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## The Family and Medical Leave Act of 1993: The Time Has Finally Come for Governmental Recognition of True "Family Values"

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## THE FAMILY AND MEDICAL LEAVE ACT OF 1993: THE TIME HAS FINALLY COME FOR GOVERNMENTAL RECOGNITION OF TRUE "FAMILY VALUES"

The number of dual-income families in the United States has dramatically increased over the past twenty years.<sup>1</sup> Today, in forty-six percent of households, both parents have joined the workforce.<sup>2</sup> Consequently, parents have been unable to care for their children, developing a need to afford working couples the opportunity to care for their young children and ill family members, while maintaining the ability to produce an income.<sup>3</sup> In the past,

<sup>1</sup> See JOHANNA FRIEDMAN, *The Changing Composition of the Family and the Workplace*, in *THE PARENTAL LEAVE CRISIS* 23-33 (Edward F. Zigler & Meryl Frank eds., 1988). There is an increasing trend of movement away from the traditional family unit, consisting of a father at work and a mother at home. *Id.*; SUSAN S. STAUTBERG & MARCIA L. WORTHING, *BALANCING ACTS!: JUGGLING LOVE, WORK, FAMILY & RECREATION* at xiii (1992). In the United States, dual-income families outnumber single-income families three to one. *Id.* In contrast to the 9 million dual-income families documented in 1989, there are 31 million such families today. *Id.*; Howard V. Hayghe, *Children in Two-Worker Families and Real Family Income*, MONTHLY LAB. REV., Dec. 1989, at 48, 48-49 (discussing statistics regarding dual-career families); see also Marjorie Jacobsen, Note, *Pregnancy and Employment: Three Approaches to Equal Opportunity*, 68 B.U. L. REV. 1019, 1019 (1988). In 1988, over 50 million women worked outside of home and dual-income families became a necessity. *Id.*; Elizabeth F. Thompson, Comment, *Unemployment Compensation: Women and Children—The Denials*, 46 U. MIAMI L. REV. 751, 751 (1992). The composition of the workforce has dramatically changed and 66.3% of all married mothers participate in the workforce. *Id.*

<sup>2</sup> See Scott A. Caplan-Cotenoff, *Parental Leave: The Need for a National Policy to Foster Sexual Equality*, 13 AM. J.L. & MED. 71, 72 n.3 (1987) (observing that in 1985, over 44% of work force was female); Jennifer G. Gimler, *Mandated Parental Leave and the Small Business: A Cause for Alarm?*, 93 DICK. L. REV. 599, 602 n.23 (1988) (noting that in over 90% of American families, both parents work outside home); Stephen Keyes, *Affirmative Action for Working Mothers: Does Guerra's Preferential Treatment Rationale Extend to Childrearing Leave Benefits?*, 60 FORDHAM L. REV. 309, 309 (1991) (projecting that by 1995, over 80% of women between ages of 18 and 24 will be working); Anne Lofaso, *Pregnancy and Parental Care Policies in the United States and the European Community: What Do They Tell Us About Underlying Societal Values?*, 12 COMP. LAB. L.J. 458, 459 (1991) (noting that by 1991, women still constituted over 44% of workforce); cf. RICHARD WORTH, *THE AMERICAN FAMILY* 108 (1984) (percentage of married women with children under 6 years old is 45%, while those with children ages 6 through 17 is 62.5%).

<sup>3</sup> See Caplan-Cotenoff, *supra* note 2, at 72. The government should develop a "national parental leave policy" because the responses of states and the private sector have been inadequate. *Id.* Increased participation by both parents, during the child's early years, will not only strengthen the parent-child relationship, but will also help the child relate better within society. *Id.* at 99; see also Nadine Taub, *From Parental Leaves to Nurturing Leaves*, 13 N.Y.U. REV. L. & SOC. CHANGE 381, 384 (1985). Jobs without leave policies make it impossible for working women to stay on equal footing with men. *Id.* "An adequate governmental leave system . . . would go a long way toward resolving the tension between the demands of work and home life which so often restrict women's employment opportunities."

there was no federally mandated parental or medical leave policy,<sup>4</sup> except for a wide array of legislation, enacted by Congress in the 1930s, protecting similar civil rights.<sup>5</sup>

The Senate and the House of Representatives finally proposed a Family and Medical Leave Act (the "FMLA") to redress this disparate situation.<sup>6</sup> This new policy was signed by President Bill Clin-

*Id.* By the year 2000, approximately 30.6 million people in the United States will be 65 years of age or over, thereby demonstrating the need to provide care for the elderly. *Id.* at 385 (citing Elaine W. Brody, *The Aging of the Family*, 438 ANNALS 13, 15-16 (July 1978)). *But see* Gimler, *supra* note 2, at 603. Since most women work for financial reasons, the demand for a parental leave policy has increased to ensure that the family structure is not sacrificed. *Id.* Therefore, national attention has focused on the changing need of all workers. *Id.* at 602.; Taub, *supra*, at 382. Preferential treatment of women is resented by male co-workers and supports the stereotype that raising children is the role of women. *Id.* *See generally* CARYL WALLER KRUEGER, *WORKING PARENT-HAPPY CHILD* 29 (1990) (discussing how parenting is easier in two-parent families when each spouse can depend on other for help and support).

<sup>4</sup> *See* Gimler, *supra* note 2, at 600-01 (noting failed efforts of Congress to promulgate family leave policy in late 1980s). *But see* DANIEL P. MOYNIHAN, *FAMILY AND NATION* 11 (1986) (discussing need for national family leave policy and its potential for promoting "the stability and well being of the American family"); *cf.* Johnson v. Goodyear Tire & Rubber Co., 790 F. Supp. 1516, 1523 (E.D. Wash. 1992). Washington's family leave policy, authorized 12 weeks unpaid leave in a 24 month period for a newborn or terminally ill child, and mandated employers to provide a position to a returning employee. *Id.* However, the employer had significant flexibility in deciding which position to offer. *Id.* at 1523-24; Elizabeth R. Sullivan, *Leave Act Confounds Attorneys*, *New Jersey Leader*, NAT'L L.J., Apr. 2, 1990, at 1. As of April 1990, 14 states had legislation pending, and over 26 others mandated some form of a family leave policy. *Id.* New Jersey's family leave policy, effective May 4, 1990, was described as the most generous of the various states' legislation. *Id.* New Jersey allows 12 weeks of unpaid leave in any 24 month period for newborns, adopted, and seriously ill family members, while guaranteeing benefits and job security. *Id.* By contrast, Minnesota and Oregon limit family leave to cases of adoption or child-birth. *Id.*

<sup>5</sup> *See* U.S. v. Darby, 312 U.S. 100, 115 (1941) (upholding constitutionality of Fair Labor Standards Act, and stating that Congress did have power to enact such legislation); Johnson, 790 F. Supp. at 1523. The Pregnancy Discrimination Act of 1978, was enacted to "guarantee women the basic right to participate fully and equally in the workforce, without denying them the fundamental right to full participation in family life." *Id.* (citing California Fed. Savings & Loan Assoc. v. Guerra, 479 U.S. 272, 277 (1987)); Mary Lu Christie, *Labor Law: An Inside View*, AM. LAW., Mar. 1992, at 1. The author observes:

Congress has passed [many similar acts such as] the Americans with Disabilities Act of 1990, the Older Worker Benefit Protection Act, the Whistleblower Protection Act of 1989 and the Civil Rights Act of 1991 . . . [meanwhile] many states are enacting their own 'whistle-blower' statutes, family leave acts, and other statutes paralleling federal law.

