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FAMILY AND PARENTAL LEAVE STATUTES: A STATUS REPORT

by

Rosemarie Feuerbach Twomey\*

INTRODUCTION

Congress was unable to override President Bush's veto of legislation that would have provided mandated leave, upon request, to employees of private companies for "family related" purposes--birth of a child, adoption of a child, or to care for sick or disabled family members. However, nineteen states and the District of Columbia have passed such legislation. Of that number, nine states and the District of Columbia have passed laws mandating leave for both parental and family reasons, and ten states require leave for birth and/or adoption of a child only (parental leave). Congress has vowed to revisit the issue at its next opportunity, and it is highly probable that a federal family leave bill will be passed into law during the Clinton administration.

A comparison of the states' parental and family leave statutes reveals wide variations in provisions. This gives rise to a number of questions. Should the federal government pass a family or parental leave law to insure uniform protection to employees and avoid the problems of wide differences between the laws of one state and the laws of another? Would a Uniform Family Leave Act accomplish the major objectives of a federal statute while still allowing states some discretion to consider the impact of such laws on their unique business environments? Should employers be free of the requirements of any such legislation and, in lieu of those laws, be encouraged through tax benefits or other governmental assistance to provide leave to employees for family related purposes? In light of demographic trends indicating higher percentages of women, minorities, and disabled persons entering into the workforce [1], employers might prefer to offer cafeteria style benefits to their diverse workforces (including, as an option, parental or family leave) rather than be required by law to grant one type of benefit at the risk of having to forego others [2].

The primary focus of this paper is on parental and/or family leave laws, although maternity and pregnancy leave laws

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will also be addressed. Since there are inconsistencies in the labelling of the various types of leaves, it is suggested here that uniform labels be adopted as described below.

The passage of Title VII of the Civil Rights Act of 1964 as amended by the Pregnancy Disability Act led many states to enact statutes requiring that leave be granted to an employee who gives birth. Such leave may or may not include a period of time for the care of the newborn as distinguished from time to heal and recuperate from the act of giving birth. These leaves are usually called "maternity" or "pregnancy" leaves, but are sometimes referred to as "medical," "disability," "parental," "child care," or "family" leaves.

It is recommended here that those labels be refined and used as follows: "Maternity" and "pregnancy" leave should refer to leave for a female employee in relation to the birth of that employee's child. To be in compliance with federal law, such leave should be equal to or greater than, but not less than, leave made available to employees for other temporary disabilities [3]. "Parental" leave should refer to leave which is granted to care for a newborn or newly adopted child. The EEOC uses the term "parental leave" to refer to leave which is taken "to care for a child of any age, or to develop a healthy parent-child relationship, or to help a family adjust to the presence of a newborn or adopted child" [4]. "Family" leave should refer to leave for the purpose of caring for a sick or disabled family member, or for some other family-related reason. "Medical" and "disability" leave should refer to leave for the employee who cannot work due to his or her own temporary disability or illness.

The states' parental and family leave statutes ride a continuum from minimum to maximum concern for employer needs. The statutory provisions of the several family/parental leave laws are presented below with comments indicating which are the most and the least favorable to employers. Also addressed is whether the provisions of the laws pose any significant legal problems; and, where appropriate, comparisons are made with the federal bill which was vetoed by President Bush. The paper concludes with a discussion comparing the advantages and disadvantages of enacting federal law on the subject, formulating a Uniform Parental/Family Leave Act, leaving the matter completely to the states' legislators, or, conversely, discouraging passage of more legislation in this area at either the state or federal level.

The twenty statutes which provide for mandated parental and/or family leave for private sector employees have been divided into two categories: Section I lists and describes those which provide for both parental and family leave, and Section II lists and describes those which require leave only for birth and/or adoption of a child (including maternity and pregnancy leave laws). Section III describes statutory provisions in four states' laws which provide alternative means of addressing family concerns in employment.



For purposes of this paper, only statutes which apply to private sector employers are included. Laws which pertain only to public sector employers are not covered.

