

POTENTIAL LEGAL PITFALLS FOR THE INTERNATIONAL COMPANY: NAVIGATING WORK LEAVE LAWS IN THE USA AND HUNGARY (and some brief comparisons with other European laws)

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Abstract

The American worker's right to time off work for personal reasons as specified in a federal statute, the 1993 Family and Medical Leave Act, is sparse relative to the more liberal European rights. With a focus on Hungarian law, this article compares these two bodies of law regarding length of leave; reasons for leave; any conditions the worker must meet for such entitlement; compensation during leave, if any; and consequences of abuse of rights. A brief survey of comparable laws in some other eastern European countries (Croatia, Poland, Czech Republic, the Baltics, Finland, Bulgaria, Romania, and Turkey) shows the generous leave right trend not apparent in American domestic law.

Typically, European workers have statutory job security, whereas the several United States generally recognizes the "employment-at-will" rule, permitting the employer to terminate without cause. Only those discharges based upon grounds specified in federal legislation—race, color, religion, national origin, disability, or age are prohibited. An exception to this right-to-terminate applies to the worker during and immediately after lawful leave.

The purpose is to present a guide for the enterprise doing business in both the USA and Eastern Europe, in particular, Hungary. Many management prerogatives that are taken for granted by American employers would impose considerable liability in a European setting.

Key words: comparative law; transnational commerce; work leave laws; social benefits; termination rights

„One of the symptoms of an approaching nervous breakdown is the belief that one's work is terribly important.”
Bertrand Russell, 19th century British philosopher

1. Introduction

Learned philosopher Russell would find himself closely aligned with the underlying rationale of most European legislatures with regard to work leave rights. However, the relegation of personal concerns to one's work duties in the United States stands in stark contrast to the comparatively ample right to leave from work characteristic of most European countries.

The 1993 Family and Medical Leave Act (hereinafter FMLA 29 U.S.C. secs. 26 *et seq.*), the first bill signed into law by President Bill Clinton, was adopted by the U.S. Congress after an earlier veto of a similar measure by President George H. W. Bush. (President Bush vetoed a similar bill, H.R. 770 on June 29, 1990.) Unlike social states in Europe, this was the first federal law since the 1935 Social Security Act (Pub. L. 74-271, 49 Stat. 620, enacted August 14, 1935, codified at 42 U.S. C. Ch. 7) that mandated that employers grant employment benefits to workers.

In contrast to the FMLA, the European employer has far greater responsibilities under the law regarding right to leave from work. This article will summarily explain a business' obligations under the FMLA for purposes of comparison with laws in European Union countries. Expansion by American companies is increasing exponentially, particularly into Eastern European countries, an area that had been relatively meagerly tapped by North American investors in comparison with the West of Europe. Using Hungary as an example, rights and obligations of American vis-a-vis European workers and employers are established in statutes with stark contrasts. The American or European business considering investing or expanding onto another continent should be aware of the breadth of the more liberal workers' rights in Europe in general, and of legislation assuring relatively lengthier and more generous work leave in particular. (For an International Labour Organization overview of maternity rights alone in the 167 member nations, see *Maternity at Work: a review of national legislation*/International Labour Office. Conditions of Work and Employment Branch—2nd edition. Geneva: ILO 2010.)

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Europe has taken a more pro-active stance in addressing concerns for a liberal work-personal life balance than has the United States Congress. (See, e.g., A. Zbyszewska, *Reshaping EU Working Time Regulation: Towards a More Sustainable Régime*, 2016 (3) EUROPEAN LABOUR LAW JOURNAL.)

After a brief summary of the FMLA, Hungarian laws assuring leave from work are explained. A cursory look at similar laws in other Eastern European countries that are member states of the European Union will illustrate the same trend of workers' rights that are substantially broader than United States law provides. (A portion of the research supporting text on the FMLA and Hungarian laws was the basis a lengthier article in the 2016 COMPARATIVE LAW YEARBOOK FOR THE INTERNATIONAL BUSINESS, published annually by the Center for Legal Studies in Salzburg, Austria.)

2. Why Hungary?

Twenty-one per cent of all investments in Hungary are by foreign automotive companies (more than 600, for example, Suzuki, Audi, Opel, and Daimler), an industry that is among the best developed in the former Eastern Bloc countries. (*The Central and Eastern European automotive market*. [www.ey.com>Home>Industries>Automotive& Transportation](http://www.ey.com/Home/Industries/Automotive&Transportation) Accessed March 14, 2017.)

Six of the ten top electronics manufacturing companies in Europe have branches in Hungary, and 22% of her exports are in electronics goods, a sector where Hungary leads the Central and Eastern European Region (Eugo.gov.hu/key-facts-about-hungary/main-industries).

Hungary has the most developed pharmaceutical and biotechnological industry base in the Central and Eastern European region. (*Id.*) Additionally, her wine-growing industry is thriving, with seven wine regions in this country that is approximately the size of the American state of Indiana. Other attractions include a flat corporate income tax rate of 9% as of January 1, 2017 (Price Waterhouse. [taxsummaries.pwc./.../Hungary-Corporate-Taxes-on-corporate-income](http://taxsummaries.pwc.com/Hungary-Corporate-Taxes-on-corporate-income)), the lowest in the European Union. (YAHOO! News, Nov. 17, 2016. <https://www.yahoo.co/news/hungary-cut-corporate-tax-rate-eu-low...>)

Unfortunately, Hungary is not yet in the Eurozone. The currency is the forint (at this writing, 278/\$1 US), so one traveling to neighboring Austria, Slovenia, or Slovakia must maintain some reserve of Euro. Another drawback is that English is not as widely spoken in Hungary with the fluency that is characteristic of some western European countries, for example, Germany. Nonetheless, most Hungarian academics and professionals are sufficiently well-versed in English.