*Id.*; *see also* Gimler, *supra* note 2, at 601. Congress has been enacting similar employer-employee legislation since the 1930s. *Id.*

<sup>6</sup> *See* Family and Medical Leave Act of 1993, Pub. L. No. 103-3, § 105, 107 Stat. 6 (1993); *see also* Leslie W. Gladstone, *Parental Leave Legislation*, CRS Issue Brief, Oct. 1, 1992, at 9. This bill was virtually identical to the House resolution, which was vetoed by the Senate in 1990. *Id.* Pursuant to the 1990 proposal, employees would have been eligible for 12 weeks of combined medical and parental leave per year. *Id.* Additionally, firms with 50 employees or less, would have been permanently exempt; leave could be taken to care for a seriously ill spouse; employer-provided paid leave could be required to be used first; only one parent could take leave for a newborn; physician certification of the illness was required; and House of Representative employees would be treated no different than private employees. *Id.* The 1991 proposal contained the following modifications:

ton on February 5, 1993, and became effective August 5, 1993.<sup>7</sup> Under the FMLA, either spouse may be provided twelve weeks of unpaid leave in order to care for a newborn child, an adopted infant, or a seriously ill family member, while preserving job security and medical benefits.<sup>8</sup>

This Note discusses the evolving role of family members, and its influence in the establishment of the FMLA. Part One analyzes the history of the FMLA, and the reasons underlying its previous veto. Part Two discusses the FMLA's impact on small businesses and the federal government's plan to ensure compliance. Part Three addresses the advantages of a federal leave policy, while Part Four reviews the advantages of several state and international leave acts. Finally, Part Five suggests revisions aimed at enhancing the legitimacy of the FMLA.

## I. THE FMLA: A HISTORICAL PERSPECTIVE

### A. *The 1986 Proposal*

In 1986, Congress proposed a bill that would have established a federally mandated policy for family-related employee benefits, in both the public and private sectors.<sup>9</sup> The 1986 proposal provided two types of gender-neutral employee leave benefits.<sup>10</sup> The first

1) Eligibility would be restricted to employees who worked 1,250 hours per year or twenty-five hours per week; 2) penalties for employers who violated the bill would be limited to double the actual losses; 3) employers could deny leave to the highest paid ten percent of the workforce; and 4) employers were permitted to recapture health benefits if employees on leave did not return to work.

*Id.*

<sup>7</sup> See *supra* note 6 and accompanying text (discussing various provisions of the FMLA); *Text of Family and Medical Leave Act of 1993 Interim Final Regulations*, Daily Lab. Rep. (BNA) No. 107, at D-27 (June 7, 1993) [hereinafter *Text of 1993 Act*]. The FMLA will become effective on August 5, 1993, except where a collective bargaining agreement exists. *Id.* If such an agreement exists, Title I provisions become effective on the date the collective bargaining agreement terminates or February 5, 1994, whichever comes first. *Id.*

<sup>8</sup> See Family and Medical Leave Act of 1993, Pub. L. No. 103-3, § 105, 107 Stat. 6 (1993). The 1993 version would apply to employers with more than 50 employees. *Id.* Employees would be given 12 unpaid weeks of combined parental and temporary medical leave, during any 12 month period, in cases of birth, adoption, serious illness of a child or parent, or the inability to work due to a serious health condition. *Id.* The FMLA would protect an employee's benefit rights and employment during, and after such leave, and would apply to employers in both the private and public sectors. *Id.* The FMLA also provides for administrative and civil enforcement. *Id.* Finally, the FMLA authorizes a commission to determine methods of providing salary replacement for employees who take parental and disability leaves. *Id.*

<sup>9</sup> See XLII CONG. Q. ALMANAC 584, 584 (1986) (discussing Congress's first attempt to establish family leave).

<sup>10</sup> See Catherine P. Colvin, Note, *New Perspectives in Parental Leave: The Family and Medical Leave Act of 1987*, 12 EMPL. REL. L.J. 546, 565 (1987). Either the father or mother

benefit would have afforded employees eighteen weeks of unpaid leave during any twenty-four month period, to care for a newborn, newly adopted,<sup>11</sup> or seriously ill child.<sup>12</sup> The second benefit would have provided twenty-six weeks of medical leave, in any year, to all workers who were temporarily disabled.<sup>13</sup> If an employee, for example, required pregnancy leave, she could continue to receive health benefits from her employer's health plan.<sup>14</sup> Additionally, an employee could retain her previous job or a guarantee of a comparable position, with full benefits and seniority, upon resuming her position.<sup>15</sup>

### B. The 1987 Proposal

This bill was highly controversial in Congress and throughout the general public.<sup>16</sup> The 1986 proposal was amended by the

is entitled to parental leave, to act as primary caregiver for the child. *Id.* Likewise, this resolution was not based on cultural stereotypes in order to accommodate a woman's dual role as worker and mother. *Id.*; The Library of Congress, *Congressional Research Service*, Oct. 1, 1992, at 1 (discussing how FMLA would have provided parental or medical leave for either male or female employee).

<sup>11</sup> Colvin, *supra* note 10, at 565. "[S]ince adoptive parents have the same family bonding needs as biological parents, they also would have been eligible for parental leave." *Id.*

<sup>12</sup> *See id.* at 548 (defining serious health condition as "an illness, injury, or physical or mental condition that involves inpatient care or continuing treatment or supervision by a licensed health-care provider").

<sup>13</sup> *See* XLII CONG. Q. ALMANAC, *supra* note 9, at 584. "The bill required public and private employers with 15 or more workers . . . to grant up to 26 weeks of unpaid disability to employees with serious medical conditions." *Id.*

<sup>14</sup> *See id.* (discussing that under FMLA of 1986 employer would have to continue health benefits).

<sup>15</sup> *See id.* (stating that employee would have right to old position or similar one while maintaining both seniority and benefits).

<sup>16</sup> *Id.* at 585. Congressman Tom Tauke of Iowa stated that "[t]his bill clearly establishes a new precedent for federal involvement in employer-employee relations. . . . This is a very serious issue that has not been handled today in a very serious manner." *Id.*; *see also* Martha Brannigan, *Laws on Parental Leave Benefits Draw Opposition From Employers*, WALL ST. J., Oct. 12, 1987, at 23. A brewing controversy centers on motherhood and the family. *Id.* Advocates claim that the demands of work and home necessitate parental leave. *Id.* Business interests counter that such legislation would be expensive, disruptive, and a danger to competitiveness. *Id.*; *Mandated Benefits: McLaughlin Calls Bill Misguided*, 5 Ben. Today (BNA) No. 10, at 159 (May 6, 1988). Ann McLaughlin, Labor Secretary under President Bush, stated that the mandatory requirements for employers would be harmful to everyone, but businesses needed to formulate solutions for conflicts between the home and work. *Id.* *See generally* Plan Administration: *Mandated Benefits Would Stifle Workplace Flexibility: NCSL Told*, 15 Pens. Rep. (BNA) No. 14, at 545 (Apr. 4, 1988). The Reagan Administration opposed mandatory leave requirements because such legislation would stifle workplace flexibility. *Id.* Gerald Thorne, the Deputy Solicitor for National Operations, testified before the Pensions and Government Operating Committee and indicated that the use of the word "mandatory" was problematic. *Id.*; *see also* Colvin, *supra* note 10, at 555-56. The National Organization for Women, the Congressional Caucus for Women's Issues, the Association of Junior Leagues, General Foods Corporation, and the United Mineworkers of America all supported this bill. *Id.* *But see* Colvin, *supra* note 10, at 555.

House Education and Labor Committee in 1987, to provide employees ten weeks of parental leave over a two-year period or fifteen weeks medical leave over a one-year period.<sup>17</sup> Under this bill, employers with less than fifty employees were exempted from providing family and medical leave benefits for three years from the date of the enactment.<sup>18</sup> Additionally, by establishing a "business necessity," such as decreased profits or financial cutbacks, the employer could disclaim benefits to the highest paid ten percent of employees.<sup>19</sup> However, this version of a family and medical leave act, as with the 1986 proposal, engendered much debate.<sup>20</sup> Opponents argued that such a policy would reduce competitiveness. Proponents, in contrast, contended that the proposed leave act would protect those who were not currently protected by an employer leave policy.<sup>21</sup>

The National Chamber of Commerce was actively opposed to the bill, as was the Reagan Administration. *Id.* at 554-55. Although it was believed that feminists would support the legislation promoting the needs of working women, many feminists were wary of "protective" legislation which would be at odds with the equality principle. *Id.* at 554-55; Shannon L. Antle, Note, *Parental Leave: An Investment in Our Children*, 26 J. FAM. L. 579, 588 (1990). Some dissenters of the bill were against the "mandatory" requirement because it was too rigid, and they thought employers would reduce the number of other benefits to about the cost of those imposed by the bill. *Id.* See generally Richard Delgado & Helen Leskovic, *The Politics of Workplace Reforms: Recent Works on Parental Leave and a Father-Daughter Dialogue*, 40 *RUTGERS L. REV.* 1031, 1058-59 (1988) (noting possibility that parental leave may place woman at disadvantage); Jack B. Helitzer, *State Developments in Employee Benefits*, 3 *BENEFITS L.J.* 121, 122-29 (1990) (discussing various state approaches to maternal and paternal leave); Maria O'Brien Hylton, "Parental Leaves" and Poor Women: *Paying the Price for Time Off*, 52 *U. PITT. L. REV.* 475, 476 (1991) (arguing cost of such mandatory legislation may be borne by poor, low-skill working women); David E. Berquist, Note, *Who's Bringing Up Baby: The Need for a National Uniform Parental Leave Policy*, 5 *LAW & INEQ. J.* 227, 227 (1987) (arguing nationwide gender-neutral policy is necessary for women, children, and men).