#### I. COMPREHENSIVE STATUTES MANDATING BOTH PARENTAL AND FAMILY LEAVE.

Nine states and the District of Columbia require both parental and family leave. Those states are California, Connecticut, Hawaii, Maine, New Jersey, Oregon, Rhode Island, Washington, and Wisconsin. In analyzing these laws, the following items were selected for comparison:

- A. Provisions as to who is a "child" whose birth or adoption triggers the right to mandated leave.
- B. The circumstances under which family leave is to be granted.
- C. Provisions indicating what constitutes an illness for purposes of family leave.
- D. The number of employees needed to bring an employer within the coverage of the law.
- E. Employee's rights and remedies under the act.
- F. The employee's right to reinstatement.
- G. The employer's right to require notice and/or certification to confirm the need for the leave.
- H. Length of the mandated leave period.
- I. The employer's right to deny or limit leave.
- J. Effects of leave on employee benefits.

##### A. Provisions as to who is a "child" whose birth or adoption triggers the right to mandated leave.

All the statutes in Section I require employers to grant "parental" leave for both birth and adoption of a child. Leave granted for birth of a child always refers to a natural or biological child. With regard to adoption, the statutes differ. California's [5] definition for purposes of adoption includes a requirement of dependency status. Connecticut's [6] definition of child is limited to one who is under the age of 18 or who is a dependent due to inability to care for him or herself. New Jersey [7] and Wisconsin [8] are similar to Connecticut in their definition of child. The District of Columbia's [9] statute mandates leave for an employee with whom a child is placed--even when such placement is not for purposes of adoption, i.e., as long as the employee permanently assumes and discharges parental responsibilities for such a child. As such, it is the only statute which does not require a legal relationship to establish who is a child for either a leave granted when such child is placed with the employee or leave granted to care for such a child upon his or her illness. Maine [10], Rhode Island [11], and Washington [12] limit the definition of child for purposes of adoption by age: for Maine and Rhode Island the child must be 16 years of

age or less, and for Washington, 5 years of age or less. Hawaii [13] neither broadens nor limits its definition of child for adoption purposes.

Oregon [14] provides for both parental and family leave in two separate statutes--one which makes it an unlawful employment practice to refuse to grant an employee's request for a parental leave of absence and one which provides for Family Medical Leave. Although Oregon is unlike the above states which provide the parental and family leave benefits in one comprehensive statute, it is included in Section I. Under Oregon's law a child, for purposes of requesting leave for adoption, is one who is under 6 years of age.

Least Favorable to Employers: The District of Columbia's statute gives broadest protection to employees by requiring leave for the placement of any child with an employee, regardless of the existence of a legal relationship with such a child, as long as the employee "assumes and discharges" parental responsibility for such a child.

The federal bill's definition describes a "son or daughter" as a "biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis..." [15]. This definition is similar in scope to D.C.'s statute, and would preempt the state laws which have narrower definitions.

Most Favorable to Employers: Rhode Island and Maine, by omitting definitions of child, could be narrowly construed, and thereby benefit employers. Washington and Oregon limit the definition of child in the case of adoption to children 5 years of age or less, the most restrictive of the statutes which limit the definition of child for adoption purposes.

##### B. The circumstances under which leave is to be granted.

Family leave, which refers to leave granted in order to enable an employee to care for a sick family member, is mandated in all the statutes included in Section I. However, the definitions of family member, child, spouse, and parent differ; the criteria which constitute an illness which entitles an employee to such leave varies; and the states are not in agreement as to whether family leave (with its guarantees of reinstatement and other benefits) includes the right of an employee to take leave for his or her own illness. The questions of when family leave is to be granted and who is considered a family member are addressed first.

Connecticut [16], Maine [17], Rhode Island [18], and Wisconsin [19] provide family leave for the employee's own illness, a logical extension of the concerns expressed in the objectives of family leave laws.

The federal bill includes a provision for leave to an



employee whose serious health condition makes the employee unable to perform the functions of his or her position [20].

