) [hereinafter *Comparative Chart*], <https://www.abetterbalance.org/resources/paid-family-leave-laws-chart> [<https://perma.cc/P7AQ-38A5>]. Some of these laws also provide leave for needs related to military service and domestic violence, sexual violence, and stalking. See *id.*

90. I discuss the laws' structure and financing in detail elsewhere, in the context of a fuller discussion of separate provisions in the laws that provide time off to new parents. See Widiss, *supra* note 30, at 2205-06.

91. See *id.*

92. See *id.* at 2205.

93. See BETTER BALANCE, *supra* note 89.

94. See *id.* However, many exclude public employers. See *id.*

95. See Widiss, *supra* note 30, at 2207 (noting that the payroll tax to fund the programs is generally less than one percent of wages, or a few dollars per employee per week). States differ as to whether the tax is assessed on employers, employees, or both. See *id.*

96. See, e.g., *The Process: For Employers*, CONN. PAID LEAVE, https://ctpaidleave.org/s/employer-landing-page?language=en_US [<https://perma.cc/Q8UR-4MYJ>] (explaining that the state paid-leave authority “accepts applications for paid leave benefits, reviews those applications, and if approved, administers benefits to eligible employees”).

guarantee both benefits and job-protected leave.⁹⁷ Some, however, simply provide benefits without ensuring that an employee's job will be kept open.⁹⁸

In terms of eligible medical conditions, most of the state laws directly track the federal FMLA in allowing workers to take up to twelve weeks of leave for their own or a family member's "serious health condition."⁹⁹ But the state laws depart in important ways from the FMLA's definition of eligible "family" for whom a worker can provide care. As discussed in Part III below, many adopt a much more expansive and flexible standard.

In response to COVID-19, the federal government passed temporary legislation that expanded both paid sick leave and paid family leave to meet caregiving needs related to the pandemic.¹⁰⁰ Although the mandatory leave under these provisions expired at the end of December 2020, the pandemic has heightened calls for a more comprehensive and permanent federal solution. In April 2021, President Biden presented a sweeping bundle of policy proposals designed to better support American families, including calls for Congress to enact both paid sick leave and paid family and medical leave.¹⁰¹ Bills that would provide this leave are pending as this Essay is published.¹⁰²

III. RECOGNITION OF NONMARITAL PARTNERS, EXTENDED FAMILY, AND OTHER CHOSEN FAMILY

The state and federal legislation in this area shows a gradual expansion in the scope of eligible "family" for whom a worker can take time off to provide

97. See BETTER BALANCE, *supra* note 89 (indicating that Colorado, Connecticut, Massachusetts, New York, Oregon, and Rhode Island provide job-protected leave to most or all employees taking family leave, while leave rights for a worker's own health needs may be more limited).

98. See *id.* In that instance, an employee might be eligible for job-protected leave under the FMLA or a state analogue, see Widiss, *supra* note 30, at 2207, but those laws would not necessarily cover the same scope of extended or chosen family, see *infra* Part III.

99. See, e.g., WASH. REV. CODE ANN. § 50A.05.010(22)(a) (West 2021) (defining "serious health condition" similarly to the FMLA); MASS. GEN. LAWS ANN. ch. 175M, § 1 (West 2021) (same); see also BETTER BALANCE, *supra* note 89 (describing the scope and length of authorized benefits for each state law).

100. See, e.g., Elizabeth C. Tippet, *Paid Leave Under the Families First Coronavirus Response Act*, WORK L. UNDER COVID-19 (Sept. 15, 2020), <https://worklawcovid19book.netlify.app/ffcra.html> [<https://perma.cc/5N3Z-N3LS>].

101. See *Fact Sheet: The American Families Plan*, WHITE HOUSE (Apr. 28, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/04/28/fact-sheet-the-american-families-plan> [<https://perma.cc/7YSJ-L8ZT>].

102. See *supra* note 16 (describing the inclusion of paid family leave in the infrastructure bill that, as of October 2021, Congress is actively debating, and a separate bill that would provide paid sick leave).

care. The most recently enacted laws are truly transformative. They explicitly give workers autonomy to define their *own* conception of family. The leave laws are thus not only important for the essential benefits that they provide, but also because they serve as models for inclusive family definitions in other contexts.

Advocates trace recognition of chosen family in leave policies back to federal regulations promulgated in the Vietnam War era.¹⁰³ Those regulations allowed federal workers to take time off for the funeral of an “immediate relative,” which was defined as “[a]ny individual related by blood or affinity whose close association with the deceased was such as to have been the equivalent of a family relationship.”¹⁰⁴ This policy was later expanded to permit federal employees to take sick leave for the same expansive range of family,¹⁰⁵ and it was endorsed by Congress in subsequent legislation governing federal workers.¹⁰⁶

However, the first federal legislation requiring private-sector employers to provide medical leave – the FMLA – adopts a much narrower conception of eligible family: only an employee’s child, parent, or spouse.¹⁰⁷ This excludes even close blood relatives such as grandparents, grandchildren, and siblings, as well as more distant relatives. Additionally, although the “parent” and “child” definitions include some functional relationships,¹⁰⁸ “spouse” only covers legal marriages.¹⁰⁹ The law’s implementing regulations also explicitly state that “parent” does not include “parents in law.”¹¹⁰ Finally, children are only covered when they are under the age of eighteen, unless they are “incapable of self-care because of a mental or physical disability.”¹¹¹

103. See Bowman et al., *supra* note 55, at 17.

104. Funeral Leave, 34 Fed. Reg. 13,655, 13,656 (Aug. 26, 1969) (to be codified at 5 C.F.R. pt. 630).

105. See Bowman et al., *supra* note 55, at 17 & n.80.

106. See Federal Employees Family Friendly Leave Act, Pub. L. No. 103-388, 108 Stat. 4079 (1994).

107. 29 U.S.C. § 2612(a)(1)(C) (2018). The statutory language actually specifies “son” or “daughter,” which could be interpreted to exclude nonbinary children, but the definition of “son or daughter” refers generally to a “child.” See 29 U.S.C. § 2611(12) (2018).