Hungary is among those eastern European countries (including former East Germany) that went from the proverbial Nazi frying pan into the communist fire at the end World War II. During the communist period (1948-1990) that followed World War II (in which Hungary was allied with the German *Nationalsozialismus* government), two comprehensive labor codes were adopted (1951 and 1967). When Hungary finally achieved freedom from Soviet control in 1989, one goal was to attain some modicum of social equality. One such effort was the passage of a new Labor Code in 1992. Despite this attempt, the post-communist revision led to lingering problems for both companies and workers. Twenty years later, the legislature adopted a completely new statute. The 2012 legislative package was an imperfect effort, a situation that is more fully discussed below. (Hungarian Labor Code; Gyulavari and Kartyas.)

The governmental transition undergone in post-communist Hungary is one unlike any sustained in the United States. Since colonization and late 18th century independence from England, The USA has been a democratic republic. Americans have never been governed by Naziism, socialism, or communism.

Hungarians have a sense of pride and patriotism that is one to be admired. British Prime Minister Winston Churchill and British Foreign Minister Anthony Eden entered into an agreement with Soviet leader Joseph Stalin in October, 1944, that the U.S.S.R. would have a 75-80% influence in governing Hungary, Bulgaria, and Romania, with only a 20-25% British decision-making power. This provisional communist government in Hungary entered into an official pact with the Soviet Union that recognized this imbalance on January 20, 1945. This established an Allied Control Commission in Hungary, titularly having representatives from the U.S.S.R., the U.S.A., and the United Kingdom, but strongly controlled by the Soviet government. Absolute control was vested in Kliment Voroshilov, a member of Stalin's inner circle. Stalin's decision was to take a more gradual governing policy in Hungary than in other post-war countries because of his desire to avoid any confrontation with Allied powers, which still maintained troops in post-war Europe. Even with a broad reconstruction movement after 24% of Hungary's industrial base had been destroyed during the war, the populace suffered. Stalin returned Transylvania (then a part of Hungary) to Romania, and the February 10, 1947, Treaty of Paris required Hungary to pay substantial reparations to the Soviet Union, Czechoslovakia, and Yugoslavia (approximately \$300 million) and to transfer another considerable amount of territory to Czechoslovakia. (Postwar Hungary, accessible at countrystudies.us/hungary/36.htm)

Not only were the systems of politics and economics and the social state program forced upon post-War Hungary, but these payments and concessions also left her impoverished.

The Hungarian people were never fully reconciled to Soviet control, and on October 23, 1956, a mass revolution took place largely in Budapest, but also in other parts of the country. Organized by university students, marchers demanded the return to power of the Soviet-deposed former Primer Minister Imre Nagy, dismissed because of his more liberal policies. After several days during which the Soviet government alluded to an accommodation with the protestors, Soviet tanks nonetheless rolled through the streets of Budapest to quell the protests. By November 19, 1956, the uprisers were defeated. Over 20,000 Hungarians were killed, 2500 in Budapest alone, and another 13,000 were injured. (Countrystudies.us/hungary/36htm)

Immediate recriminations by the communist government came in the forms of arrests, imprisonments, and executions. (www.local-life.com>Budapest>Articles...)

Nonetheless, the 1956 rising became the „first nail in the Soviets’ coffin” (Hungarian American Memorial Committee website, accessible at www.hungary1956nyc.org/hungarian-revolution-html), generating international support for the protestors. Despite the government’s imposition of a „milder form of communism” (a diluted form often referred to as „goulash communism”) in Hungary, less drastic than in other post-war countries, the rebellious spirit remained among the Hungarian people. The apex of the break from the Soviets was the 1989 literal cutting down by the Foreign Ministers of Austria and Hungary of the wire fence that had been erected between the two countries as part of the Iron Curtain. (See Walter Mayr, *Hungary’s Peaceful Revolution: Cutting the Fence and Changing History*, May 29, 2009 Spiegel Online, accessible at www.spiegel.de>EnglishSite>Europe>Hungary)

Since shortly after that event, Hungary has been a republic. (See website of the Hungarian Government for a full description of its government and governing bodies. www.kormany.hu/en) The proud demeanor evidenced by the 1956 revolution remains and is evidenced by the attitude and work ethic of the Hungarian people. This is a mood that is reflected in the labor legislation, albeit a statute that is conceded to have some remaining problems, such as an inability to stimulate the economy by the creation of much-needed jobs. (Tamas Gyulavari and Gabor Kartyas, *THE HUNGARIAN FLEXICURITY PATHWAY? NEW LABOUR CODE AFTER TWENTY YEARS IN THE MARKET ECONOMY* (Pazmany Press, 2015) at 17.)

Actually, this might be an asset for the non-domestic company. The result of this low level of economic simulation, there are many people available to work.

According to The World Bank Group, procedures involved in establishing a business in Hungary can be completed within a week. A local lawyer must be retained, and a bank account must be opened. Thereafter, the business must be registered at the Hungarian Registration Court, where a tax number is assigned by the Tax Authority. Next, the new business must register at the Hungarian Social Security Office, the tax department for the chosen municipality (current tax rate in Budapest is 2%, the maximum allowed under federal law), and the Hungarian Chamber of Commerce and Industry. (See World Bank website, accessible at www.doingbusiness.org/data/exploreeconomies/hungary)

3. A Brief Primer on the FMLA

3.1. Covered businesses

Only businesses with a minimum number of fifty workers within a 75-mile radius for each working day during any twenty weeks in the current or prior calendar year are subject to the FMLA. (FMLA §101(4))

An example of a covered employer would be a company with 40 workers in metropolitan Boston and 15 in Lowell, Massachusetts, approximately 25 miles from Boston, a total of 55 workers. However, if the 15-worker plant were located in Springfield, Massachusetts (about 90 miles from Boston), the company would not be required to comply with FMLA.

An employee may be factored into the worker-count to determine whether his employer must comply with the FMLA, but nonetheless he may not have any work leave rights under the same law. In order to have these leave rights, he must satisfy two cumulative requirements: (1) he must have worked a total of twelve months for the employer from which he is requesting leave; and (2) he must have worked a minimum of 1250 hours for this employer during the past twelve months. (FMLA §102(2)(A)(i)-(ii).)