All the statutes, except Washington, indicate that an employee is entitled to family leave to care for a serious health condition or serious illness of a child, spouse, or parent of the employee. Under Washington's law [21] employers must grant leave to employees to take care of a newborn or a newly adopted child under the age of 6 or a child under the age of 18 with a terminal health condition. There is no provision for leave to care for a spouse or parent. Interestingly, the law does provide that an employee's accrued sick leave can be used to care for a child under 18 who simply requires "treatment" or "supervision"--no other statute addresses leave to care for a child who is neither seriously nor terminally ill, but only mildly ill.

The District of Columbia [22] has passed the only statute which includes in its definition of family member a child who lives with the employee and for whom the employee permanently assumes and discharges parental responsibility and a person with whom the employee shares or has shared, within the past year, a mutual residence and with whom the employee maintains a committed relationship.

Least Favorable to Employers: The District of Columbia has the broadest definition of family member. It is the only one which includes a person with whom the employee shares or has shared a mutual residence and with whom the employee maintains a committed relationship. In addition, it includes as a child one who lives with the employee and for whom the employee permanently assumes and discharges parental responsibility. This could include one who is the child of a live-in companion, whether or not a legal or blood relationship exists.

Most Favorable to Employers: Washington does not require that leave be granted for the illness of family members other than the child of the employee.

C. Provisions indicating what constitutes an illness for purposes of family leave.

California [23], Connecticut [24], the District of Columbia [25], New Jersey [26], and Wisconsin [27] have substantially similar definitions for serious health condition or serious illness: an illness, injury, impairment, or physical or mental condition that involves either inpatient care in a hospital or other health care facility, or continuing treatment or supervision by a health care provider. Wisconsin and Connecticut add the adjective "disabling" to the definition, a word that was found to be ambiguous in a Wisconsin case since it could mean any illness or injury that interferes with performance of daily functions, not necessarily one that is limited to long-term illnesses or

conditions. In the same case, it was decided that the employee who took one day off for bronchitis was not entitled to protection from discharge under this law because the illness did not call for outpatient care with "continuing treatment" by a health care provider [28].

The Rhode Island [29] statute defines a seriously ill person as one who by reason of an accident, disease, or condition is in imminent danger of death, or requires hospitalization involving an organ transplant, limb amputation or other procedure of similar severity. Maine's [30] definition is the same, except that it adds a third possibility: a mental or physical condition that requires constant in-home care. The Washington [31] statute, which limits family leave to care for an ill child only, is further limited to a child with a "terminal health condition" one which is caused by injury, disease, or illness, that is incurable and will produce death within the period of the leave. This very restrictive definition is softened somewhat by the state's law which requires employers to allow employees to use accrued sick leave to care for a child who requires treatment or supervision due to a "health condition." Hawaii [32] defines a serious health condition as "an acute, traumatic or life threatening illness, injury, or impairment that requires a physician's treatment or supervision."

Oregon [33] defines serious health condition in more severe terms, such as a condition which poses an "imminent danger of death, is terminal in prognosis with a reasonable possibility of death in the near future," but also includes in the definition the more general "illness of a child of an employee requiring home care" and "any mental or physical condition that requires constant care."

Least Favorable to Employers: California, Connecticut, D.C., New Jersey, and Wisconsin entitle employees to broad protection with regard to reasons for requesting family leave. However, the California law states that the condition must be one which "warrants the participation of a family member to provide the care." An employer could require evidence that the employee's personal presence is necessary to care for the ill family member.

Most Favorable to Employers: Hawaii and Rhode Island allow employees a right to family leave only in very restricted circumstances involving a terminal prognosis for the ill family member.

D. The number of employees needed to bring the employer within the coverage of the law.

The following list shows the number of employees an employer must have in order to be considered an "employer" under the law. They are in order, from the lowest number of employees to the highest. Some of the statutes staggered the







his or her former position, or to a position with equivalent duties, pay, benefits, and other terms and conditions of employment. The remaining states, while acknowledging substantially the same right of reinstatement, qualify the right by recognizing exceptions which operate in favor of employers. Hawaii [57] and New Jersey [58] state that reinstatement can be denied if the employer experiences layoffs or workforce reductions and the employee would have lost the position if not on leave pursuant to a bona fide layoff and recall system.