108. See *id.* § 2611(12) (defining son or daughter as a biological, adopted, or foster child; a step-child; a legal ward; or a child of a person serving *in loco parentis*); see also 29 C.F.R. § 825.102 (2021) (same). In general, to satisfy the *in loco parentis* standard, a person must provide day-to-day care for a child and financial support. See 29 C.F.R. § 825.122(d)(3) (2021); Widiss, *supra* note 30, at 2222-24 (discussing case law and agency guidance on the *in loco parentis* standard).

109. See 29 C.F.R. § 825.102 (2021) (defining “spouse” as meaning “husband or wife,” and specifying that it applies to same-sex and common law marriages, so long as the marriage was lawful where formed).

110. See *id.*

111. 29 U.S.C. § 2611(12) (2018); see 29 C.F.R. § 825.102 (2021); *Fact Sheet # 28K: “Son or Daughter” 18 Years of Age or Older Under the Family and Medical Leave Act*, U.S. DEP’T LAB. (Jan. 2013), <https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/whdfs28k.pdf>

All of the state paid family and medical-leave laws and most of the paid sick-day laws include broader definitions of “family” than the definition in the FMLA.¹¹² That said, some of the laws expand the scope only minimally and still limit coverage to a specific list of relations. These laws generally cover all of the relationships addressed in the FMLA and add formal legal domestic partnerships, grandparents, grandchildren, and parents of a spouse or domestic partner¹¹³ – or include all of those relationships and also siblings.¹¹⁴ Most of the laws define “parent” and “child” similarly to the FMLA, but do not incorporate the age limit that excludes care for nondisabled adult children.¹¹⁵

Recent laws expand the boundaries more dramatically. States have adopted four different approaches, with some using two or more. The first approach lists specific blood relations and legally recognized relationships such as marriage, but also explicitly covers domestic partners without requiring any kind of formal registration.¹¹⁶ These laws typically provide a multifactor list of attributes (including shared household, shared budgeting, shared children, and length of personal relationship) that are used to determine whether a requisite closeness exists; however, the laws specify that not all factors are required.¹¹⁷ As discussed

[<https://perma.cc/3D72-VRSZ>] (describing in more detail how to apply the disability and “incapable of self-care” standards).

112. See BETTER BALANCE, *supra* note 77 (describing which family members can be cared for under each sick day law); BETTER BALANCE, *supra* note 89 (describing which family members can be cared for under each family leave law).
113. See, e.g., R.I. GEN. LAWS § 28-41-34 (2021) (family leave); CAL. UNEMP. INS. CODE § 3301(a)(1) (West 2021) (family leave).
114. See, e.g., D.C. CODE § 32-541.01(7) (2020) (family leave); WASH. REV. CODE § 50A.05.010(11) (2021); MD. CODE ANN. LAB. & EMPL. §§ 3-1301-3-1311 (LexisNexis 2021) (sick leave); CAL. LAB. CODE § 245 (West 2021) (sick leave).
115. See, e.g., R.I. GEN. LAWS § 28-41-34 (2021).
116. See, e.g., MASS. GEN. LAWS ch. 175M, § 1 (2021) (defining “family member” as the “spouse, domestic partner, child, parent, or parent of a spouse or domestic partner of the covered individual; a person who stood in loco parentis to the covered individual when the covered individual was a minor child; or a grandchild, grandparent or sibling of the covered individual”). Domestic partner in turn is defined inclusively. See *infra* note 117. See, e.g., R.I. GEN. LAWS § 28-41-34 (2021).
117. See e.g., MASS. GEN. LAWS ch. 175M, § 1 (2021) (defining domestic partner as a person who is at least 18 years of age and who “(i) is dependent upon the covered individual for support as shown by either unilateral dependence or mutual interdependence that is evidenced by a nexus of factors including, but not limited to” common ownership of property; common householding; shared children; signs of intent to marry; shared budgeting; and the length of the personal relationship or (ii) has formally registered as a domestic partner); N.Y. WORKERS’ COMP. LAW § 201(17) (McKinney 2021) (establishing family leave while incorporating by reference N.Y. WORKERS’ COMP. LAW § 4 (McKinney 2021) (providing a similar list of non-exclusive factors considered to identify a domestic partner)). The federal bill addressing paid sick days adopts a similar approach, defining “domestic partner” as a person with whom an

in Part I, this approach is significant because many Americans spend a considerable portion of their adult life in a committed romantic relationship – either cohabiting or living separately – without marrying or taking other steps to formalize a legal relationship. The definition could also potentially cover long-term, close platonic friendships that include mutual dependence and support.