This minimum-hours-worked section is strictly construed. In *Gray v. Clarksville Health Systems, G.P.*, (2015 WL 136137 (M.D. Tenn., Jan. 9, 2015)) a Tennessee federal district court held the plaintiff whose clocked-in records showed that she had worked 1249 hours and 50 minutes during the relevant 12-month period—only 10 minutes less than the required 1250 hours—was held not to be qualified for FMLA leave.

3.2. Entitlements

The FMLA entitles a qualifying worker to a total of twelve weeks unpaid leave per year (FMLA §102(a)(c) for three reasons: (1) birth or adoption of a child; (2) the employee's medically documented „serious health condition” that renders him unable to work; and/or (3) a „serious health condition” of a spouse, parent, or child of the employee that necessitates his caring for that person. (FMLA §102(a)(1)(A)-(D).)

The worker is entitled to his same or a substantially equivalent job upon return to work and to all benefits provided by the employer during the leave. (FMLA §104(a)(1).) The exception to this right to reinstatement is for the employee who meets the statutory definition of a „key employee,” defined as one who is among the top 10% in pay and whose restoration to his pre-leave position would cause the business „substantial and grievous injury”. (FMLA §104(b). For an insightful look at determining who qualifies as a key employee, see Neil S. Levinbook, *Family and Medical Leave Act: Unlocking the Door to the Key Employee Exemption*, 15 HOFSTRA LABOR AND EMPLOYMENT LAW JOURNAL 513 (1998).)

A recent change in the law with regard to who is considered a spouse was occasioned by *U.S. v. Windsor*. (570 U.S. ___, 133 S.Ct. 2675 (2013).) This case involved the U.S.' Internal Revenue Service's refusal to grant the marital estate tax exemption to the survivor of two same-sex spouses. Both were residents of New York State, where same-sex marriage was not then recognized. Consequently, they had traveled to Canada, where they were married. Later, one of the two died, leaving a sizeable estate that would have been liable for more than \$360,000 in federal estate taxes without the marital exemption. (The Internal Revenue Code exempts as taxable income the amount passing from a deceased spouse to the surviving spouse. 26 U.S.C. sec 2056(a).)

The IRS had applied the Defense of Marriage Act (DOMA) definition of marriage as between one man and one woman, (1 U.S.C. sec. 7), a definition the *Windsor* Court held to be unconstitutional under the right to liberty as assured by the Fifth Amendment to the United States Constitution. Accordingly, the Department of Labor revised its definition of spouse” to include validly married persons of the same sex. (80 Fed. Reg. 9989 (March 27, 2015).)

It should be noted that the definition of „spouse” still requires that the parties be lawfully married, regardless of their respective sexes. (*See, e.g.*, *Lukudu v. JBS USA, LLC*, No. 3:12-cv-00704-TBR (W.D. Ky. March 4, 2014).) For example, two persons who live together as married persons, whether male and female or of the same sex, but who have not been lawfully married, do not qualify for this recognition.

Only a year after the *Windsor* decision, the Supreme Court decided *Obergefell v. Hodges* (576 U.S. ___, 135 S.Ct. 2584 (2015)), in which two men had challenged the refusal of the state of Ohio to issue them a marriage license. A 5-4 Court (the split among the justices was the same as that in *Windsor*) held the refusal unconstitutional under the Fourteenth Amendment Equal Protection clause. (Notably, the majority opinions in both *Windsor* and *Obergefell* were written by Justice Kennedy, who was joined in both by the same justices, i.e., Breyer, Ginsburg, Kagan, and Sotomayor.)

The effect of *Obergefell* was to render same-sex marriages lawful in all 50 American states. One might surmise that this probable increase in marriages would likely increase the total of FMLA claims for leave to care for an ill spouse.

Interestingly, the FMLA is not a particularly beneficent statute. For example, there is no statutory right to time off for bereavement when a close family member has died. (*See, e.g.*, *Lacayo v. Donahue* 2015 Case No. 38660700 (N.D. Cal. June 22, 2015) and *Torres v. Inspire Dev. Ctrs.*, 2014 WL 3697816 (E.D. Wash. 2014).)

Moreover, an employer's insistence that a pregnant worker take time off is limited by law. Because of the Pregnancy Discrimination Amendment (this 1978 amendment to Title VII of the 1964 Civil Rights Act, 42 U.S.C. §§2000 *et seq.*, added §701(k), i.e., 42 U.S.C. §2000e-(k) to that comprehensive statute's general proscription against workplace discrimination on the ground of sex, mandatory pregnancy leave is generally unlawful. The 1978 amendment included discrimination by reason of pregnancy as within the concept of sex discrimination. In order for a company-mandated leave because of pregnancy to be within the statutory proscription, the employer must prove that the pregnancy renders the worker unable to perform the usual duties of her work.

The general rule that a pregnant worker cannot be forced to take maternity leave as long as she is still able to work and to perform her job duties can be held inapplicable if she indeed cannot perform these duties by reason of the pregnancy. (*See, e.g.*, *Carney v. Martin Luther King Home, Inc.*, 824 F.2d 643 (8th Cir. 1987). Thus, this rule is tempered somewhat by by defense of „business necessity.” (*See, e.g.*, *Harriss v. Pan American Airways*, 649 F.2d 670 (9th Cir. 1980). Author's note: It is unclear why this defense applies in such cases, although mandatory leave during pregnancy is obviously disparate impact discrimination, to which the more difficult *bona fide* occupational qualification (BFOQ) usually applies.) This usually applicable rule

against mandatory maternity leave is diametrically contrary to the many domestic maternity leave laws prevalent in European countries. For example, Austria requires by statute that a pregnant worker take leave eight weeks prior to her expected delivery date and eight weeks after the birth of the child (the post-delivery date mandatory leave is twelve weeks in the event of a complicated or multiple birth. Germany requires six weeks pre-anticipated delivery date and eight weeks after the birth (each such leave is twelve weeks if the birth were multiple or premature. Spain requires sixteen weeks' leave during which the employer obligated to pay the mother 100% of her usual wage (up to a maximum of 3230 Euro per month, *i.e.*, approximately \$356). Italy requires two months leave before delivery date and three months after the birth of the child.)