The District of Columbia [59] allows an employer to deny reinstatement to an employee who is among the highest paid 10% of the employer's workforce if the employer can demonstrate that reinstatement would result in substantial economic injury to its operations. Oregon [60] and Washington [61] have similar language stating that if the employer's circumstances have so changed that the employee cannot be reinstated to the former or equivalent job, the employee shall be reinstated to any other position that is available and suitable. Washington's statute goes on to state that the entitlement to reinstatement does not apply if the position has been eliminated by a bona fide restructuring or reduction-in-force, the workplace has been moved to at least 60 miles away or is permanently or temporarily shut down for at least 30 days, or if the employee takes another job, or does not provide timely notice of his or her intent to take family leave, or did not return on the agreed-on-day.

The broadest right to deny reinstatement is found in Maine's [62] law which states that reinstatement can be denied if the employer proves that the employee was not restored because of conditions unrelated to the employee's exercise of rights under this act.

Least Favorable to Employers: The statutes which are silent as to the right of an employer to deny reinstatement could prove most beneficial to employees. These include California, Connecticut, Rhode Island, and Wisconsin.

Most Favorable to Employers: Those statutes which specifically recognize the employer's right to deny reinstatement in particular circumstances are desirable for employers. In particular, Maine's catch-all exception provides a major loophole operating in favor of employers.

The federal bill contains an exemption for certain highly compensated employees--the highest paid 10 percent of the employees employed by the employer within 75 miles of the facility at which the employee is employed--which allows the employer to deny restoration to such employee if it is necessary to prevent substantial and grievous economic injury to the operations of the employer [63].

#### G. Employer's right to require notice and/or certification to confirm the need for a leave.

All of the statutes require notice of the intent to take a leave unless the reasons for taking the leave are unforeseeable. Connecticut [64] requires 2 weeks' notice; Maine [65] and Rhode Island [66] require 30 days' notice; and the others require "reasonable" notice. Washington [67] is the only state which requires written notice (30 days for parental leave and 14 days for family leave). All except Maine and Rhode Island state that employees should make reasonable efforts in scheduling leave dates to avoid disrupting the employer's business operations.

All the statutes except Rhode Island specifically permit employers to require certification from a physician or health care provider, and Connecticut alone requires that the employee provide a written certificate from a physician stating the nature of the illness and its probable duration. New Jersey [68], Washington, and Wisconsin [69] permit the employer to obtain a second medical opinion at the employer's expense, with New Jersey and Washington adding that if there is a conflict between the two opinions, a third opinion may be sought--in New Jersey such party is chosen jointly. In Washington the third is chosen by the other health care providers.

Oregon [70] and Washington laws provide that if the employee fails to provide notice as required, the employer may reduce the leave period by 3 weeks.

Least Favorable to Employers: By reason of its limited employee notice requirements and its silence regarding the employer's right to require verification from a physician, Rhode Island shows less concern for employers.

Most Favorable to Employers: Washington has a 30-day written notice requirement, a concern for disrupting the business operations of the employer, an allowance for an employer's demand for confirmation from a health care provider, plus the right of the employer to punish an employee who fails to abide by the notice requirements.

#### H. Length of mandated leave period.

The length of the mandated leave periods fall between 2 weeks in a 1-year period to 16 weeks in a 2-year period. In order from the shortest to the longest, they are:

- Wisconsin [71] - 2 weeks in a 1-year period for family leave.
- 6 weeks in a 1-year period for parental leave.
- 8 weeks in a 1-year period for a combination of leaves.



Hawaii [72] - 4 weeks in a 1-year period.

Maine [73] - 10 weeks in a 2-year period.

New Jersey [74] - 12 weeks in a 2-year period.

Washington [75] - 12 weeks in a 2-year period.

Oregon [76] - 12 weeks in a 2-year period for family leave.  
12 weeks in a restricted period of time for parental leave.\*

Rhode Island [77] - 13 weeks in a 2-year period.

Connecticut [78] - 16 weeks in a 2-year period.

District of Columbia [79] - 16 weeks in a 2-year period.

California [80] - 4 months in a 2-year period.