The second approach lists specific covered relationships but adds a catch-all phrase: Any individual related to the employee “by blood or affinity” whose “close association” with the employee is equivalent to the enumerated family relationships.¹¹⁸ The pending federal bills include similar phrasing.¹¹⁹ The language obviously covers extended family. It may be particularly useful for kinship caregivers who might otherwise be ineligible to take time off for the medical needs associated with the children in their care.¹²⁰ This approach also arguably covers nonmarital partners and other chosen family, depending on the meaning ascribed to the word “affinity.”¹²¹ Notably, the wording is very similar to the language used in the earlier federal legislation governing benefits for federal employees.¹²² The U.S. Office of Personnel Management, the federal agency charged with implementing that statute, indicated that the “blood or affinity” clause should be interpreted to include individuals who have close family-like relationships, whether or not those relationships rest on blood or formal legal ties.¹²³ Given that states often follow federal interpretations for borrowed language, they might apply the same interpretation.¹²⁴

individual is in a “committed” exclusive relationship where the individuals “share responsibility for a significant measure of each other’s common welfare.” Healthy Families Act, H.R. 2465, S. 1195, 117th Cong. § 4(2) (2021).

118. See, e.g., 2019 Conn. Acts. 19-25 (Reg. Sess.) (family leave); H.R. 2005, 80th Leg. Assemb., Reg. Sess. (Or. 2019) (family leave); ARIZ. REV. STAT. § 23-371(h) (2021) (sick leave).
119. See H.R. 5376, 117th Cong. § 130001 (2021) (to be codified at 42 U.S.C. § 2202(c)(2)(A)); Healthy Families Act, H.R. 2465, S. 1195, 117th Cong. § 5(b)(3) (2021).
120. Only a very small portion of kinship placements are formal foster placements through the child-welfare process. See *supra* note 36. Some kinship caregivers might be able to meet the *in loco parentis* standard or have established a legal guardianship, but the explicit inclusion of extended-family relationships makes it far more obvious that the relationship is covered.
121. Dictionaries define “affinity” as meaning both “a natural attraction or feeling of kinship” and “relationship by marriage.” *Affinity*, AM. HERITAGE DICTIONARY ENG. LANGUAGE, <https://www.ahdictionary.com/word/search.html?q=affinity> [<https://perma.cc/7HW2-VDGP>].
122. See text accompanying *supra* note 104.
123. See 75 Fed. Reg. 33,492 (June 14, 2010) (indicating that the language could encompass a “close friend, to the extent that the connection between the employee and the individual was significant enough to be regarded as having the closeness of a family relationship even though the individual might not be related by blood or formally in law”).
124. See, e.g., Scott Dodson, *The Gravitational Force of Federal Law*, 164 U. PA. L. REV. 703, 721-24 (2016) (providing examples of how “state judicial interpretations of state [employment discrimination] statutes have tended to track federal interpretations of the federal statutes”).

The third model covers close relationships that are “like” family without requiring a connection by “blood or affinity” at all. For example, Colorado’s paid family-leave law specifies that a covered individual may take leave to care for “any other individual with whom the covered individual has a significant personal bond that is or is like a family relationship, regardless of biological or legal relationship.”¹²⁵ New Jersey’s paid family-leave law was amended in 2019 to extend coverage to “any individual . . . that the employee shows to have a close association with the employee which is the equivalent of a family relationship.”¹²⁶ New Jersey’s¹²⁷ and New Mexico’s¹²⁸ paid sick-day laws include similar language. This approach removes any doubt as to whether nonmarital partners and other chosen family is covered. It also has an important signaling effect, affirming the reality of such bonds.

Finally, a few recently enacted statutes employ a functional approach, listing specific covered relationships and then adding any additional people who depend on an employee for care. For example, Colorado’s paid sick-day law allows an employee to take leave to care for any “person for whom the employee is responsible for providing or arranging health- or safety-related care,” as well as immediate family.¹²⁹ Rhode Island’s paid sick-day law includes similar language and also explicitly covers any member of the employee’s household.¹³⁰ The temporary paid sick leave Congress passed in response to COVID-19 took a similar approach.¹³¹

The inclusive family definitions in the leave laws bear a superficial resemblance to earlier policies regarding domestic-partnership benefits, but there are important differences. State and local governments and private businesses began formally recognizing “domestic partnerships” in the 1980s and 1990s, primarily as a mechanism to make benefits and privileges that were premised on marriage

125. COLO. REV. STAT. ANN. § 8-13.3-503(11)(e) (West 2021).

126. See N.J. STAT. ANN. § 43:21-27(n) (West 2021) (describing a “significant personal bond that is, or is like, a family relationship, regardless of biological or legal relationship”).

127. *Id.* § 34:11D-1 (including “any other individual . . . whose close association with the employee is the equivalent of a family relationship”).

128. N.M. STAT. ANN. § 50-17-2(G)(7) (West 2021) (including “an individual whose close association with the employee or the employee’s spouse or domestic partner is the equivalent of a family relationship”).

129. COLO. REV. STAT. ANN. § 8-13.3-402(6)(c) (West 2021).

130. 28 R.I. GEN. LAWS ANN. § 28-57-3(9) (West 2021) (including “care recipient” and “member of the employee’s household” in its definition of family member).

131. See *Families First Coronavirus Response Act: Questions and Answers*, U.S. DEP’T LAB. (2020), <https://www.dol.gov/agencies/whd/pandemic/ffcra-questions/#63> [<https://perma.cc/2YV3-9KF7>] (explaining that leave could be taken to care for an individual who is subject to a quarantine or isolation order, or who “depends” on the employee for care).

available to same-sex couples.¹³² Prime among those benefits was covering a partner under employer-provided health insurance. To qualify as domestic partners, couples typically needed to show that they were in a long-term, committed relationship and lived in a shared household with intermingled finances.¹³³ Recognition thus rested on a very traditional conception of marriage, offering same-sex couples less autonomy than heterosexual married couples.¹³⁴ By contrast, the new family provisions offer employees the freedom to define and determine their *own* conception of what it means to be “family,” without requiring a shared household or financial dependency.