<sup>17</sup> XLIII CONG. Q. ALMANAC 681, 681 (1987). This version of the bill would require businesses with 50 or more employees to grant unpaid leave, and after three years the threshold would drop to 35 employees. *Id.* It also allowed 10 weeks leave over a two-year period to care for a new or sick child, or parent. *Id.* Moreover, it allowed employees 15 weeks of leave per year for their own illness or disability. *Id.*

<sup>18</sup> See *supra* note 17 and accompanying text (describing provisions of 1987 proposal); cf. Colvin, *supra* note 10, at 547-48 (defining "employer" as "any person under the Fair Labor Standards Act who employs 15 or more employees and acts in the interest of any employee").

<sup>19</sup> See *Employee Benefits: Markup of Family Leave Act*, 17 *Daily Rep. (BNA)* 1 (Mar. 9, 1989) [hereinafter *Markup*] (permitting denial of leave benefits under 1987 proposal for highest paid employees).

<sup>20</sup> See XLIII CONG. Q. ALMANAC, *supra* note 17, at 681. Congressman Dick Armey, a Republican from Texas, stated that "the young men and women of this country deserve opportunity and fairness, not repression and intrusion." *Id.* But see *Markup*, *supra* note 19, at A9. However, opponents argued that this favored dual-income families. *Id.* James M. Jeffords, a Republican from Vermont, noted that the United States lagged behind most other industrialized nations in terms of family and medical leave legislation. *Id.*

<sup>21</sup> *Markup*, *supra* note 19, at A9. Joseph Pleck, a professor at Wheaton College, stated that the proposed act would extend a privilege to employees who were not covered by an

### C. *The 1989 Proposal*

The search for legislation continued when a third leave act was presented to the Senate and the House of Representatives in February of 1989.<sup>22</sup> The 1989 proposal provided employees of businesses with fifty or more employees, twelve weeks of unpaid parental or medical leave.<sup>23</sup> The legislation also provided that an employee's personal medical leave could be used to care for a sick child, parent,<sup>24</sup> or spouse when such illness was certified by a physician.<sup>25</sup> This bill would have also extended leave benefits to federal employees.<sup>26</sup> Additionally, the 1989 proposal permitted employers to exempt the highest paid ten percent of employees if "just cause" was established.<sup>27</sup>

Although Congress passed the 1989 proposal, it was vetoed by President George Bush.<sup>28</sup> President Bush vetoed the legislation, believing that the federal government should not mandate a rigid leave policy.<sup>29</sup> Instead, President Bush stated that such an issue

employer leave policy. *Id.* But see XLIII CONG. Q. ALMANAC, *supra* note 17, at 681. "Even diluted poison can kill," stated Cass Ballenger, a Republican from North Carolina. *Id.* "Federal mandate on top of federal mandate will reduce competitiveness." *Id.*

<sup>22</sup> See THE COMMITTEE ON SEX AND LAW, *Family Leaves of Absence*, in 44 REC. OF THE ASS. OF THE BAR OF THE CITY OF N.Y., No. 6, 648, 650 (1989) [hereinafter *Family Leaves of Absence*] (discussing Congress's third attempt at equitable legislation).

<sup>23</sup> See XLVI CONG. Q. ALMANAC 359, 359 (1990) (discussing how legislation would have made such leave mandatory and that employee would have to work at least 1,000 hours in that year in order to be eligible).

<sup>24</sup> See *Congressional Research Service*, *supra* note 10, at 2. "Parent" is defined as "to include only a biological parent or a person who functioned in loco parentis." *Id.*

<sup>25</sup> See XLVI CONG. Q. ALMANAC, *supra* note 23, at 359. "Medical leave, when certified by a doctor, could have been used to care for a sick spouse, parent or child." *Id.*

<sup>26</sup> See *Regulations, Economics & Law*, Daily Rep. (BNA) No. 127, at A-12 (July 2, 1990). Federal employees would be allowed eighteen weeks unpaid leave over two years for new children, in addition to twenty-six weeks unpaid medical leave over one year. *Id.*

<sup>27</sup> See XLVI CONG. Q. ALMANAC, *supra* note 23, at 359. The employer could exempt the highest paid ten percent of its employees if the employer could show that providing such benefits to these highly compensated employees would cause "substantial and grievous economic injury." *Id.*

<sup>28</sup> See *id.* at 359. Although Democrats lobbied feverishly to have this bill passed, on July 25, 1989, Congress failed to override President Bush's veto. *Id.*

<sup>29</sup> See President George Bush, *Message to the House of Representatives Returning Without Approval the Family and Medical Leave Act of 1990*, reprinted in 1 PUB. PAPERS 890, 890-91 (June 29, 1990). "My administration is strongly committed to policies that recognize that the relationship between work and family must be complementary, and not one that involves conflict." *Id.* President Bush also stated:

In vetoing this legislation with its rigid, federally imposed requirements, I want to emphasize my belief that time off for a child's birth or adoption or for family illness is an important benefit for employers to offer employee's. I strongly object, however, to the federal government mandating leave policies for America's employers and workforce. By substituting a one size fits all government mandate for innovative individual agreements, this bill ignores the differing family needs and preferences of employees and unduly limits the role of labor-management negotiations.

should be part of employer-employee labor negotiations.<sup>30</sup>

Opposition by the business community was the most prominent reason for the failure of the 1989 proposal.<sup>31</sup> Business feared that such a federal mandate would be the beginning of a long line of subsequent federal legislation dictating corporate policies.<sup>32</sup> Additionally, the United States Chamber of Commerce argued that the 1989 leave policy would restrict the "employer's flexibility and lead them to cut other benefits workers might prefer."<sup>33</sup>

#### D. The 1992 Proposal

Family and medical leave legislation was again proposed in 1992.<sup>34</sup> This proposal required employers with fifty or more employees to provide twelve weeks of unpaid leave to employees.<sup>35</sup> This legislation was vetoed by President Bush on September 22, 1992.<sup>36</sup> President Bush proposed an alternative plan that allowed a refundable tax credit to a business with fewer than 500 employees if the business provided sixty days of employee leave for "family responsibilities."<sup>37</sup> Congress, however, refused to consider this proposal before attempting to override the veto.<sup>38</sup> While the Senate was able to override the veto, the House of Representatives failed to obtain the two-thirds majority necessary to override Pres-

*Id.* at 891.

<sup>30</sup> *See id.* "Choosing among these options traditionally has been within the purview of employer-employee negotiation or the collective bargaining process." *Id.*

<sup>31</sup> *See* Buck Brown, *Parental Leave Case Alarms Small Business*, WALL ST. J., June 13, 1988, at 19. Small companies fear harsh, business consequences of permitting time leave to several employees at once. *Id.*; *Against Mandated Benefits*, NATION'S BUS., Oct. 1988, at 4. Carol J. Sappington, vice president of a 25 employee company, cautioned that a federally mandated parental and medical leave policy would "cripple" her small company, forcing drastic changes in hiring part-time employees or independent contractors. *Id.*; *Family Leaves of Absence*, *supra* note 22, at 670-72. Businesses asserted that government "meddling" with free enterprise would be detrimental and costly. *Id.* Additional costs would include replacing an employee on leave, productivity loss from shifting from an experienced to an unexperienced employee, and the inconvenience of guaranteeing a job upon return. *Id.*

<sup>32</sup> *See* XLVI CONG. Q. ALMANAC, *supra* note 23, at 359 (noting fear of deluge of such proposals).

<sup>33</sup> *Id.* at 359.