Additionally, an American employer might require a leave-taking employee to follow established work policies independent of his leave rights. A worker can be terminated for violation of these policies, whether or not during FMLA leave. (*See, e.g.*, *Anderson v. Willman Products Group*, 157 Ohio App.3d 565 (2004).)

In addition to the statutory leave rights, a covered employee has the right to recourse if his or her employer has interfered with (FMLA, 29 U.S.C. sec 2615(a)(1)) or retaliated against his rights. (FMLA, 29 U.S.C. sec. 2615(a)(2),)

These are two different concepts, retaliation being an adverse action by employer after the employee has taken or begun to take leave to which he was qualified. Significantly, before an interference claim is viable, the employee must prove that he was actually qualified to leave. Simply having given notice of a „serious health condition” without having presented medical documentation that this condition requires that he take leave is insufficient to support an interference claim. (*See, e.g.*, *Hurley v. Kent of Naples, Inc.*, Case No. 13-10298 (11th Cir. 2014).) A retaliation claim lies if a worker alleges that his or her employer took adverse action against him because he had exercised his rights under the FMLA.

Although the unpaid-wage or salary during leave feature of the FMLA has been criticized (*see, e.g.*, Sharon Lerner, *why unpaid maternity leave isn't enough*, WASHINGTON POST, June 13,2010), no measure have been taken to require the employer to compensate a leave-taking worker. There has also been o move toward creating a social benefit right in one taking FMLA leave.

Foreign businesses locating in the United States should know that, despite the sparcity of the FMLA, some states have adopted laws that augment FMLA rights and responsibilities. (For a 2008 list of such states and their statutory provisions, see compilation by the National Conference of State Legislatures.) Only three of these states (California New Jersey, and Washington State) as of 2010 had mandated pay, at least in part, during leave. (National Conference of State Legislatures.)

Notably, the 2015 Massachusetts legislature adopted a statute entitling fathers to eight week paid paternity leave.(Katie Johnston, *State paternity leave law benefits working fathers*, BOSTON GLOBE, Jan. 18, 2015.) Generally, however, the leave is indicated simply as p arental, rather than maternal or paternal.

3.3. What can an employer do about a worker's abuse of FMLA rights?

An ancillary issue might arise from the proscription against employer interference with lawful leave and/or retaliation against a worker for having exercised his lawful right to leave. (FMLA §105(a).) The operative word is „lawful.” Federal courts have not looked favorably on employees who have deceived their employers or flagrantly abused this right. If one has feigned the severity of his own illness, and the alert employer has terminated him , the employer generally prevails on summary judgment in any post-discharge suit for interference or retaliation. (*See, e.g.*, *Tillmann v. Ohio Bell Telephone*, 2011 U.S.Dist., LEXIS (W.D. Ohio 2011), in which a worker on leave for degenerative lumbar disease was observed driving his family, working in his garage, bending and performing other physically strenuous tasks. *See also* *Jones v. Gulf Coast Health Care of Delaware, LLC*, Case No. 8:15-cv-702-T-24EAJ (M.D.Fla. 2015) and *Lineberry v. Detroit Medical Center et al.*, No. 11-752 (E.D. Mich. Feb. 5, 2013).)

Employees who have exaggerated circumstances or failed to provide the care for a close relative on which his leave was based have met similar fates. For example, the plaintiff in *Bahan v. McLane Foodservice, Inc.* (2011 U.S. App. LEXIS 13620 (5th Cir. 2011) proved his daughter's serious illness that necessitated care (while on family vacation in Honduras she sustained a head injury that required her being airlifted to a Miami hospital for emergency surgery), but he was subsequently held unentitled to leave. His downfall was his return to his residence in Texas during her Florida hospitalization for which he had requested leave in order to mow the grass at his home after neighbors had complained and to „child-proof” the house in antipation of her ultimate return. Mowing a yard hundreds away from her physical presence, despite his insistence that he kept in constant telephone contact with his wife about his daughter's condition, was held not to qualify as „care.”

Some plaintiffs have exercised questionable judgment by actually posting photos on Facebook or other social media that show them engaging in activities prohibited by their alleged „serious health condition.” (*See, Jones, id.*, and *Jaszczyszyn v. Advantage Health Physicians Network*, 504 Fed. App’x 440 (6th Cir. 2011).)

Other admissible proof by employers who have reasonably suspected such abuse has been video taping taken by surveillance of the employer or its agent. (The Seventh Circuit has been especially approving of the propriety of such surveillance. *See, e.g., Vail v. Raybesto Production Co.*, No. 07-3621, 7th Cir. (July 21, 2008); *Scruggs v. Carrier Corp.*, 688 F.3d 821 (7th Cir. 2012); and *Bratcher v. Subaru Indiana Automotive, Inc.*, 458 F.Supp. 753 (S.D. Ind. 2006). For another decision turning on similar video surveillance in the 6th Circuit, *see Tillmann.*) Such surveillance would likely be regarded as an unlawful invasion of the employee’s privacy in most European countries.

Indeed, many law firms representing management have urged their clients actively to scrutinize more strictly a worker’s possible abuse of leave rights. (*See, e.g., Dana S. Connell, No More Half Measures: A Case-Based Approach for Addressing FMLA Abuse*, 39 EMPLOYEE RELATIONS LAW JOURNALS 1 (2014).)

4. Hungarian Work Leave Laws

4.1. covered employers and employees and impact of European Union law

A single comprehensive labor code (Hungarian Labor Code, hereinafter HLC) covers all private sector employment. (Act 1 of 2012, effective July 1, 2012. The English text is accessible at <https://www.ilo.org/dyn/natlex/docs/MONOGRAPH/89886/103369/F-622727815/HUN89886.pdf>) All employers in Hungary are subject to this act, regardless of the number of workers, and all employees are protected, with no specified minimum work time.

The first post-communism labor law statute in Hungary was enacted in 1992. This law simply set forth minimum standards for workers. The statute relied upon collective bargaining agreements and employment contracts to fill in the legislative blanks in the forming of workers’ rights. (Tamas Gyulavari and Gabor Kartyas, at 16.)