IV. ADMINISTRATING FAMILY AUTONOMY

Expanding family leave to support the varied structures of modern families meets a real and pressing need. But because effective administration generally relies on standards that can be applied consistently by multiple actors, implementation of the new laws may pose some challenges. In the family-leave context, traditional definitions of family—individuals related by blood or marriage—rest on well-established legal concepts with (relatively) clear criteria. By contrast, a functional assessment of whether a person has a “close association” or a “significant” personal bond that is “like” a family relationship is necessarily more subjective. As Katherine Baker points out in a related context, this may raise privacy concerns and risks reinscribing structural inequities.¹³⁵ While a full explication of this issue is beyond the scope of this Essay, this Part offers some preliminary thoughts regarding potential hurdles to effective implementation and proposes some solutions.

The expansive conception of family included in these leave laws responds to the reality that workers routinely seek to provide care for their extended and chosen family—and that legislatures believe they should be able to do so. To achieve this mandate, both public and private personnel administering leave

132. See generally, e.g., Douglas NeJaime, *Before Marriage: The Unexplored History of Nonmarital Recognition*, 102 CALIF. L. REV. 87 (2014) (describing early domestic-partnership benefits). Older heterosexual couples also often sought such recognition, since remarriage could end access to survivors’ social-security benefits.

133. See *id.* at 112-47 (describing private-employer policies and explaining how advocacy and litigation for public domestic partnerships utilized the common conception of marriage).

134. Cf. Mary Anne Case, *Marriage Licenses*, 89 MINN. L. REV. 1758, 1772 (2004) (observing that “marriage now licenses couples to structure their lives as best suits them without losing recognition for their relationship”).

135. See Katherine K. Baker, *Equality and Family Autonomy*, 21 U. PA. J. CONST. L. (forthcoming 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3826639 [<https://perma.cc/S7XW-VUG6>].

laws must understand and properly apply the provisions. This task has at least three facets: (1) developing regulations, policies, and claim forms that appropriately represent the broad scope of statutory language; (2) ensuring that applicants' privacy is respected and that applicants do not face workplace discrimination or harassment; and (3) fairly assessing whether the relation is "like family" or meets the relevant domestic-partnership standard when the legitimacy of a claimed connection is questioned. If administrators are unduly rigid, or substitute their own judgments for the worker's judgment of what constitutes a "real" relationship, the underlying purpose of the laws will not be realized.

A. Developing Regulations, Policies, and Claim Forms

Government agencies in the relevant jurisdictions are generally charged with developing rules, regulations, and other informational materials.¹³⁶ Once in effect, the employers independently administer paid sick-day laws. The paid family-leave laws are a hybrid; benefits are administered by the relevant state agency, but employers manage the leave portion by keeping the job open or placing the employee in a comparable position when she is ready to return.¹³⁷

For the laws to achieve their objective, potential beneficiaries need to know about new protections and everyone tasked with implementing them needs to understand their scope. On this front, initial signs are promising. Publicity and informational materials developed by state agencies in relevant jurisdictions

^{136.} See, e.g., MASS. GEN. LAWS ch. 175M, § 8 (2021) (establishing a department of family leave with authority to promulgate regulations, conduct outreach, and administer the leave program); WASH. REV. CODE ANN. § 50A.05.020 (West 2021) (requiring an employment-security department to administer the family- and medical-leave program, which involved establishing procedures and forms for filing for benefits, and developing and administering outreach to employees to explain the program); *id.* § 50A.05.060 (authorizing the commissioner of the department to adopt rules as necessary to implement the program).

^{137.} See, e.g., CONN. PAID LEAVE, *supra* note 96 (explaining that employees apply to their employer for leave and apply to the state agency for benefits to receive income replacement while on leave).

prominently include the relevant language regarding informal domestic partnerships¹³⁸ and extended or chosen family¹³⁹ in describing the scope of protections.¹⁴⁰ Agencies developing formal regulations implementing the provisions should maintain the flexible understanding of family that the relevant statutory language signals. It also might be helpful to provide examples of different kinds of relationships that might be covered.¹⁴¹

As these laws are phased in, employers will need to appropriately update their own employment policies regarding sick days and family leave. It also will be essential for employers to train supervisors and human-resources personnel on the new provisions, making clear that the scope of family coverage is much broader under the new state laws than it is under the FMLA. Institutional leaders in the human resources field, such as the Society for Human Resources Management (SHRM), and legal counsel can assist with this by providing model policy language and conducting trainings.

Relevant forms should also signal that nonmarital partners, extended family and other chosen family may be covered. The state administers claims for family leave. Most state forms simply ask applicants to check a box indicating the connection to the person for whom they will be caring, such as a spouse or grandparent.¹⁴² The forms sometimes require the worker to affirm or assert that the information provided is accurate, but they generally do not require any other

138. See, e.g., *Paid Family Leave for Family Care: What Is Family Care?*, N.Y. STATE (2021) <https://paidfamilyleave.ny.gov/paid-family-leave-family-care> [https://perma.cc/3X9H-AWHB] (specifying that family members include “domestic partner[s],” including same and different gender couples, and not requiring legal registration).