\* Oregon's statute requires an employee to take the parental leave between the birth of the infant and the time the infant reaches 12 weeks of age. If the child was born prematurely, the 12-week period will be extended to the time the child will have reached the developmental stage equivalent to 12 weeks of age. For adoptions, the leave must be within the 12-week period which begins when the employee takes physical custody of the child.

The federal bill provides a total of 12 workweeks of leave during any 12-month period [81].

Least Favorable to Employers: California, Connecticut, and the District of Columbia permit the longest leave periods for employees.

Most Favorable to Employers: Wisconsin provides only 2 weeks in a 1-year period for family leave, by far the shortest leave period of all the statutes.

#### I. Employer's right to deny leave.

The statutes of California [82], Connecticut [83], the District of Columbia [84], New Jersey [85], Oregon [86], and Washington [87] specifically recognize the right of employers to deny parental and/or family leave to employees in certain situations. The California, Connecticut, Oregon, and Washington laws allow employers to restrict the combined leave of a husband and wife to the maximum leave period provided for one employee (in some states, even though they may work for different employers). In California, if an employee's spouse is unemployed, the employee cannot take a leave. Likewise, in Oregon leave can be denied to an employee if another family

member is available to be a caregiver. In Oregon, Washington, and California the employer can deny leave to a husband and wife simultaneously (in some states, whether or not they work for the same employer).

Employers in California, the District of Columbia, New Jersey, and Washington can deny leave to high paid employees when necessary to avoid substantial economic injury to the employer's operations. In California and the District of Columbia this would include an employee who is one of the 5 highest paid or is among the top 10% in gross salary. In New Jersey it means an employee who is salaried and among the highest paid 5% or one of the 7 highest paid employees, whichever is greater. In Washington it includes up to 10% of the workforce who are designated (in writing and displayed in a conspicuous place) as "key personnel," or the highest paid 10% of the employees.

New Jersey has inserted a punitive clause in its parental/family leave statute stating that no employee shall, during the leave period, perform services on a full-time basis for any person for whom the employee did not provide those services immediately prior to taking leave. However, no sanctions are given for violators.

Least Favorable to Employers: Hawaii, Maine, Rhode Island, and Wisconsin have no provisions specifically granting employers the right to deny parental and family leave in given circumstances or to certain classes of employees.

Most Favorable to Employers: California, New Jersey, and Washington recognize at least two types of situations in which employers can deny parental or family leave to employees. Additionally, California has an open-ended provision which would permit an employer to deny leave if it would result in undue hardship to the employer's operations.

#### J. Effects of leave on employee benefits.

Preservation of rights and benefits which have accrued up to the commencement of a leave period is standard for all the parental/family leave statutes. The laws differ in regard to whether or not they require continuation of benefits during the leave period. The District of Columbia [88], New Jersey [89], Rhode Island [90], and Wisconsin [91] statutes indicate the employers shall continue certain benefits for employees while on leave.

New Jersey's law specifically states that the employer shall maintain coverage under a group health insurance policy, a group subscriber contract, or a health care plan at the level and under the conditions coverage would have been provided if the employee had continued to work. The law was challenged and was found to be pre-empted by the Employee Retirement Income Security Act with regard to any plans which would come within the jurisdiction of the federal



law [92]. The legal issue of pre-emption would apply to several other of the state's statutes with similar provisions.

For the protection of employers, some states have a provision that employees pay to the employer a sum of money equal to the amount of the insurance premiums which will be paid during the time of the leave. Rhode Island makes this payment a statutory requirement, adding that the employer shall return such payment to the employee within 10 days following the employee's return to work. Wisconsin permits employers to require an escrow payment for this purpose.

California [93], Washington [94], and Oregon [95] have provisions which specifically absolve employers from requirements of continuing benefits during leave. California allows employers to refuse to make pension or retirement contributions during the leave. Washington's law states, "Nothing in this act shall be construed to require the employer to grant benefits, including seniority or pension rights, during any period of leave." Both states acknowledge the employees' rights to continue group health insurance plans at the employee's expense. Finally, under Oregon's law benefits are not required to accrue during the leave.

Maine's [96] law requires that employers make it possible for employees to continue benefits at the employee's expense.