The Hungarian legislature followed the more usual European manner (Austria and its multitude of labor and employment laws is an exception) of codifying employment laws into one comprehensive statute. This first effort to revise the labor code after communist rule was replete with problems. Criticisms included its being designed for larger companies that were state-owned and that had operated before the demise of communism. (Gyulavari and Kartyas at 17.)

Other legislation was criticized as adversely affecting Hungary’s labor market, such as the imposition of extraordinarily high taxes and high contributions to social insurance programs. Unfortunately for workers, the path taken to reduce these costs was not to lower taxes, but rather to diminish employee protections. (Gyulavari and Kartyas at 17-18.)

Accordingly, a new code was adopted in 2012, one that harmonized domestic law with EU law, while increasing the role of labor contracts in the regulation of the workplace. Additionally, the needs of smaller and medium-sized businesses were addressed. (Gyulavari and Kartyas at 18-21.)

Following the approach in Germany, the role of works councils was embraced. (*See Carol Daugherty Rasnic, Germany’s Statutory Works Council and Employee Codetermination: a Model for the U.S.?* 24 LOYOLA INTERNATIONAL AND COMPARATIVE LAW JOURNAL 275 (1992), for a description of the German works council. *See Gyulavari and Kartyas, id.* at 43-47 and 214-219 for description of works councils vis-à-vis unions under Hungarian law.) Although German works councils exist independently of trade unions, in Hungary, these in-house worker representative bodies largely took the place of former trade unions. (Gyulavari and Kartyas at 22.)

In 2009, 33.9% of Hungarian workers were covered by collective bargaining agreements. (Gyulavari and Kartyas at 24) This union percentage rate pales in comparison with the private sector American workforce counterpart union membership rate of only 6.7%, (The total union membership among all American workers was 11.1%. However, that figure must be viewed in terms of the higher rate of union membership in the public sector, 35.2%. In the private sector, this figure is only 6.7% (*See Bureau of Labor Statistics 2015 report, USCL-16-0158m* accessible at <http://www.bks.gov/news.release/pdf/union2.pdf> on American private sector workers in unions), as reported in 2015 by the Bureau of Labor Statistics. This illustrates the relatively small influence of unions in the United States.

Unlike the broad Labor Code that applies to all private sector employees, public sector workers continue to be covered by several statutes. One act applies to public employees working in public education, health care, social services, and state cultural institutions. (Act 33 of 1992 on the legal status of public

employees.) Another law covers civil servants, that is, those working in central administration. (Act 199 of 2011 on the legal stats of civil servants.)

Several other statutes apply to judges, public prosecutors, police, and members of the military.

Hungary and nine other eastern European (Czech Republic, Poland, Slovakia, and Slovenia), Baltic (Estonia, Latvia, and Lithuania), and southern (Cyprus and Malta) countries became members of the European Union (hereinafter EU) on May 1, 2004, the largest augmentation of that originally six-country body. With the addition of three more eastern European countries (Bulgaria and Romania in 2007 and Croatia in 2013), that institution now has twenty-eight member states.(Sometime in the near future, planned for 2018,, this number will decrease to twenty-seven when the departure of the United Kingdom has become fully implemented. On June 23, 2016, voters in the UK voted to leave the European Union, a decision commonly referred to as “Brexit.” See Malcolm Coles, Ashley Kirk, and Charlotte Kroll, *EU referendum results and maps: Full breakdown*, The Telegraph, July 1, 2016, accessible at www.telegraph.co.uk/news/2016/06/23/leave-or-remain-eu-referendum...)

Not only the geographic size of the EU, but also the nature of areas of law addressed, have increased. What began as an economic treaty in post-World War II western Europe has now expanded exponentially into the area of social law, including the measures enacted in the Maastricht social policy agreement. (See Chapter 13 on Social Policy and Employment, Treaty of Accession to the European Union 2003, accessible at http://www.europarl.europa.eu/enlargement_new/treat/default_en.htm) Particularly germane to this subject is the Parental Leave Directive, (Council Directive 2010/18/EU of March 8, 2010, implenting the revised Framework Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC, and repealing Directive 96/34/EC, accessible at [http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=months' parental leave. \(Council Directive 2010/18/EU Clause 2.2\).CELEX:32010L0018&from=EN.](http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=months%20parental%20leave.%20(Council%20Directive%202010/18/EU%20Clause%202.2).CELEX:32010L0018&from=EN.)) This directive requires each member country to provide a minimum of four months parental leave for the birth or adoption of a child. Another EU directive forbids any discrimination between full-time and part-time workers. (Council Directive 97/81/EC of December 15, 1997, accessible at <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:31997L0081&from=EN>)

For the non-EU reader, EU legislation takes two forms. The first is the regulation, which is enacted by the European Commission and is immediately effective and applicable to all member states. More often used is the directive, a mandate that member states adopt a law (whether by regulation, statute, executive order, or judicial fiat) accomplishing a stated objective by a specified date. There is no American counterpart to the EU directive.

Just as each American state is subject both to federal law and laws of that state, each EU member state is subject both to EU law and to that state's domestic law.

4.2. length of leave, whether paid or unpaid, and for what reasons

The HLC provides for both paid and unpaid leave. With regard to sick leave, the employer must pay a worker 70% his usual wage or salary for at least fifteen working days each calendar year. Although the worker is required to provide medical proof (Article 83 of 1997 Law on Compulsory Health Insurance Services.), academics and practitioners agree that some doctors routinely provide such dubious proof merely upon request of the worker. This fifteen day-leave does not include leave for injuries from industrial accidents or occupational illnesses or pregnancy. (HLC Article HLC Article 126.) Moreover, the fifteen-day figure is somewhat deceptive, since sick leave is actually unlimited as to duration. This figure refers solely to the time of payment obligation for the employer. Thereafter, the worker is entitled to benefits from Public Social Security Insurance in an amount dependent upon his record of contributions to the system, usually approximately 60% his salary or wage. (Article 83 of 1997 Law on Compulsory Health Insurance Services.)