139. See, e.g., *Frequently Asked Questions: Eligibility*, CONN. PAID LEAVE (2020), https://ctpaidleave.org/s/frequently-asked-questions?language=en_US [https://perma.cc/CXB8-ZCW3] (including the “blood or affinity” standard explicitly).

140. This is a striking difference from the information they provide regarding parental status, which tends to omit reference to persons serving *in loco parentis*. See Widiss, *supra* note 30, at 2248.

141. Cf. 75 Fed. Reg. 33,492 (June 14, 2010) (providing extended discussion, with many different examples, of the coverage of extended and chosen family under provisions governing federal workers).

142. See, e.g., *Forms for Applying for Paid Family & Medical Leave*, WASH. PAID FAM. & MED. LEAVE (Aug. 2020), <https://paidleave.wa.gov/app/uploads/2020/11/Paid-Leave-Certification-Forms-11-09-2020.pdf> [https://perma.cc/J7EP-EXBN] (providing a simple check box for the relevant family relationship).

proof of the family relationship.¹⁴³ The federal agency charged with administering leave benefits for federal employees takes a similar approach.¹⁴⁴ Claim forms for the newer laws should simply add an additional check box with the relevant statutory standard for partners, extended, or chosen family.

Some administrators might believe that a worker should be required to provide more rigorous documentation of a close relationship to claim benefits to care for family who are not part of an employee's nuclear family. While it is possible that expanding the scope of eligible family could open the door to misuse, initial implementation of leave laws with flexible standards suggests this has not been a significant problem.¹⁴⁵ The structure of the laws includes an element of built-in deterrence: if an employee exhausts her leave allotment caring for a casual acquaintance or distant family member, she risks being fired if she subsequently needs to take time off for her own medical needs or to care for a closer family member.¹⁴⁶ Additionally, workers who lie on a form may be subject to discipline by their employers.¹⁴⁷ And for family leave, the family member receiving care typically must provide medical certification to establish that her health needs meet the “serious health condition” threshold,¹⁴⁸ which further reduces the risk of frivolous or fraudulent claims.

143. See, e.g., *Certification of Family Relationships (PFL-FR)*, D.C. PAID FAM. LEAVE (June 2020), <http://dcpaidfamilyleave.dc.gov/wp-content/uploads/2020/07/PFL-FR.pdf> [<https://perma.cc/XSJ8-59DZ>] (asking applicants to enter the code that corresponds to the family relationship and to “certify” that the information provided is “true and complete”). This is very different from the requests for bonding leave, which typically require a birth certificate, voluntary acknowledgement of paternity, or adoption or foster papers. See Widiss, *supra* note 30, at 2248. In that context, the more detailed certification arguably is akin to the certification of medical need, in that it substantiates a new birth, adoption, or foster arrangement. *Id.*

144. See 75 Fed. Reg. 33,494 (indicating the Office of Personnel Management (OPM) generally does not require proof a domestic partnership or proof of other family relationships).

145. See Bowman et al., *supra* note 55, at 16–17 (citing a report submitted by OPM after implementing an expanded-family definition in federal law that indicated employees had used, on average, less than one-third of available leave).

146. See *supra* text accompanying notes 60 & 72 (discussing how employees can often be terminated for missing work for medical needs, unless a leave law applies).

147. See, e.g., Heather R. Huhman, *What Should Employers Do About Misrepresentation?*, ENTREPRENEUR (Feb. 26, 2015), <https://www.entrepreneur.com/article/243326> [<https://perma.cc/3QF4-NXNQ>] (concluding that in most situations employers have power to fire or otherwise discipline dishonest employees).

148. See, e.g., WASH. PAID FAM. & MED. LEAVE, *supra* note 142 (requiring documentation from a medical professional of the family member’s serious health condition).

Workers should not be required to pre-identify the full universe of persons who might be considered “family” for leave purposes.¹⁴⁹ As Part I emphasized, both the nature of the medical need and when it arises will affect who might provide care. Nor should employers or state administrators expect that any such designations would necessarily be reciprocal. That is, an employee might legitimately ask to take leave to care for a cousin or an aunt, even if that employee would turn to her spouse if she herself needed care.

B. Addressing Privacy and Discrimination Concerns

Employers should also take steps to ensure that employees do not face discrimination, harassment, or retaliation at work for taking leave. In surveys assessing the efficacy of the FMLA, workers routinely indicate that they fear negative repercussions for taking time off work, even though such retaliation is illegal.¹⁵⁰ This risk may be heightened for workers seeking leave to care for chosen or extended family under the new laws. Supervisors or coworkers might not only resent any inconvenience that comes from covering the leave itself, but also feel that the time off was unwarranted because the care recipient was not a “real” family member. As Part I details, marginalized communities are more likely to rely on care networks outside the nuclear family, meaning such resentment could be intertwined with racism, sexism, or animus based on sexual orientation or gender identity.¹⁵¹ Some kinds of chosen family are further stigmatized, such as choosing to be in a polyamorous relationship or serving as a kinship caregiver because of a parent’s drug abuse or incarceration.

I have explored elsewhere how employees can face adverse actions at work for the exercise of “intimate liberties” that merit constitutional protection, such

149. Cf. Baker, *supra* note 135 (suggesting that nonmarital couples should be required to register to be recognized as functional families as a way of mitigating privacy concerns). That said, employers might invite workers to provide a list of potential care recipients, so long as the list also allowed updating and revision.