Least Favorable to Employers: Statutes which mandate continued benefits during the leave period include those of the District of Columbia, New Jersey, Rhode Island, and Wisconsin.

Most Favorable to Employers: Rhode Island indicates a concern for the employers' protection by requiring employees to make a prior payment to employers for the cost of continuing benefits for the duration of the leave period. California, Washington, and Oregon allow employers to refuse to continue certain benefits during that period.

II. STATES MANDATING LEAVE FOR PREGNANCY, CHILDBIRTH, ADOPTION OR CARE OF A NEWBORN OR NEWLY ADOPTED CHILD ONLY. (These statutes contain no provisions for care of an ill family member.)

The following statutory provisions reflect a deliberate effort to abide by civil rights requirements concerning sex and pregnancy discrimination. It is somewhat ironic that in an attempt to comply with those laws, several states have enacted laws which appear to violate those very laws. Part of the problem stems from the fact that it is legally necessary to treat pregnancy and childbirth the same as other temporary disabilities are treated, and that treating pregnancy more favorably than other temporary disabilities met with approval by the U.S. Supreme Court [97]. Since pregnancy and childbirth are biologically associated only with the female

gender, many of the statutes grant benefits such as leave only to female employees. As long as the benefits are tied to the related medical condition of pregnancy and childbirth, there is no legal problem with granting them only to females. However, as stated earlier, by mixing child care leave with pregnancy and childbirth leave, and granting the benefit only to females, there can be a sex discrimination violation of Title VII as well as a potential constitutional question of equal protection [98].

The following statutes are presented in alphabetical order with code cite accompaniments for reference. Many are part of comprehensive fair employment practice or civil rights statutes. Key words have been highlighted to enable the reader to scan the significant facts.

Iowa: The Iowa Civil Rights Act requires that pregnant employees be given leave for their period of disability or for 8 weeks, whichever is less [99].

Kansas: The state's law against discrimination has been interpreted to require employers to grant a reasonable period of leave to female employees for childbearing and to reinstate her to her original (or like) position after leave [100].

Kentucky: The Fair Employment Practices law requires an employer to grant a reasonable leave up to six 6 weeks to care for an adopted child under the age of 7 [101].

Louisiana: Under a pregnancy discrimination law, an employer is required to grant a reasonable leave up to 4 months for disability for pregnancy or a related medical condition [102].

Massachusetts: Maternity leave shall be granted to a female employee for birth or the adoption of a child under the age of 18, or if the child is physically or mentally disabled, under the age of 23. The employee shall be restored to her original position or a similar position with the same status, pay, length of service credit and seniority. However, this does not apply if there is a layoff [103].

Note: Massachusetts' law is likely to be in violation of the federal Civil Rights Act, Title VII. The EEOC recently warned that leaves granted to females only, which are not limited to pregnancy, childbirth, or related medical conditions, may be in violation of the sex discrimination prohibitions of the law [104]. Clearly, a leave granted to a woman for the purpose of adoption does not involve a medical condition and is only for child care. It therefore should also be made available to male employees in order to be in compliance with federal law.

Minnesota: Leave shall be granted to an employee who is a natural or adoptive parent in conjunction with the birth or adoption of a child. The leave may begin not more than 6



weeks after the birth or adoption [105].

The act covers employers with 21 or more employees at at least one site [106].

The length of the leave period is 6 weeks [107].

In addition to remedies otherwise provided by law, a person may bring a civil action to recover any and all damages recoverable at law, together with cost and disbursements, including reasonable attorney's fees, as well as injunctive and other equitable relief at court's discretion [108].

The employee shall be entitled to return to his or her former position or a position of comparable duties, number of hours, and pay. However, if the employer experiences a layoff and the employee would have lost a position pursuant to a bona fide layoff and recall system, the employee is not entitled to reinstatement, but retains all other rights under the system as if the employee had not taken the leave [109].

The leave shall begin at a time requested by the employee. The employer may adopt reasonable policies governing the timing of requests for unpaid leave [110].