<sup>34</sup> *See* XLVII CONG. Q. ALMANAC 353, 354 (1992) (discussing proposal of 1992 bill and its variation from 1990 bill; new version allowed employers to exempt highest paid 10% of employees and premised eligibility on employee having worked at least 25 hours per week for prior 12 month period).

<sup>35</sup> *See id.* (requiring employer with 50 or more employees to give 12 weeks unpaid leave for serious illness of family member, birth or adoption of child).

<sup>36</sup> *See id.* at 355.

<sup>37</sup> *Id.* at 356. President Bush suggested allotting a \$1200 per employee tax credit for allowing employees to take such leave. *Id.*

<sup>38</sup> *Id.* at 357.



ident Bush's veto.<sup>39</sup>

### E. The 1993 Proposal

Finally, in 1993, Congress proposed a bill requiring employers to provide twelve weeks of unpaid leave to an employee.<sup>40</sup> The 1993 proposal required that the individual be employed for at least twelve months and have worked at least 1,250 hours during the year preceding the start of the leave.<sup>41</sup> However, to prevent abuse and to protect small businesses that fall within the FMLA's guidelines, the bill provided certain safeguards.<sup>42</sup> Businesses would be exempt from the legislation, regardless of how many employees they have if fewer than fifty employees are working within seventy-five miles of each worksite.<sup>43</sup> In addition, employers would be permitted to require medical certification if the request for leave was based on the employee's own illness.<sup>44</sup> It was this

<sup>39</sup> XLVII CONG. Q. ALMANAC, *supra* note 34, at 357.

<sup>40</sup> See S. REP. NO. 3, 103d Cong., 1st Sess. 105 (1993). An employer is defined as having 50 or more employees. *Id.* Such an employer is mandated to allow an employee 12 weeks of leave per year. *Id.* However, the employer is under no obligation to allow the employee to accrue seniority or other employment benefits during the leave. *Id.* Conversely, any pre-existing health benefits provided to the employee by the employer must be maintained. *Id.* Additionally, upon return from leave, the employee must be restored to the same or equivalent position. *Id.*

<sup>41</sup> See *id.* (discussing requirement that in order for employee to be eligible under FMLA, employee must have worked for employer during prior 12 month period).

<sup>42</sup> See Family and Medical Leave Act of 1993, Pub. L. No. 103-3, § 105, 107 Stat. 6 (1993). "If the employer provides paid leave for which the employee is eligible, the employee may elect or the employer may require the employee to substitute the paid leave for any part of the twelve weeks of leave to which the employee is entitled under the Act." *Id.* Additionally, when the need for leave is foreseeable, the employee is obligated to provide the employer with reasonable notice, and make an effort to schedule leave so as to minimally disrupt the employer's operations. *Id.* An employer may also require the employee to periodically report the status of his or her leave. *Id.* Furthermore the employer can exclude from eligibility the highest paid 10% percent of his employees. *Id.*

<sup>43</sup> See *Text of 1993 Act, supra* note 7, at D-27. There is a difference between a covered employer and an eligible employee. *Id.* In the private sector, an employer is covered by the FMLA if he or she employs more than fifty employees. *Id.* A public agency is covered by the FMLA if such public agency employs 50 or more employees within a 75-mile radius around the worksite. *Id.* Similarly, in order for an employee to be eligible under the FMLA, the employer, whether in the private sector or a private agency, must employ 50 employees within a 75 mile radius of each worksite. *Id.* Therefore, if an employer of a chainstore employs 400 employees across the country, the employer is covered under the FMLA, however, his employees would not be eligible under the FMLA because there are not 50 employees working within a 75 mile radius of each worksite. *Id.*

<sup>44</sup> See *id.* An employee on his or her own medical leave must provide certification that the employee is unable to perform the functions of his or her position. *Id.* An employer may require a second medical opinion and periodic recertification at the employer's own expense. *Id.* The employer is under no obligation to allow the employee to accrue seniority or other employment benefits during the leave. *Id.* However, any pre-existing health benefits provided to the employee by the employer must be maintained. *Id.* Additionally, upon return from leave, the employee must be restored to the same or equivalent position. *Id.*

proposal which became the Family and Medical Leave Act of 1993.

## II. ENSURING COMPLIANCE BY SMALL BUSINESSES

The business community's main concerns were that the FMLA was impractical and imposed financial burdens on employers.<sup>45</sup> The business sector viewed the legislation as unnecessary because many employers already provided benefits to employees voluntarily.<sup>46</sup> While recognizing the need for a leave policy,<sup>47</sup> small businesses feared that a rigid federal policy would infringe upon their basic right to contract and increase the "cost of doing business."<sup>48</sup> Small businesses argued that they would be forced to decrease other benefits in order to meet the requirements of the FMLA.<sup>49</sup>

Thus, by exempting employers with less than fifty employees, the FMLA would adequately protect very small businesses from the imposition of excessive financial burdens.<sup>50</sup> Additionally, busi-

<sup>45</sup> See Gimler, *supra* note 2, at 604-05. Senators Orrin Hatch and Thad Cochran questioned whether the federal government should adopt a federal family leave policy for businesses because it would infringe on the freedom of business. *Id.* at 599 (citing S. REP. NO. 447, 100th Cong., 2d Sess. 59 (1988)); Linda Hassberg, Comment, *Toward Gender Equality: Testing the Applicability of a Broader Discrimination Standard in the Workplace*, 40 BUFF. L. REV. 217, 232-33 (1992) (stating that many employers display negative attitudes towards mandated parental and family leave policies as opposed to collective bargaining agreements); see also Hylton, *supra* note 16, at 481. "The primary argument against the statute has come from organized business . . . [who] worry about increased discrimination against female employees." *Id.*; Mark H. Leeds, *Maternity Leave for Fathers*, N.Y. ST. B. J., 1983, at 35. Employees have a right to freely contract with their employers to include such benefits as maternity and paternity leaves or both. *Id.*; Markup, *supra* note 19, at 1. The National Small Business United opined that Congress should enact legislation requiring employers to establish an equitable leave policy. *Id.* Also, it has been predicted that such parental leaves may force businesses to pass these costs onto consumers. *Id.*

<sup>46</sup> See Gimler, *supra* note 2, at 604-05. Employers argue that federal legislation is unnecessary because most employers voluntarily provide the vast majority of employee benefits. *Id.*; Georgia Dullen, *Conference Discusses Parental Job Leave*, N.Y. TIMES, Mar. 11, 1985, at C11. Approximately 37% of all major U.S. companies offer unpaid leave for fathers and more than 50% offer unpaid maternity leave. *Id.*

<sup>47</sup> See Helitzer, *supra* note 16, at 122. Most small businesses support voluntary leave programs and understand their social advantages. *Id.*

<sup>48</sup> See *id.* at 121. A requirement of parental or family leave could be extremely burdensome for a small employer. *Id.*; Marguerite T. Smith, *Fighting to Have it All*, MONEY, Jan. 1991, at 130, 131. "Parental leave can be especially onerous for small companies, which cannot afford to hold jobs open for long periods and where the loss of even one person can mean added work for everyone else." *Id.*

<sup>49</sup> See Smith, *supra* note 48, at 132. Many employees will be effected by cuts in benefits that small companies will have to make in order to comply with mandated parental leave. *Id.*; Macon Morehouse, *Senate Fills its Spare Time Feuding Over "Family Issues"*, CONG. Q., Oct. 1, 1988, at 2709. Forcing companies to comply with a mandated parental leave policy could lead to cutbacks of other benefits. *Id.*

<sup>50</sup> See XLVII CONG. Q. ALMANAC, *supra* note 34, at 354. "Because [the FMLA] would apply only to those businesses with more than 50 workers, the measure already exempted more than 95% of employers." *Id.*

nesses with fifty or more employees are not as affected by the requirements of the FMLA because such businesses must already comply with the Pregnancy Discrimination Act.<sup>51</sup> The FMLA, therefore, does not impose additional unforeseeable burdens on these larger businesses. Further, the argument that employers will not have adequate notice of an employee's request for leave is untenable. Because the FMLA requires an employee to give notice of intended leave, barring a sudden emergency, adequate time to prepare for such sabbaticals will exist.<sup>52</sup>

The remaining concern of the FMLA's proponents will be to enforce compliance by small businesses.<sup>53</sup> To ensure compliance by employers and employees, the Secretary of Labor was vested with investigative authority similar to that which exists under the Fair Labor Standards Act of 1938.<sup>54</sup> Under the FMLA, employers are required to prepare and maintain records regarding an employee's medical or parental leave.<sup>55</sup> If, upon review of these records, the Secretary of Labor determines that a provision of the FMLA has been violated, an employer may be subject to civil litigation.<sup>56</sup> If an employer is found to have violated the FMLA, the employer may be liable to aggrieved employees for actual damages and interest in the form of liquidated damages.<sup>57</sup> However, damages may be limited if the employer demonstrates that the employee was dismissed in good faith.<sup>58</sup>

<sup>51</sup> See 42 U.S.C. § 2000(e)-(k) (1982). The Pregnancy Discrimination Act was enacted as an anti-discrimination measure to protect pregnant women. *Id.*

<sup>52</sup> See *supra* notes 40-44 and accompanying text (discussing most recent FMLA proposals and requirement that employees give notice to their employer prior to taking leave).