150. See, e.g., ABT Associates, *Employee and Worksite Perspectives of the Family and Medical Leave Act: Results from the 2018 Surveys*, U.S. DEP’T LAB. (July 2020), <https://www.dol.gov/sites/dolgov/files/OASP/evaluation/pdf/FMLA%20Report%20OnePager.pdf> [<https://perma.cc/682V-A2ZB>] (reporting that 36% of all employees and 59% of low-wage workers did not take a needed FMLA leave because they believed that they might lose their job).

151. The proposed federal paid family and medical-leave legislation includes a requirement that the government conduct a “robust program” to analyze and prevent disparities on the basis of “race, color, ethnicity, religion, sex, sexual orientation, gender identity, disability, age, national origin, family composition, or living arrangements.” See H.R. 5376, 117th Cong. (2021) § 130001 (to be codified at 42 U.S.C. § 2206); see also *id.* (proposing amendments to be codified at 42 U.S.C. § 2207(b)(9) that would fund training to prevent such discrimination); *id.* (proposing amendments to be codified at 42 U.S.C. § 2208(b) that would fund research to assess any such disparities).

as nonmarital pregnancy or cohabitation.¹⁵² Although the state may not punish individuals for engaging in nonmarital intimacy, courts often interpret existing antidiscrimination law to offer no protection from workplace discrimination on these grounds.¹⁵³ I have argued that even under more general antidiscrimination laws, these cases frequently rely on an untenable distinction between status and conduct.¹⁵⁴ The new paid-leave laws are more explicit that some kinds of discrimination based on family relationships would be unlawful.¹⁵⁵ Nonetheless, illegal discrimination of all kinds occurs routinely, and most employees (or former employees) never challenge unfair treatment in court.¹⁵⁶

Rather than relying on after-the-fact litigation, effective implementation will depend on employers protecting worker privacy in the first place. Employers generally are required to keep health information separate from the rest of an employee's personnel records.¹⁵⁷ The same rules should apply to information or supporting documentation regarding family status. Additionally, as noted above, employers and outside organizations such as SHRM or management-side law firms should provide training to personnel involved in administering the programs. This training should explain not only the scope of the laws, but also *why* flexible understandings of family are essential. That is, training should provide a snapshot of the many varied forms of the modern family and make clear that it is reasonable and appropriate for workers to provide care for intimate partners, extended family, and other chosen family.

152. See Deborah A. Widiss, *Intimate Liberties and Antidiscrimination Law*, 97 B.U. L. REV. 2083 (2017).

153. See *id.* at 2119-40.

154. See *id.* at 2123-25 (describing and critiquing court decisions holding that landlords may discriminate against cohabiting couples, notwithstanding statutory prohibitions on marital status discrimination, because cohabitation is "conduct" not "status"); *id.* at 2135-37 (describing and critiquing court decisions holding that employers may discriminate against unmarried pregnant women, notwithstanding statutory prohibitions on pregnancy discrimination, because nonmarital intimacy is "conduct" not "status").

155. See, e.g., MASS. GEN. LAWS ch. 175M, § 9 (2021) (providing that it is unlawful for an employer to discharge, fire, or discriminate against an employee for "exercising any right to which such employee is entitled under" the leave law); *id.* at § 1 (explicitly allowing employees to take leave to care for a nonmarital domestic partner who is dependent or interdependent on the employee).

156. See, e.g., Jenny R. Yang & Jane Liu, *Strengthening Accountability for Discrimination: Confronting Fundamental Power Imbalances in the Employment Relationship*, ECON. POL'Y INST. (2021), <https://files.epi.org/pdf/218473.pdf> [<https://perma.cc/424N-NFKZ>] (identifying multiple power imbalances that deter employees from filing complaints and allow individual and systemic discrimination to go unaddressed).

157. See, e.g., 29 C.F.R. § 825.500(g) (2021) (providing that medical-history records and documentation for FMLA leave shall be "maintained as confidential medical records in separate files/records from the usual personnel files").

Training should also reaffirm that it is illegal to discriminate or retaliate against an employee for requesting or taking leave. In the FMLA context, unlawful retaliation includes discouraging employees from requesting or using leave, denying future professional opportunities based on an employee's having requested or used leave, or counting FMLA leave under "no fault" attendance policies.¹⁵⁸ Similar standards would likely apply under the state or local laws providing more extensive paid leave.

C. Assessing Legitimacy of Claims

Finally, if questions arise as to the legitimacy of the claimed connection, administrators – and ultimately courts – might be required to assess what kind of personal relationships are "like" family.¹⁵⁹ This is a comparative process that necessarily calls for identifying the key markers of what constitutes a "family" relationship and evaluating factual support for the claimed personal connection.¹⁶⁰

As a threshold matter, it is important to distinguish the recognition of family for employment-leave purposes from other contexts in which functional family relationships have been considered. Many such cases arise when one person alleges that a family-like relationship has existed and another person in the putative "family" challenges the claim, typically because they have since separated. For example, an adult seeking to be recognized as a de facto parent, and thus eligible for legal and physical custody of a child, will seek to prove, often over the objections of an already-recognized parent, that she has played a parental role for a child.¹⁶¹ Or a person who was in a long-term nonmarital relationship that has since ended may allege that during the relationship she minimized her financial earnings to provide support to her partner, and thus has a claim to a

158. See, e.g., *Fact Sheet #77B: Protection for Individuals under the FMLA*, U.S. DEP'T LAB. (Dec. 2011), <https://www.dol.gov/agencies/whd/fact-sheets/77b-fmla-protections> [<https://perma.cc/S2MJ-BUHJ>].