The employer shall continue to make coverage available to the employee, while on leave, under group insurance, group subscriber contract, or health care plan for the employee and dependents. Nothing in this act requires the employer to pay the costs [111].

Montana: Under the state's Fair Employment Practices law, an employer must grant a reasonable leave for pregnancy/maternity, the length to be determined on a case-by-case basis. The employee must be reinstated to her original or equivalent position [112].

New Hampshire: Under the state's law against discrimination, leave is to be granted for temporary disability due to pregnancy, childbirth or a related medical condition and to reinstate the employer to the same or a comparable position unless business necessity makes it impossible or unreasonable [113].

Tennessee: An employer must grant a full-time female employee up to 4 months leave for pregnancy, childbirth, and nursing of her infant and reinstate her to her original or similar position unless the position is so unique it cannot be temporarily filled after reasonable efforts have been made or if the employee has used the leave to pursue other employment or has worked full-time for another employer during the leave. The act specifically excludes male employees from taking "maternity leave" [114].

Vermont: Under the state's pregnancy leave law, an employer must grant up to 1 year to a female employee during pregnancy and following birth and reinstate her to the same or comparable position. An employee may seek relief for violation of the act in a private civil suit [115].

Commentary: Because providing leave for childcare to females and not to males has been ruled as sex discrimination

under federal law [116], states which run the risk of being invalidated include: Kentucky and Massachusetts (both of which mandate leave for female employees for adoption), and Vermont (which mandates leave for female employees for up to a period of 1 year (unless it is clearly granted only when a related medical condition is involved)).

### III. ALTERNATIVE STATUTORY PROVISIONS ADDRESSING FAMILY CONCERNS IN EMPLOYMENT.

The following statutory provisions are included to illustrate that other possibilities exist for addressing the need for family concerns in the context of employment. Creative legislators should be encouraged to propose statutory schemes which may better address the needs of employees with family obligations than the ones already enacted.

California: Up to 4 hours per year must be granted for visits by an employee to his or her child's school. Employers may require a signed document verifying the visit [117].

Connecticut: In conjunction with its family and parental leave law, the state's Department of Labor shall report on the feasibility of establishing a statewide job bank of replacement employees available to work for temporary periods of time [118].

Oregon: The Oregon family leave law is not applicable if the employer offers to the employee a nondiscriminatory cafeteria plan, as defined by the IRS Code, providing as one of its options a parental leave benefit that is at least equivalent to the benefit required by this act [119].

Nevada: It is a misdemeanor to terminate an employee who is a parent, guardian or custodian of a child and who (1) appears at a conference requested by an administrator of a school or (2) is notified during work of an emergency regarding the child by a school employee [120]. In addition, it is an unlawful employment practice to fail or refuse to grant leave to a pregnant female employee if such a benefit is provided to employees for other medical reasons [121].

### COMMENTS AND CONCLUSIONS

The foregoing statutes, with their varied and sometimes conflicting definitions, remedies, and even major provisions, pose a challenge for large, interstate employers who must deal with the numerous requirements relating to their employer-employee relationships. One solution would be for Congress to successfully pass a family/parental leave bill. Proponents of a national policy on parental leave are concerned about balancing the needs of America's young children against the other demands made on their working parents--demands which lead to the need for two-income



families and working mothers [122]. Others recognize a need for a policy to help employees who choose to care for aging parents at a time when costs of health and nursing care are rapidly increasing and people are living longer.

There is reason to believe that a federal law which would provide minimum benefits and/or leave to employees would be acceptable to employers. Many large corporate businesses already make parental/family leave available to their workers and, as women become a larger portion of the workforce, management will respond to their needs in order to retain them. A recent study of 700 firms conducted by the National Chamber Foundation of the U. S. Chamber of Commerce revealed that 77 percent of the firms implemented policies that addressed the parental leave needs of workers [123]. The benefits to employers of making family/parental leave available to the workforce include greater productivity, better quality of job performance, and reductions in absenteeism, tardiness, turnover, and stress.