<sup>53</sup> See S. REP. NO. 3 *supra* note 40, (discussing compliance of small businesses with the FMLA).

<sup>54</sup> *Id.* at 16. "The Secretary shall receive, investigate, and attempt to resolve complaints of violations of section 105 [of the FMLA] in the same manner that the Secretary receives, investigates, and attempts to resolve complaints of violations of sections 6 and 7 of the Fair Labor Standards Act of 1938." *Id.*

<sup>55</sup> *Id.* at 5. "[T]he Secretary [of Labor] may not under authority of the Act require employers to submit their books or records to the Secretary more than once during any twelve month period unless the Secretary has reason to believe that the Act has been violated or is investigating a complaint of violation." *Id.*

<sup>56</sup> *Id.* at 16. "An action to recover damages . . . may be maintained against any employer in any federal or state court of competent jurisdiction." *Id.*

<sup>57</sup> See Family and Medical Leave Act of 1993, Pub. L. No. 103-3, § 105, 107 Stat. 6 (1993). Employers must pay damages for violations of the FMLA. *Id.*; see also S. REP. NO. 3, *supra* note 40. A civil action for damages or equitable relief may be brought against an employer in any federal or state court of competent jurisdiction by the Secretary of Labor or the actual employee. *Id.* However, the right to bring an action by the aggrieved employee is terminated if the Secretary files an action for relief on behalf of that employee. *Id.*

<sup>58</sup> Family and Medical Leave Act of 1993, Pub. L. No. 103-3, § 105, 107 Stat. 6 (1993) (discussing instances when employer's damages, for violating FMLA, may be limited).

### III. THE EXISTING NEED FOR A COMPREHENSIVE FAMILY AND MEDICAL LEAVE ACT

Traditionally in America, women have stayed at home and men supplied the primary source of income.<sup>59</sup> However, because of the rising cost of living and the need for personal fulfillment, many women have chosen to pursue careers outside of the home.<sup>60</sup> By 1995, over eighty percent of women between the ages of eighteen and twenty-four will be working,<sup>61</sup> and will continue working through their childbearing years.<sup>62</sup> Therefore, while many states enacted parental leave legislation,<sup>63</sup> modern society required a federally mandated leave policy.<sup>64</sup>

<sup>59</sup> See WILLIAM M. KEPHART, *THE FAMILY, SOCIETY, AND THE INDIVIDUAL* 350 (1981). "Traditionally . . . the roles of husband and wife were clearly defined. . . . [T]he man was expected to be the breadwinner, and a woman's place was clearly in the home." *Id.*; STAUTBERG & WORTHING, *supra* note 1, at xiii. "The traditional division of labor: daddy earns the living while mommy runs the home and brings up the baby." *Id.*; WORTH, *supra* note 2, at 111. Generally, the woman ran the household and raised the children while the husband went to work. *Id.*; Gimler, *supra* note 2, at 602. Fifteen years ago, women stayed at home and raised the kids, while men comprised the majority of the labor force in America. *Id.*; Leeds, *supra* note 45, at 32. Until recently, child care has been viewed primarily as the mother's role. *Id.*; Lofaso, *supra* note 2, at 459. Traditionally, in western states, women stayed at home and men went off to work. *Id.*

<sup>60</sup> See Gimler, *supra* note 2, at 603. Changing economic conditions have forced women to work outside of the home in order to provide a secondary source of income. *Id.* (citing PATRICIA SCHROEDER, *FAMILY AND MEDICAL LEAVE: OVERVIEW 1* (1988)); Taub, *supra* note 3, at 388. With a rapidly increasing flow of women into the workforce, there is a need for public support of caregiving, whether the recipient is disabled, young, or old. *Id.*; cf. S. KAMERMAN & A. KAHN, *THE RESPONSIVE WORKPLACE: EMPLOYERS AND A CHANGING LABOR FORCE* 12 (1987). "For the first time in 1986, more than half the married mothers of children aged 1 and over were in the labor force, too; and most of these women worked full time." *Id.* In contrast to earlier years, women are increasingly likely to remain at work regardless of pregnancy, maternity, and/or child care. *Id.*; Marge Roukema, *In a Risky World Teenagers Get Reckless; Save the Family*, N.Y. TIMES, Dec. 6, 1987, § 4, at 30. "Two worker families, which must juggle the demands of work and parenthood, make up the majority of the work force." *Id.*; NATIONAL CONFERENCE OF STATE LEGISLATURES, *DRAFT—PARENTAL LEAVE 1* (1988). Researchers estimate that since 1987, only 10% of American families consisted of a working father and the mother being the primary caretaker of the children. *Id.* In contrast, during the 1950s, 75% of American families had a father who worked outside the home while the mother cared for the children at home. *Id.*

<sup>61</sup> See Keyes, *supra* note 2, at 309 (discussing various statistics relating to working women).

<sup>62</sup> See STAUTBERG & WORTHING, *supra* note 1, at xv. According to the "Roper surveys," most 18 through 29 year olds will have 2.2 children. *Id.* Eighty-five percent of all women who work "will become pregnant during their working life." *Id.* at 46; Gimler, *supra* note 2, at 602. Seventy-five percent of all working women will become pregnant at some point in their careers. *Id.*

<sup>63</sup> See *infra* notes 95-112 and accompanying text (discussing several state family leave acts); see also Nancy E. Dowd, *Maternity Leave: Taking Sex Differences Into Account*, 54 *FORDHAM L. REV.* 699, 700 (1986) (several states addressed problem of working women by requiring employers provide "job protected maternity leave"); Karl E. Klare, *Workplace Democracy and Market Reconstruction: An Agenda for Legal Reform*, 38 *CATH. U. L. REV.* 1, 39 (1988) (state legislatures have taken action regarding employment relationships).

<sup>64</sup> See Caplan-Cotenoff, *supra* note 2, at 72. The government should develop a "national

The FMLA allows working mothers the necessary time to care for their newborn or adopted children. Also, men, traditionally known as the family "breadwinner," have seen their role change.<sup>65</sup> The FMLA's paternity policy, therefore, will assist fathers who stay at home and care for their children.<sup>66</sup> Beyond the need to have employee leave for childrearing, there is growing concern over the care of elderly and sick family members.<sup>67</sup> By 2025, there will be twice as many elderly people requiring health care, as there are children five years of age and under.<sup>68</sup> The FMLA, therefore, is also necessary to aid those family members who will nurse their aging parents.