159. Cf. WASH. REV. CODE ANN. § 50A.05.025 (West 2021) (authorizing the commissioner of the employment-security department and an appeals commission to subpoena documents to resolve disputes under the family-leave program); *id.* § 50A.05.040 (establishing an ombuds office to investigate and attempt to resolve complaints relating to the leave program).

160. These laws are, implicitly at least, premised on the idea that a family offers positive care and support for each other. This is often true, but it is not always true, and even the most loving of families typically includes some level of discord or disagreement.

161. See, e.g., *Sinnott v. Peck*, 180 A.3d 560 (Vt. 2017) (seeking recognition as a de facto parent of a child after the plaintiff's relationship with the child's adoptive mother ended); *Conover v. Conover*, 146 A.3d 433 (Md. 2016) (seeking recognition as the de facto parent of a child after the plaintiff separated from the child's biological mother); see also Courtney G. Joslin, *De Facto Parentage and the Modern Family*, 40 FAM. ADVOC. 31 (2017) (discussing recent judicial and legislative developments regarding de facto parenthood recognition).

share of her partner's property.¹⁶² In both of these contexts, even if one agrees as a matter of law that these relationships can be akin to other forms of "family," it is generally appropriate for courts to carefully scrutinize these claims' factual basis. This is both because the stakes are high—recognition of one person's claim diminishes the familial rights or autonomy of another person—and because discord or animosity between the parties may heighten the risk of false claims.¹⁶³ Moreover, in these contexts, the alleged family-like connection is often contested by one of the parties.

Family-leave policies will not typically pit one family member "against" another. Rather, recognizing family in this context imposes a burden on a third party—the employer or the state. Thus, the concern could be that the relevant parties might collude in falsely asserting a family relationship exists. Again, however, other contexts that impose costs on third parties often concern high-cost open-ended benefits, such as health insurance for a partner¹⁶⁴ or a path to citizenship.¹⁶⁵ The sick- and family-leave laws, by contrast, provide a relatively short time off work. Moreover, as noted above, they include a built-in element of deterrence against abuse because an employee who exhausts her leave on a spurious claim would have no recourse if she or a close family member subsequently needed care.¹⁶⁶ This suggests administrators should err on the side of assuming legitimacy. This will help to ensure that the laws achieve their objective: providing immediate support to workers in times of need.

Nonetheless, administrators may sometimes need to substantively analyze whether a claimed relationship is "like" family. In answering that question, it seems relatively obvious that a romantic monogamous relationship between two adults (of whatever sex) would meet a requisite threshold. Likewise, a household

162. See, e.g., Albertina Antognini, *Nonmarital Contracts*, 73 STAN. L. REV. 67, 113-17, 120-22 (2021) (providing examples of several such lawsuits, while also observing that courts are often reluctant to enforce such claims).

163. See, e.g., *id.* at 150 (discussing the concern of fraudulent claims in the context of claims by former nonmarital partners, while also critiquing this assumption); Joslin, *supra* note 161, at 32-33 (emphasizing how functional-parent tests require a petitioner to prove that the legal parent encouraged the formation of the relationship and excludes relationships developed with the expectation of financial compensation).

164. See, e.g., Kaiponanea T. Matsumura, *Beyond Property: The Other Legal Consequences of Informal Relationships*, 51 ARIZ. ST. L.J. 1325, 1339-41 (2019) (discussing factors employers use in assessing domestic partners for insurance benefits).

165. Notably, in the citizenship context, the government scrutinizes even *legal* marriages to make sure that they are not fraudulent. See Kerry Abrams, *Marriage Fraud*, 100 CALIF. L. REV. 1, 30-37 (2012) (discussing the range of factors that the government uses in the immigration context to evaluate marriages).

166. See *supra* text accompanying notes 60 & 72 (explaining that absent legislative mandates, employees can be fired for absences).

that is structurally similar to a nuclear family, such as an unmarried couple and children of either member of the couple, or an aunt raising a niece, should clearly qualify. But what about a polyamorous family, who may or may not share a household?¹⁶⁷ Or a collaborative childrearing co-op of single moms?¹⁶⁸ A group of elderly persons who live together in a cohousing community?¹⁶⁹ Close friends who have never lived together, but count on each other for primary emotional or financial support, rather than on romantic partners?¹⁷⁰

To achieve the underlying purpose of the laws, administrators and courts should recognize that all of these arrangements could, at least sometimes, be appropriately characterized as “like” a family. Though they depart from the traditional nuclear family, each of these relationships might give rise to close personal bonds and each might describe persons who would support each other with medical needs. By passing laws with expansive and flexible language, legislatures have signaled their understanding that family and family-like relationships vary enormously, and that they exist in the absence of blood ties, legal ties, or other tangible markers such as shared households. However, there is a risk that administrators or courts would apply their own moral standards to deem some relationships as categorically improper. Thus, an administrator might recognize a collaborative childrearing co-op but not a polyamorous family, even if both are essentially a collection of adults sharing in the rearing of children. This kind of selective recognition would be inappropriate, just as is generally inappropriate for employers to second-guess an employee’s religious beliefs.¹⁷¹ Barring special

167. See generally, e.g., Mark Goldfeder & Elisabeth Sheff, *Children of Polyamorous Families: A First Empirical Look*, 5 J.L. & SOC. DEVIANCE 150, 189-236 (2013) (describing a 15-year longitudinal study of polyamorous people and their children); Matsumura, *supra* note 28, at 20-22 (discussing the prevalence and variety of structures of plural relationships including children).