A federal law would establish uniform regulations to ease the burden on interstate employers. However, although the federal bill contains a preemption provision, it makes clear that states which pass leave laws more favorable to employees shall not be superseded by the federal law. The problem of conflicting statutory requirements would therefore still exist. A Uniform Family/Parental Leave Act may better address this problem. Those states wanting to insure some measure of job security for workers in the face of increasing family responsibilities and rising health costs, could turn to the Uniform Act and select from alternative provisions those which best fit their needs. Although the states may choose different options, there would be a standardization of definitions, remedies, and language which would make both compliance and enforcement more effective.

Although small businesses have voiced opposition to a federal mandatory leave law on the basis of cost, the fact that all the states' leave laws as well as the proposed federal bill require only unpaid leave, leads others to believe that the cost burden is exaggerated. A major argument of small business is that when a business is required by law to offer one type of benefit for its workforce, the effect is to make it more costly to offer varied benefit packages for workers with different needs. It has been suggested that a better alternative to mandated leave is to provide tax credits to employers who provide such leave [124].

The United States has been compared unfavorably to other western industrialized nations regarding its national and state policies on employment security issues, in general, and parental leave, in particular. Most of those nations provide medical care or health insurance for pregnancy, and have maternity leave benefits which include a specified leave before and after childbirth, in addition to replacement of all or some of the wages lost during the leave and a guarantee of

job reinstatement [125]. Although in those countries the burden is shared by the taxpayers rather than by employers, mandated unpaid leave may not be too high a price to pay to preserve the economic and social wellbeing of the American family. Proponents of these laws regard them as reasonable minimum requirements which would secure the jobs of employees whose family responsibilities might otherwise lead to loss of employment, compounding already stressful situations.

In conclusion, the objectives of parental and family leave laws can be met through either a federal statute or through the continued enactment of statutes in the individual states. The present situation can be problematic for large interstate businesses since the statutes present an array of requirements which makes it difficult for such organizations to comply. A Uniform Family/Parental Leave Act is a possible alternative solution to that problem.

Beyond the statutory schemes presented above are other alternatives which could be explored by employers, such as company-provided child care, flexible work schedules for working parents, home work, and job sharing arrangements. Legislators could consider other creative solutions to the problem, such as tax credits to parents for childcare expenses, tax benefits to employers to encourage policies aimed at helping employees who are burdened with family responsibilities which affect their employment, or laws similar to Nevada's and California's which require employers to be flexible in regard to employees who must attend to the educational needs of their children by meeting with school personnel during working hours.

The challenge for legislators at both the national and state level is to fashion laws which can satisfactorily meet the needs of both employees and employers and at the same time accomplish the larger, societal objectives of a productive workforce without compromising the employees' ability to meet family obligations outside of the workplace.

#### ENDNOTES

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## MAKING SENSE OF RULES 10b-5 AND 14e-3

by

Susan Lorde Martin\*

### I. Introduction

Now that the "go-go" eighties are gone and Michael Milken and Ivan Boesky and other high profile securities traders have served time in jail, the relative calm in Wall Street "wheeling and dealing" presents a wonderful opportunity for Congress to finally clarify insider trading law. Although the newspapers have been full of insider trading stories and numbers of highly publicized insider trading cases have come before the courts, Congress has never clarified what insider trading is and what specific behavior should be prohibited. Leaving these "details" to the Securities and Exchange Commission (SEC) and the courts has resulted in wrangling between the former and the latter and in a body of law that does not make much sense.

This article will first discuss the Congressional purpose and methods for prohibiting insider trading. Then, SEC Rules 10b-5 and 14e-3 will be explained and compared. The comparison will show that the statutes authorizing the SEC to promulgate those rules are not identical and, therefore, the letter of the law does not require those rules to be interpreted identically. Nevertheless, there is no policy reason to have rules prohibiting insider trading vary depending on whether or not the securities being traded are the subject of a tender offer. Therefore, this article concludes that Congress, in order to create coherent insider trading law, should explicitly indicate which of the two rules has been properly interpreted by the courts. Application of the rules is difficult enough without having the additional burden of incongruous policy.

### II. Prohibiting Insider Trading

Congress has made clear its intention to stop insider trading as well as other market practices it considers abusive in order to maintain public confidence in the fairness of the securities markets. The stock market crash

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