Beyond the practical aspects of the FMLA, this legislation places men and women on "equal footing in the workplace."<sup>69</sup> Fur-

parental leave policy" because state and private sector responses have been inadequate. *Id.* Increased participation by both parents during the child's early years will not only strengthen the parent-child relationship, but will also help the child relate better in society. *Id.* at 99; Gimler, *supra* note 2, at 603. Because most women have to work, the demand for parental leave has increased to ensure that family duties and responsibilities will not be sacrificed. *Id.*; Taub, *supra* note 3, at 383. Jobs which do not have leave policies make it impossible for working women to stay on equal footing with men. *Id.* "An adequate governmental leave system . . . would go a long way toward resolving the tension between the demands of work and home life which so often restrict women's employment opportunities." *Id.* at 384. By the year 2000, over 44% of the population will be over the age of 75, thereby demonstrating the need to provide care for the elderly. *Id.* at 385. *But see* Taub, *supra* note 3, at 382. Preferential treatment of women causes resentment by male coworkers and reinforces the notion that raising children is the woman's responsibility. *Id.*

<sup>65</sup> See Keith H. Hammonds, *Taking Baby Steps Toward a Daddy Track*, BUS. WK., Apr. 15, 1991, at 90. "Women have been struggling with the mommy track for years as they try to juggle work and kids." *Id.* Men's as well as women's roles regarding work and family life are changing. *Id.*

<sup>66</sup> See Caplan-Cotenoff, *supra* note 2, at 100. "Awareness of the significance of fathers' involvement in child care is increasing." *Id.*; Lofaso, *supra* note 2, at 466. Even though some employers do grant maternity leave, very few provide paternity leave. *Id.*; Taub, *supra* note 3, at 381. "The equal treatment approach seeks to define parenting in gender-neutral terms and promotes male participation in childrearing." *Id.* Maternity leave programs should be entitled "parental leave" thereby extending benefits to men as well. *Id.*

<sup>67</sup> See STAUTBERG & WORTHING, *supra* note 1, at 59. A realization must occur that as parents get older, many of their children will care for them. *Id.*; Taub, *supra* note 3, at 389. Although it is not unconstitutional, it is poor public policy to address child care needs before elderly needs. *Id.*

<sup>68</sup> See Taub, *supra* note 3, at 386 (discussing statistics of elderly persons who will require health care (citing STAT. ABSTRACT OF THE U.S., CHART NO. 31, NAT'L DATA BOOK & GUIDE TO SOURCES 9, at 32 (1984))); Marshall B. Kapp, *Options for Long-Term Care Financing: A Look to the Future*, 42 HASTINGS L.J. 719, 721 (1991) (stating that by year 2020, number of people over 65 years of age will be 50.3 million as opposed to 31.3 million in 1990).

<sup>69</sup> See Lofaso, *supra* note 2, at 466. Because women are normally viewed as the primary caretaker, businesses are more likely to hire men. *Id.* Even when paternity leave is available, few men take advantage of it because of the pressure society places on them as the "breadwinners." *Id.* at 467; Caplan-Cotenoff, *supra* note 2, at 72. A federal parental leave policy would be one step towards the development of a less male dominated, stereotypical society. *Id.*; Taub, *supra* note 3, at 381. Feminists have attempted to sever the link of preg-

thermore, the FMLA is not sexually biased,<sup>70</sup> and therefore, its constitutionality is ensured.<sup>71</sup> The Pregnancy Discrimination Act of 1978,<sup>72</sup> which amended Title VII of the Civil Rights Act of 1964,<sup>73</sup> was attacked as being discriminatory against men, but was deemed constitutional as an additional, temporary disability leave policy.<sup>74</sup> While this was the first recognition that working women needed time to care for their young children,<sup>75</sup> conspicuously absent from the statute, was the father's right to take the

nancy and parenting, which traditionally assigns raising children to women. *Id.*; WORTH, *supra* note 2 at 112. The traditional view of family roles is difficult to change. *Id.*

<sup>70</sup> See Family and Medical Leave Act of 1993, Pub. L. No. 103-3, § 105, 107 Stat. 6 (1993). One of the main findings of congressional hearings was that "employment standards that apply to one gender only have serious potential for encouraging employers to discriminate against employees and applicants for employment who are of that gender." *Id.*; see also Christine A. Littleton, *Reconstructing Sexual Equality*, 75 CAL. L. REV. 1279, 1298 (1987). The author comments:

The Coalition for Reproductive Equality in the Workplace (CREW) advanced the position that working women and men share a right to procreative choice in addition to an interest in disability leave. In order to ensure equal exercise of procreative rights, it argued, an employer must provide leave adequate to the effects of pregnancy.

*Id.* But see Wendy S. Strimling, *The Constitutionality of State Laws Providing Employment Leave for Pregnancy: Rethinking Geduldig After Cal. Fed.*, 77 CAL. L. REV. 171, 172 (1989). Pregnancy leave laws treat men and women differently on the basis that women can take pregnancy leave regardless of whether such leave is provided for men. *Id.*

<sup>71</sup> See Leeds, *supra* note 45, at 34. It is sexual discrimination to deny a father the right to care for his child, if such right is bestowed upon the mother. *Id.* The Equal Employment Opportunity Commission and Title VII of the Civil Rights Act of 1964 prohibit discrimination based on sex. *Id.*; see also Lofaso, *supra* note 2, at 459. These parental leave policies involve an area of legislation which cuts across the line of gender. *Id.*

<sup>72</sup> See 42 U.S.C. § 2000(e)-(k); see also Cynthia Hecht, *The Pregnancy Discrimination Act: Protecting a Man's Right to Infant-Care Leave*, 25 SANTA CLARA L. REV. 435, 438 (1985). The Pregnancy Discrimination Act ("PDA") expanded the definition of sex discrimination to include discrimination based on pregnancy and related medical conditions. *Id.*; Hylton, *supra* note 16, at 477. The PDA prohibits discrimination on basis of pregnancy, childbirth, or related conditions. *Id.*

<sup>73</sup> See 42 U.S.C. § 2000(e); see also California Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 276 (1987). Title VII of the Civil Rights Act of 1964, which prohibits discrimination, includes prohibition of discrimination on basis of sex. *Id.*; Hecht, *supra* note 72, at 436. Under Title VII, as amended by the PDA, an employer may not treat the sexes differently. *Id.*

<sup>74</sup> See Newport News Shipbuilding & Dry Dock Co. v. E.E.O.C., 462 U.S. 669, 684 (1983). The PDA protected a male employee with a medical benefits plan, but did not address the paternal infant-care leave. *Id.*; Leeds, *supra* note 45, at 32. The PDA, as well as New York legislation, treats pregnancy as any other temporary disability. *Id.*; STAUTBERG & WORTHING, *supra* note 1, at 47. With reference to the PDA & Title VII:

There are two key elements to this legislation that every working woman should know.

One is that employers cannot refuse to hire a pregnant woman, nor can they fire her, or force her to take a leave of absence. In addition, the bill categorizes pregnancy as a disability and states that a pregnant woman is entitled to all benefits that she would get under the company's disability plan, including continuation of health insurance, and the same income and job protection offered to anyone suffering a disability.

*Id.*

<sup>75</sup> See generally Taub, *supra* note 3, at 387. Many women are forced to quit their jobs in order to care for their children or for a sick family member. *Id.*

same leave.<sup>76</sup> The FMLA, however, took this into consideration, and it was designed to allow both male and female employees to take leave.

It seems, however, that one of the major flaws of the FMLA is its failure to consider the changing contours of the family. In the United States, the family structure no longer consists of a mother, father, and children.<sup>77</sup> Rather, the family includes an array of individuals including aunts, uncles, and grandparents.<sup>78</sup> Although the FMLA applies to parents, spouses, and children, it does not include extended families, those living out of wedlock, or people with alternative lifestyles.<sup>79</sup> "Non-traditional family" members also deserve the opportunity to care for young children, parents, relatives, or one another in times of illness.<sup>80</sup> Further, the existence of Acquired Immune Deficiency Syndrome, underscores the necessity of a family and medical leave for non-traditional families.<sup>81</sup>

<sup>76</sup> See 42 U.S.C. § 2000(e)-(k). The PDA only grants leave to mothers, and is viewed as a disability benefit. *Id.*; Hecht, *supra* note 72, at 435. "Practices that grant infant care leave solely to female employees deny male employees the right to fully participate in early child care." *Id.*

<sup>77</sup> WORTH, *supra* note 2, at 3. The meaning of the word family always changes throughout history. *Id.* Even though many families today would be considered unusual compared to our ancestors, these families still maintain unbroken bonds. *Id.*

<sup>78</sup> See KEPHART, *supra* note 59, at 350. "[T]he family, our oldest institution, . . . has always concerned itself with connubial relationships, reproduction and child rearing, the satisfaction of primary group needs, and the various statuses and roles involved in kinship organization." *Id.*; MERRIAM WEBSTER DICTIONARY 448 (9th ed. 1983). "Family" is defined as "[a] group of individuals living together under one roof and under one head: household." *Id.*

<sup>79</sup> See Mark R. Chellgren, *Court Dumps Kentucky's Sodomy Law*, CHI. DAILY L. BULL., Sept. 24, 1992, at 2 (discussing how homosexuals should be treated equally under law and that homosexuality should be treated as accepted "alternative lifestyle"); see generally Taub, *supra* note 3, at 392 (stating that there is substantial segment of population that is not being afforded these services).