168. See, e.g., *Single Mom Defined: Babysitting Cooperative*, TRYING TOGETHER (Sept. 3, 2020), <https://tryingtogether.org/single-mom-babysitting-cooperative> [https://perma.cc/244Z-UQFW] (describing a babysitting cooperative for single mothers); *About*, COABODE (2021), <https://www.coabode.org/about/article/1> [https://perma.cc/K8QM-YRC9] (describing an organization that facilitates house-sharing and childcare collaboration by single mothers).

169. See, e.g., BETH BARKER, *WITH A LITTLE HELP FROM OUR FRIENDS: CREATING COMMUNITY AS WE GROW OLDER* (2014) (describing intentional co-housing communities in which residents own individual houses but also share yards, gardens, and common space and encourage mutual support).

170. Cf. Braff, *supra* note 1 (describing close platonic friends who relied on each other as life partners).

171. See, e.g., 29 C.F.R. § 1605.1 (defining religious practice to include “moral or ethical beliefs as to what is right or wrong which are sincerely held with the strength of traditional religious views ... [even if] no religious group espouses such beliefs”); *Adeyeye v. Heartland Sweeteners LLC*, 721 F.3d 444, 451-53 (7th Cir. 2013) (emphasizing the relevant inquiry is whether the employee’s religious beliefs are (1) “religious in [the] person’s own scheme of things” and

considerations that might apply if recognition of a family relationship would be in tension with an employer's religious beliefs,¹⁷² the laws should be interpreted to provide autonomy to the workers to identify their *own* chosen family.

A deeper critique of the new laws might ask why recognition should be premised on family at all.¹⁷³ Rather than requiring a worker to assert that a non-marital partner, distant relative, or friend is “like” close family, laws could empower workers to simply take leave for anyone they would like to help. As noted, some laws gesture in this direction by relying on a functional assessment of whether the individual depends on the worker for care, rather than a qualitative assessment of the family-like nature of the relationship.¹⁷⁴ Ultimately, however, it seems likely that lawmakers, and probably much of the public, understands “family” to denote a particularly special kind of love, commitment, and support that employers can and should accommodate. That said, by recognizing the significance of extended- and chosen-family bonds – and ensuring that workers can take time away from work to care for those loved ones – the laws rework and expand the conception of family as far more capacious than traditionally recognized.

CONCLUSION

Under American workplace policies, many workers can be fired if they stay home to care for loved ones who are sick or injured. Fortunately, a rapidly growing number of states have passed legislation that ensures workers can take paid time off as necessary for both short-term and long-term medical conditions. These laws are groundbreaking in their expansive definitions of family. Many include intimate partners, regardless of legal status, and other extended and family. This flexibility is crucial because only a sliver of modern American households consist of a traditional nuclear family.

(2) “sincerely held,” opining that courts “are not and should not be in the business of deciding whether a person holds religious beliefs for the ‘proper’ reasons”).

172. There has been extensive litigation in recent years on similar tensions, such as businesses’ obligations to comply with policies prohibiting discrimination on the basis of sexual orientation or gender identity or to provide support for contraception. See Widiss, *supra* note 152, at 2102-09 (discussing a range of potentially applicable statutory and constitutional principles); see also, e.g., *Fulton v. City of Phila.*, 141 S. Ct. 1868 (2021) (holding that the Philadelphia could not require a foster care organization affiliated with the Catholic Church to consider same-sex couples as foster parents).

173. Cf. Laura A. Rosenbury, *Friends with Benefits*, 106 MICH. L. REV. 189 (2009) (advocating explicit recognition of caregiving provided by friends).

174. See *supra* text accompanying notes 129-134. This approach opens up other questions, such as what would happen when a previously independent adult, who has not required care, suddenly needs support.

These laws' enactment is an important step forward. However, effective administration will be essential to achieve their promise. State agencies charged with implementing the laws should develop regulations and claim procedures that preserve the flexibility that these statutes' language signals. Supervisors and human-resources departments will need to take steps to ensure that employees who seek leave are protected from adverse actions at work, and particularly that those whose families depart from traditional norms do not face workplace discrimination. And finally, when assessing whether or not a claimed connection is "like" family, administrators and courts should recognize that the laws give workers the autonomy to define their *own* conception of family, and that this may depart considerably from the paradigm of a married couple raising their shared children. Hopefully, with time and effective administration, the new laws will not only allow workers to care for loved ones without fearing losing a job, but also serve as a model more generally for recognizing the varied and often fluid nature of the modern American family.

Deborah A. Widiss is Professor of Law, Associate Dean for Research and Faculty Affairs, and Ira C. Batman Faculty Fellow, Indiana University Maurer School of Law. I am grateful to Rachel Arnow-Richman, Naomi Cahn, Doron Dorfman, Tristin Green, Orly Lobel, Kaiponanea Matsumura, Nicole Buonocore Porter, Leticia Saucedo, and Michelle Travis for insightful suggestions on earlier drafts. I am also grateful for feedback I received when presenting this project at the 2021 Law and Society Association conference, the 2021 Family Scholars and Teachers Conference, the 2021 Roundtable on Nonmarriage, and the 2021 Colloquium on Scholarship in Employment and Labor Law. Many thanks, too, to the editors of the Yale Law Journal, particularly Raleigh Cavero, for their conscientious work finalizing this Essay for publication.