There are various other short leave rights, such as two days upon the death of a relative (interestingly, this need not necessarily be a close relative, but some kinship is required) and/or for „personal or family reasons” (not defined). This same statutory section allows paid pauses of one hour twice daily (two hours twice daily in case of twins) for nursing mothers during the first six months of breast-feeding. (HLC Article 155(1).)

Additionally, a worker is entitled to unpaid leave upon request to care for a child until the child has reached the age of three years (HLC Article 128.), an inconceivably lengthy time to the American lawyer, since it is twice the total ie for all cumulative leave rights for which the FMLA provides. Either (or both) the mother and father might take this leave, but only one will be compensated by relatively meager social payments. (This payment is approximately 100 Euros per month, *i.e.*, about \$120.)

Unpaid leave up to two years is also permitted to care for a relative. (HLC Article 131.) Significantly, there is no specification that the „relative” be a spouse, parent, or child, as in the FMLA.

Maternity leave is a separate statutory right. Although unpaid by the employer, the working mother (in cases of both birth and adoption) is entitled to 70% her usual pay from Public Social Security Insurance (Article 42(1) of Act 83 of 1997 on Compulsory Health Insurance Services.) for a twenty-four-week period (about five and one-half months) (HLC Article 127).

Characteristic of domestic laws throughout Europe, termination of a worker during his lawful leave is absolutely prohibited. (HLC Articles 65(3) and 83) Indeed, the employment-at-will rule prevalent in many American states would violate most European countries' laws prohibiting termination without good cause, regardless of whether it occurs during the worker's leave.

5. A composite of work leave laws in other selected Eastern European countries

The favorable leave laws enjoyed by Hungarian workers are characteristic of those in other European countries, which are decidedly worker-friendly. This is contrary to the controversial status of the FMLA's statutory provision for leave, albeit unpaid. The objections to the American federal law were businesses' contentions that having to hold leave-takers' jobs would prove so economically cumbersome that the country's economic competitiveness would be weakened internationally (*See* Donna R. Lenhoff and Lissa Bell, *Government Support for Working Families and for Communities: Family and Medical Leave as a Case Study*, Chapter in *Work, Family, and Democracy Project, LEARNING FROM THE PAST—LOOKING TO THE FUTURE* (Christopher Beem and Jody Heymann, eds., Racine, Wisconsin, 2002), *citing* Ron Elving, *CONFLICT AND COMPROMISE: HOW CONGRESS MAKES THE LAW* (Simon and Schuster, 1995), at 9. Lenhoff and Bell state that this concern did not come to fruition from passage of the FMLA.)

Some American human resources commentators take the position that the FMLA should be broadened to cover more employees (*See, e.g.*, Jennifer Ludden, *FMLA Not Really Working For Many Employees*, National Public Radio, accessible at www.npr.org/2013/02/05/171078451/fmla-not-really-working-for-many- This commentary states that 40% of American workers are not entitled to FMLA rights.), but the U.S. Congress traditionally has taken a much more cautious approach to regulating business than have the social state countries in Europe. (*See* paragraphs 2 and 3 of this article.)

A perusal of some other eastern European countries with this same social state philosophy as exists in Hungary (along with most European countries) is instructive.

5.1. Croatia

Croatian law enforces mandatory maternity leave for twenty-eight days before the anticipated delivery date and a total leave (including post-birth leave) of at least forty-two days. The mother can take up to six months off, with payment in part from the employer and in part from the federal social insurance system. (For a summary treatment of Croatian labor law, *see* Danielle Urban, *Croatia Employment Law in Brief*, Fisher & Phillips LLP webpage, accessible at www.crossborderemployment.com/.../croatia-Employment-Law-in-Brief.aspx The particular statute involving maternity and other leave rights is the Labor Act (No. 758/95), 1995.)

5.2. Poland

Polish law provides for twenty weeks maternity leave (increasing to thirty-one weeks in case of twins, and incrementally up to 37 weeks for multiple births up to quintuplets). Two weeks of this leave is to be taken before the expected date of birth. (Polish Labor Code (hereinafter PLC) (Journal of Laws of 1998, No. 21, item 94 with amendments, Article 180 §1).)

An amendment adopted in 2013 added six weeks to the leave, in addition to providing twenty six weeks as parental leave for both father and mother. A mother is also permitted by this statute to take an additional twenty-six weeks, for a total of fifty-two weeks (that is, one full year). (PLC Amendment of 17. June, 2013.) Notably, the employer is required to pay the mother 100% of her salary or wage for the first twenty-six weeks and 60% for the following twenty-six weeks. (PLC Article 177 §4.)

5.3. Czech Republic

In the Czech Republic, one of the two countries formed when the former Czechoslovakia was split into the Czech Republic and Slovakia on January 1, 1993, labor and employment law is governed both by provisions in the 1992 Constitution (Act No. 1/1993 CoLL, amended by acts No. 347/1997 CoLL, No. 300/2000 CoLL, No. 395/2001 Coll, No. 448/2001 CoLL, and No. 515/2002 CoLL) and by the Czech Labor Code. (Act no. 65/1965 CoLL) as amended. Unlike the sparsely unionized private-sector United States (According the a Bureau of Labor Statistics report issued January 28, 2016, the percentage of private sector workers in the United States belonging to unions is 6.7%. www.bls.gov/news.release/union2.nr0.htm), collective bargaining agreements heavily supplement labor laws. Maternity leave of twenty-eight weeks, with payment from the public health

insurance (to which the employer heavily contributes) (Czech Labor Code §48(1)(d) and §§157), substantially compounds the liberal rights to extensive leaves for sickness, care of a family member, labor union activity, and parental leave.