<sup>80</sup> See *Text of 1993 Act*, *supra* note 7, at D-27. Under the FMLA "'spouse' is defined in accordance with applicable state law, including common law marriages where recognized by the state. It is clear from the legislative history that unmarried domestic partners are not intended to qualify for family leave to care for their partner." *Id.* But see *Braschi v. Stahl Assoc.*, 74 N.Y.2d 201, 210, 543 N.E.2d 49, 53-54, 544 N.Y.S.2d 784, 788-89 (1989). The court held that persons with an alternative lifestyle, who are live-in lovers, qualified as family members under rent regulations. *Id.*

<sup>81</sup> See Dennis P. Andurlis, et al., *Comparisons of Hospital Care for Patients with AIDS and Other HIV-Related Conditions*, 267 JAMA 2482, 2482-86 (1992).

The Centers for Disease Control (CDC) estimated in 1989 that 1 million people in the United States were infected with the human immunodeficiency virus (HIV). Two years later, 200,000 persons had been reported as diagnosed with the acquired immunodeficiency syndrome (AIDS). Accompanying these reports has been the recognition that HIV-related disease, including AIDS, will impose an ever increasing burden on our health system.

*Id.*; A.M. Nkowane, *Breaking the Silence: The Need for Counseling of HIV/AIDS Patients*, INT'L NURS. REV., Jan.-Feb. 1993, at 17-20, 24. Caring for persons with HIV/AIDS poses a

#### IV. INTERNATIONAL AND STATE FAMILY LEAVE ACTS

While the congressional legislative process was paralyzed because of "gridlock," thirty-four states, the District of Columbia, and Puerto Rico enacted legislation providing for parental leave.<sup>82</sup> In addition to state legislation, many corporations formulated their own leave policies.<sup>83</sup> Therefore, a business could invoke state legislation or its own leave policy to minimize the cost of employee leave.<sup>84</sup> Similarly, the FMLA was not designed to discourage states or businesses from adopting their own, more generous leave policies.<sup>85</sup> Thus, by examining established international and state leave programs, the FMLA may be amended to provide enhanced benefits.

##### A. *International Acts*

In Sweden, parental leave legislation is considered to be "the prime equality reform."<sup>86</sup> The goal of this legislation is to assist women having dual roles as mothers and employees.<sup>87</sup> This legislation authorizes parents, who have been employees for the previous six months, to either take full-time leave until the child is eighteen months old, or a reduced working day of six hours until the child is eight years of age.<sup>88</sup>

great burden on families. *Id.* In order to effectively care for and AIDS patients, families must be able to provide "emotional, psychological and socioeconomic support." *Id.*

<sup>82</sup> See *infra* notes 95-112 and accompanying text (discussing the various state leave acts); see also H.R. REP. NO. 699, 99th Cong., 2d Sess., pt. 2, at 54 (1986) (discussing FMLA 1986 proposal); S. REP. NO. 77, 101st Cong., 1st Sess. 68 (1989) (discussing 1989 FMLA proposal). See generally *Text of 1993 Act, supra* note 7, at D-27 (discussing how individual states, have enacted their own form of family leave); Tamar Lewin, *Battle for Family Leave Will be Fought in States*, N.Y. TIMES, July 27, 1990, at A8 (discussing President Bush's veto of FMLA and analyzing state leave statutes).

<sup>83</sup> See Barbara Franklin, *Family-Leave Plans*, N.Y. L.J. Feb. 11, 1993, at 5, col. 5. Corning, Inc. and IBM Corp. are two companies which have leave policies exceeding the three-month period provided by federal legislation. *Id.*

<sup>84</sup> See *id.* Laurie Kane, a research associate at the Family and Work Institute, stated that "companies will realize [that family leave] won't affect them in a negative way. It can only create happier employees, which tends to create better business." *Id.* at 9.

<sup>85</sup> See Family and Medical Leave Act of 1993, Pub. L. No. 103-3, § 105, 107 Stat. 6 (1993). "Nothing in this Act . . . shall be construed to discourage employers from adopting or retaining leave policies more generous than any policies that comply with the requirements under this Act or any amendment made by this Act." *Id.*

<sup>86</sup> See Karin Widerberg, *Reforms for Women-on Male Terms—The Example of the Swedish Legislation on Parental Leave*, 19 INT'L J. SOC. L. 27, 27 (1991) (discussing the effect of parental leave legislation on Swedish workers); cf. Taub, *supra* note 3, at 397 (discussing how caregivers can basically receive unlimited amount of leave and still maintain pension, job guarantee, and pay from county health department).

<sup>87</sup> See Widerberg, *supra* note 86, at 28 (evaluating purpose of Swedish leave policy).

<sup>88</sup> See *id.* (provision establishes parental leave).



Sweden's leave policy also provides working women pregnancy leave from two months through one week prior to her expectancy date.<sup>89</sup> Since the implementation of this policy, Swedish families have grown closer, while employer-employee relations have improved.<sup>90</sup>

Even the Soviet Union once provided better leave benefits than the United States.<sup>91</sup> Its maternity leave policy provided full pay for the first 112 days, coupled with leave for the following year at partial pay.<sup>92</sup> This provision surpassed the standards set by the FMLA.<sup>93</sup> However, the primary goal of this leave program, which provided paternal as well as maternal leave, was to encourage childbirth, expand the size of the family, and increase the population.<sup>94</sup>

### B. State Acts

While countries have enhanced their leave policies, various states have also required employers, in either the public or private sector, to provide some measure of unpaid parental leave to their employees.<sup>95</sup> Maine's "Family Medical Leave Act," for example, requires employers of twenty-five or more employees to afford ten weeks of unpaid family medical leave in any two-year period.<sup>96</sup>

<sup>89</sup> See *id.* (permitting pregnant women leave from seventh month of pregnancy until one week before they are due).

<sup>90</sup> See *id.* at 28. This leave legislation dramatically changes relations between parents and children, between the sexes, and even the employer—employee relationship. *Id.*

<sup>91</sup> See TATYANA MAMONOVA, *WOMEN AND RUSSIA: WRITINGS FROM THE SOVIET UNION* 91 (1984) (stating how Russian legislation is progressive by U.S. standards).

<sup>92</sup> *Id.* (sanctioning full pay during maternity leave).

<sup>93</sup> *Id.* (observing that FMLA does not provide pay during leave).

<sup>94</sup> *Id.* Because the birth rate in Russia was so low, family leave legislation was passed to foster childbirth. *Id.*

<sup>95</sup> *Text of 1993 Act, supra* note 7, at D-27. Of the 36 states, including the District of Columbia and Puerto Rico, that have enacted leave policies, 23 states cover both private and public sector employees while 13 states cover only public employees. *Id.*; see, e.g., ALASKA STAT. §§ 23.10.500—550 (1992) (covering private sector employees); ALASKA STAT. § 23.40.205 (1992) (covering collective bargaining agreements); ALASKA STAT. § 39.20.305 (1992) (covering public sector employees); CONN. GEN. STAT. ANN. § 5-248(a) (West 1988) (covering public sector employees); CONN. GEN. STAT. ANN. §§ 31-51cc-99 (West 1989) (covering the private sector); D.C. CODE ANN. § 36-1302 (1990) (covering all employees); ME. REV. STAT. ANN. tit. 26, §§ 843 to 46 (West 1987) (covering both public and private sector employees); N.J. STAT. ANN. § 34:11B (West 1990) (covering employees in both public and private sectors); R.I. GEN. LAWS § 28-48 (1987) (covering all employees); WIS. STAT. § 103.10 (1987) (covering both public and private sector employees).

<sup>96</sup> See ME. REV. STAT. ANN. tit. 26, § 844 (West 1988). In Maine, as in West Virginia, the law only provides for unpaid leave, but the employer is free to grant paid leave. *Id.* The amount of unpaid leave to which the employee is entitled is reduced to the extent that paid leave is provided. *Id.* The employee must give at least 30 days notice of the intended dates of leave and return, unless the employee is prevented by medical emergencies from doing

Employers in Maine, while not required to maintain employees' benefits during a leave period, must provide employees the opportunity to maintain health benefits at their own expense.<sup>97</sup> Furthermore, both the employer and employee may agree to vary the amount of leave provided by the statute.<sup>98</sup> This allows the employer and employee to "custom tailor" leave to the employee's needs, as opposed to being tied to an inflexible timeframe, as does the FMLA.<sup>99</sup>

The Connecticut legislature enacted the Family and Medical Leave From Employment Act to entitle state employees to twenty-four weeks of unpaid family leave during any two-year period.<sup>100</sup> Private sector employees are entitled to sixteen weeks of leave in any two-year period.<sup>101</sup> Employees become eligible for leave upon the birth or adoption of a child, as well as for the serious illness of a child,<sup>102</sup> spouse, or parent.<sup>103</sup> The statute also provides that absent employees will assume their prior or an equivalent position once the leave terminates.<sup>104</sup> If upon return, the employee is unable to perform the duties of his or her previous position, the employer must find a comparable position for the employee.<sup>105</sup> Additionally, the employee is entitled to the continuation of health and hospitalization services, as long as the employee pays the insurance premiums.<sup>106</sup> This measure lessens the employer's financial burden while allowing the employee to maintain full health benefits.

so. *Id.*

<sup>97</sup> See *id.* § 845-(2). During any family medical leave pursuant to this subchapter, the employer must make it possible for employees to continue their benefits at their own expense. *Id.*

<sup>98</sup> See *id.* § 844(1)(c). This provision allows labor organizations in the collective bargaining process greater flexibility and bargaining power. *Id.*

<sup>99</sup> See *id.* (discussing provisions in statute allowing employees to tailor length of their leave); Family and Medical Leave Act of 1993, Pub. L. No. 103-3, § 105, 107 Stat. 6 (FMLA provides 12 week ceiling on leave).

<sup>100</sup> See CONN. GEN. STAT. ANN. § 5-248(a) (West 1988) (discussing need to place limits on amount of leave employee can take during certain time period).

<sup>101</sup> See CONN. GEN. STAT. ANN. § 31-51cc-99(b) (West 1989) (stating that two-year period commences on first day leave is taken).

<sup>102</sup> See 1987 CONN. ACTS 291 (Reg. Sess.) (West Supp. 1987). The statute defines "serious illness" as "an illness, injury, impairment or physical or mental condition that involves (1) inpatient care in a hospital, hospice or residential care facility or (2) continuing treatment or continuing supervision by a health care provider." *Id.*

<sup>103</sup> See CONN. GEN. STAT. ANN. § 5-248(a) (West 1988); CONN. GEN. STAT. ANN. § 31-51cc-99(b) (West 1989).

<sup>104</sup> See CONN. GEN. STAT. ANN. § 5-248(a) (West 1988).

<sup>105</sup> See *id.*

<sup>106</sup> See *id.*

The Oregon Parental Leave Law<sup>107</sup> requires employers with more than twenty employees to provide twelve weeks of unpaid leave for the birth or adoption of a child.<sup>108</sup> Unlike other state leave policies, the statute does not provide leave for the care of a sick child, spouse, or parent.<sup>109</sup> This statute also allows employers to request written notice from the employee petitioning for parental leave.<sup>110</sup> Similarly, an employee who anticipates serious illness in the family, must provide fifteen days notice of his or her intention to request leave.<sup>111</sup> Lastly, this legislation provides that an employer is not required to reinstate the employee to the same or equivalent position if the employer can prove that conditions have changed, making such reinstatement impossible.<sup>112</sup>

As a comparison of the various state and international family leave laws demonstrate, benefits vary greatly and may detrimentally affect the employee and his or her dependent.<sup>113</sup> These policies, however, also have positive attributes which could be utilized to improve the FMLA's coordination of family needs with business concerns and employment security.<sup>114</sup> Persons living in Oregon, as well as other states, should have the same right to care for sick relatives as those living in Connecticut. A federal leave policy would provide uniformity and much-needed relief to neglected employees.

<sup>107</sup> See OR. REV. STAT. § 659.360 (1987).

<sup>108</sup> See *id.* § 659.360(1)(a). This takes into account all or part of time between birth of employee's infant and when the infant reaches 12 weeks of age, or in the case of a premature infant, until the infant has reached a developmental stage equivalent to 12 weeks as determined by an attending physician. *Id.*

<sup>109</sup> See *id.* § 659.360.

<sup>110</sup> See *id.* § 659.360(4) (stating how statute allows employer to deny leave to any employee who, barring emergency, doesn't comply with notice requirement).

<sup>111</sup> See OR. REV. STAT. ANN. § 659.570(5)(a) (1989).

<sup>112</sup> See OR. REV. STAT. § 659.360(8) (1987). "If the employer's circumstances have changed that the employee cannot be reinstated to the former or equivalent job, the employee shall be reinstated in any other position which is available and suitable. However, the employer is not required to discharge any employee in order to reinstate the employee." *Id.*

<sup>113</sup> See generally Congressional Research Service, *supra* note 10, at 1 (arguing need for uniform family leave legislation which ensures welfare of all employees and their families).

<sup>114</sup> See Caplan-Cotenoff, *supra* note 2, at 95. An effective federal family leave policy should be based on established state and foreign models. *Id.* But see Gimler, *supra* note 2, at 604. Senator Dan Quayle noted that most European countries with federally mandated leave policies have unemployment rates double that of the United States. *Id.* (citing S. REP. NO. 447, 100th Cong., 2d Sess., 68 (1988)).

## V. AMENDING THE FMLA

Congress and President Clinton must soften the economic blow to small businesses if the FMLA is to be effective. The lobbying efforts of the business community, as well as the average employer's adversity to a mandated leave program, evidence a potentially strong obstacle to the proper functioning of the FMLA. Moreover, many people whom the FMLA was intended to assist do not have the financial resources to capitalize on the unpaid leave provided by the FMLA.<sup>115</sup> Therefore, to benefit these employees, Congress might provide small business owners tax credits,<sup>116</sup> as well as incorporate several aspects of the existing international and state statutes that have proved to be successful.<sup>117</sup>

Further, the FMLA should be amended to provide benefits for alternative lifestyle families and individuals who do not have the financial means to take extended unpaid leave. Additionally, over a period of three to five years, the threshold number of fifty or more employees should be decreased since ninety-five percent of employers are exempt from the FMLA. Moreover, by reducing the seventy-five mile radius requirement, more employees would become eligible under the FMLA.

## CONCLUSION

In recent decades, federally imposed labor standards have addressed serious societal problems, such as exploitation of child labor, exposure of workers to toxic waste, and discrimination in the workplace.<sup>118</sup> More recently, to ensure the welfare of family members, the enactment of a federal leave policy was necessary. Much

<sup>115</sup> See Christopher Conte, *Parental Leave: Would it be Just Another Middle-Class Leave Benefit?*, WALL ST. J., May 12, 1992, at 1. "Fewer than forty percent of working women have . . . income protection that would allow them to take a six-week, unpaid leave without 'severe' financial penalty." *Id.*

<sup>116</sup> See *supra* note 37 and accompanying text (discussing tax credit, proposed by President Bush, given to companies which allow their employees 60 days of leave to care for family members).

<sup>117</sup> See *supra* notes 86-112 and accompanying text (discussing various provisions of state and international leave policies).

<sup>118</sup> See, e.g., *Hammer v. Dagenhart*, 247 U.S. 251, 251 (1918). In *Hammer*, the United States Supreme Court struck down a federal law that prohibited the transportation of the products of child labor in interstate commerce. *Id.* The unpopularity of a prohibition on child labor was again demonstrated in *Bailey v. Drexel Furniture Co.*, 259 U.S. 20, 20 (1922). In *Bailey*, the Supreme Court struck down a similar statute levying a tax upon the products of child labor. *Id.* Today, not only are prohibitive federal laws established, but it is also commonly held that employing children as laborers is corrupt and worthy of prohibition. *Id.*

care was taken to draft leave legislation which would establish a standard benefiting employees without placing undue burdens on employers. While the Family and Medical Leave Act of 1993 fits squarely within the tradition of labor standards that preceded it,<sup>119</sup> the FMLA does not go far enough.

By effectuating the foregoing amendments, the FMLA will create rights in the workplace that will one day be viewed as fundamental.

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<sup>119</sup> See, eg., Equal Pay Act of 1963, 29 U.S.C. § 206(a) (1982); Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 (1982); Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 (1982); Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e) (1982).