5.4. The Baltics

Looking farther north are the three Baltic states of Estonia, Latvia and Lithuania (all among the nations in the greatest EU enlargement on May 1, 2004). Each has adopted the Euro, an advancement that Hungary cannot claim. The largest and southernmost, Lithuania, has an extensive social insurance program that provides for 70 calendar days (10 weeks) of maternity leave (Art. 179 Labor Code.), somewhat shorter than the FMLA's 12 weeks time. However, this is limited to maternity leave, and the employee receives social insurance payments during the leave. Additionally, one parent (or a grandparent or relative who is raising the child) has the right to parental leave up until the third birthday of the child, during which time he or she receives payments from the social insurance fund. (www.ilo.org/ifpdial/information-resources/national/labour-law... This is a resourceful compilation by the International Labor Organization.)

Latvia's similar rights are governed by constitutional and statutory law (15 Feb. 1922 Constitution of the Republic of Latvia (with several amendments particularly since the demise of the U.S.S.R) and Latvian Labor Code, revised June 2002). Both the constitution and the code have other generous paid leaves, such as carer's leave and sick leave (both subsidized by the social insurance fund).

5.5. Finland

Further north, Finland, admitted with Austria and Sweden to the EU on January 1, 1995, also provides for expansive leave rights. Maternity leave begins 30 days before the expected date of birth and continues for a total of 105 days (15 weeks). Paternity leave is six days during the mother's confinement and six days thereafter. Parental leave might be taken by either parent, but not both, for a total of 158 days (24 weeks), all with 70% usual wage paid by the employer. One parent may also take child care leave until the child reaches three years of age, with funding from the state social insurance. (Chapter 4, Employment Contracts Act (Act 55/2000).)

Other rights to lengthy leave rights are assured by Finnish law. For example, a worker with one month's employment duration might take up to two years of educational leave (also compensated by the state fund). (Study Leave Act (1979).) Finally, many workers in heavily unionized Finland have leave rights compounded by collective bargaining agreements. (About 75% of all workers in Finland (approximately 2.2 million workers) are members of labor unions. See Worker-participation.eu/.../Countries/Finland/Trade-Unions)

5.6. Bulgaria and Romania

Bulgaria and Romania are the two newest EU members states, both having been admitted on January 1, 2007. Bulgaria, described by one source as „one of the hottest investment locations in Europe today” (www.investbulgaria.com), vests workers who have worked 12 months with considerable leave rights. Maternity leave alone is 410 calendar days (over 58 weeks). Workers who take that leave, the 15 calendar days of paternity leave and/or the right to leave for care of a „sick person” (no kinship is required) are paid the amount of 90% of his or her usual wage through a complex worker-and-employer contributory National Health Insurance Fund (NHIF) system. (The applicable statute is the Bulgarian Labour Code, SG. No. 26 of January 4, 1986, amended almost annually, the latest being 2004.)

These rights are compounded with employer-paid rights to 20 working days (four weeks) annual leave. ([Ec.europa.eu/employment_social/empl_portal/SSRinEU/your social...](http://Ec.europa.eu/employment_social/empl_portal/SSRinEU/your_social...))

Rights in Romania as assured in the Romanian Labor Code (*Codul Muncii*) include 18 weeks of maternity leave, five days paternity leave, and carer's leave (length not specified by statute). All include pay from the state social insurance to which both employers and employees must contribute. (www.xperthr.com/international-manual/romania-employee-rights/15079... Relevant parts of the Romanian Labour Code are Titles I, II, III, V, and VII.)

5.7. Turkey

Turkey, unlike its Eastern European neighbors Greece, Bulgaria, Croatia, Czech Republic, Poland, Slovakia, and Slovenia, is not a member of the EU. Turkey applied for membership in the Economic Community (now the European Union) on April 14, 1987 (See EU-Turkey relations, European Information on Enlargement and Neighbors, Eur-Activ.com 23. September 2004), but difficulties with meeting the required minimum of at least thirty-three of the thirty-five standards in the *acquis communautaire* (the core body of EU law) have impeded progression on that application. (Only sixteen had been met by May 2016.) The negotiations

that had begun on October 3, 2005, were suspended indefinitely on November 26, 2016, because of these concerns and other human rights issues. (The European Parliament voted to suspend on November 24, 2016, after the European Council (heads of state or government of all member states) had approved on November 11, 2016, a resolution to end negotiations because of autocratic rule in the country. Press release, New, European Parliament, Nov. 2016.)

Despite these impediments to EU membership, Turkish labor law (Law No. 4857, enacted May 22, 2004, published in Official Gazette, June 10, 2003, No. 25134) with regard to work leave rights is strikingly similar to, although not quite as broad as, the laws of its neighboring EU-member countries. The labor law statute provides for paid maternity leave eight weeks prior to and eight weeks after anticipated delivery date. Significantly, this is entitled, not mandated. In the event of a multiple birth, this period is lengthened by two additional weeks. Payment is from the social security office and is the amount of two-thirds the mother's gross income. Upon request of the working mother, she may ask her doctor to direct the employer to permit her an additional six weeks unpaid leave. (Law No. 4857, Article 74.) Upon her return to work and until the child is one year of age, the law permits her one and one-half hours during the working day to nurse the child. (Law 4857 Article 74.)

Three days paid leave is allowed for marriage of an employee, and three days paid leave upon the death of the worker's parent, spouse, sibling, or child. (Law 4857 Article 46(b).)

The worker with at least one year of service with an employer is entitled to paid annual leave. The length of this leave increases from fourteen days (one to five years' service) to twenty-six days (more than fifteen years' service). (Law 4857 Article 53.) Time in service is calculated by taking into account leave during that time. (Law 4857 Article 25 sec. 1(b).) The statute also provides for paid sick leave of a maximum of one week per year. (Law 4857 Article 46(c).)

Some generalizations are instructive. With the possible exception of Finland among these eastern EU member states, Hungary arguably offers the most promising investment opportunities. The foreign investor must keep in mind, however, that leave rights for employees in Hungary are among the most generous, a factor that adds to the cost of doing business.

In the European Union, Sweden is generally used as the model for broad leave rights. With its 480 total days of parental rights (to be used in any allocation chosen by the worker until the child is eight years old), at least 60 are reserved to the father. During such leave, the worker is paid at least 80% of his or her wage or salary (with a stated maximum). (Source: National Public Radio (United States), *All Things Considered*, report by Phil Reeves, Aug. 8, 2011.)

Europe is also the leader in providing carer's leave, a fact that has been particularly addressed by European legislatures as population ages, and workers must attend to older parents. Overall, the United States has the least generous family leave law among the member states of the Organization for Economic Cooperation and Development (OECD). (Y. Tony Yang and Gilbert Gimm, *Caring for Elderly Parents: a Comparative Evaluation of Family Leave Laws*, 42 JOURNAL OF LAW, MEDICINE AND ETHICS 501 (2013).)

6. Abuse of Leave Rights in Hungary

In reference to the American employer's right to use surveillance on its workers to detect abuse of FMLA rights, the European company is much more restricted by law. Until the EU adopted the Charter of Fundamental Rights in 2000, there had been no uniform EU law protecting privacy in general. (See Articles 7 and 8, Charter of Fundamental Rights of the European Union, 2000 O.J. (C 364) 1 (Dec. 18, 2000).)

Articles 7 and 8 of that convention protects all persons' privacy and personal data. This would preclude the use of electronic surveillance that is available to the American employer. (See *Vail v. Raybestos Production Coll*; *Scruggs v. Carrier Corp., Inc.*; *Bratcher v. Subaru Indiana Automotive Co.*; and *Tillmann v. Ohio Bell Telephone*. See also Lothar Determann and Robert Sprague, *Intrusive Monitoring: Employee Privacy Expectations are Reasonable in Europe, Destroyed in the United States*, 26 BERKELEY TECHNOLOGY LAW JOURNALS 979 (2011).)

In view of the liberal rights to leave, both in terms of length and right to compensation, and the lack of difficulty of acquiring medical documentation for a worker's own sickness, the temptation for workers to take unjustified time away from the workplace is a profound problem for Hungarian companies. A suspicious employer might ask the national insurance agents for a revision of eligibility for sick leave upon payment of an administrative fee (about \$50 US). In such instances, a public officer will check the suspected worker's health status at his home, but if the investigation shows that he is in fact able to work, the only remedy is cessation of any benefits during that leave. Because there is an inexplicable real lack of public trust in this process, requests

for such revisions are rare. Hungary does have a statute criminalizing budgetary fraud (Act 100 of 2012 on the Criminal Code, Article 310), but the enforcement mechanism is generally regarded as ineffective.

The employer might terminate the worker on the ground of breach of an obligation inherent in the employment relationship (HLC Article 74), but the burden of proof is onerous. Moreover, in addition to any available EU employee privacy protections, the Hungarian employer that suspects a worker of abuse cannot lawfully engage in the surveillance available to the American business because of the strong domestic legal protections against invasion of privacy. The Labor Code only permits monitoring a worker at the workplace, and that, only to the extent that it pertains directly to his employment duties. Also, prior notice must be given to the worker that this will be done. (HLC Article 73.)

These restrictions upon management's obtaining substantiating facts compound the difficulty of obtaining probative evidence of a faked illness in encouraging such abuse.

Hungary is in common company among its neighbors in ensuring workers ample time off from work that is far in excess of what they would be provided under the FMLA. The twenty-four-week maternity leave (with 70% salary or wage paid by the employer); the fifteen working days of paid sick leave (and unlimited additional sick leave with compensation from the state); the three years unpaid leave provided for care of a child; and the miscellaneous specified leaves (some paid, some unpaid) for death of a family member and/or attendance to „personal needs” all combine to dwarf the total twelve weeks of unpaid leave per year provided by the FMLA, and that only to workers who meet the work record requirement and who work for relatively large employers (*i.e.*, with at least 50 workers). In both Hungary and the United States, the business is obligated to return the employee to his prior job or an equivalent one (with some exceptions), but these duties are considerably more substantial for a Hungarian employer because of its obligation of permitting such lengthy times off work.

The liberal rights of most American employers to terminate a worker at will (this rule assures the right of either party in an employment relationship to terminate the employment contract without cause and is generally applicable in all American states except Montana. There are exceptions to the general rule, but the presumption applies so that the burden of proving that he comes within a recognized exception is on the challenging terminated employee.) also should be contrasted with the general rights against unfair dismissals under European domestic laws. Only the American state of Montana has adopted a law prohibiting termination without cause, (Montana Wrongful Discharge From Employment Act, MONT. CODE ANN. Secs 39-2-901 to -914 (1987).) a variant of the Model Termination in Employment Act (META). This statute (META) was drafted by the National Conference of Commissioners on Uniform State Laws, 1991.)

All other states follow the general employment-at-will rule. (*See* survey of state laws compiled by the National Conference of State Legislature, accessible at www.ncsl.org/research/labor-and-employment/at-will-employment...)

In contrast, the general proscription of unjust termination is prevalent among European countries and is established in the Hungarian Labor Code. (HLC sec 66.)

Generally, a termination in Hungary and in most European countries is presumed to have been unlawful, and the burden is on the employer to prove otherwise. This job protection for workers can be a veritable shock to the American business' system if it is not forewarned.

7. Conclusion

The post-World War II European Community—now European Union—was conceived as an economic program to rebuild the economies of war-torn Europe. The original six member states now number twenty-eight (this will be twenty-seven member states when the withdrawal of the United Kingdom is officially complete), and this original concept has gradually expanded into the foray of social law rights and obligations. Not only human and civil rights, but also labor and social rights now are vested under EU law.

In no area is this more prevalent than in the workplace, where workers enjoy a vast array of rights unknown to their American counterparts. The Hungarian worker, the primary example used in this article, enjoys a panoply of leave rights—relatively lengthy, available for a multitude of reasons, and usually accompanied by some form of compensation.

An American business contemplating expanding into Eastern Europe should be aware that the attractions of investing into any EU member state must be viewed with the proverbial jaundiced eye because of the myriad of workers' rights relative to those of American workers. Principals in such a business must be

educated so that they might determine whether the trade-off—that is, the cost of financing these greater workers rights, especially the right to lengthy leaves from work—justifies the projected generation of income.

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