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## Privately Funded Family Medical Leave?

### Abstract

[Excerpt] Women's greater participation in the workplace spurred support for the Family Medical Leave Act of 1993. Nonetheless, advocates have not gained what they desired the most: a program of federally funded paid family medical leave and wage replacement. American social insurance models that offer paid family leave through workers' compensation benefits has been effectuated in states like California, Rhode Island and New Jersey, but it is time to consider an alternative: privately funded family medical leave pensions similar to 401(k) plans authorized by the Internal Revenue Code<sup>[1]</sup> or the Traditional IRA<sup>[2]</sup> and Roth IRA plans.<sup>[3]</sup> These might be funded exclusively through employees' contributions with the possibility of an employer match. Such programs would meet important policy goals of minimizing Americans' tax liabilities and contributing towards long-term investment strategies. Income streams would then follow in the wake of a family medical leave occurrence.

### Keywords

HR Review, Human Resources, family medical leave, private funds

### Disciplines

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### Comments

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# CORNELL HR REVIEW

## PRIVATELY FUNDED FAMILY MEDICAL LEAVE?

*Bernie D. Jones*

### **Executive Summary**

Women's greater participation in the workplace spurred support for the Family Medical Leave Act of 1993. Nonetheless, advocates have not gained what they desired the most: a program of federally funded paid family medical leave and wage replacement. American social insurance models that offer paid family leave through workers' compensation benefits has been effectuated in states like California, Rhode Island and New Jersey, but it is time to consider an alternative: privately funded family medical leave pensions similar to 401(k) plans authorized by the Internal Revenue Code<sup>1</sup> or the Traditional IRA<sup>2</sup> and Roth IRA plans.<sup>3</sup> These might be funded exclusively through employees' contributions with the possibility of an employer match. Such programs would meet important policy goals of minimizing Americans' tax liabilities and contributing towards long-term investment strategies. Income streams would then follow in the wake of a family medical leave occurrence.

### **Thinking Outside the Box: Private Family Medical Leave Pensions**

A survey by the Society for Human Resources Management (SHRM) indicates how employers have worked within the guidelines provided by the Family Medical Leave Act. Approximately 25% of organizations offer paid family leave.<sup>4</sup> Data from the Bureau of Labor Statistics indicates that the beneficiaries of paid family leave work for larger employers employing 500 or more workers;<sup>5</sup> They tend to be highly paid workers in management and professional fields, including those who work for state and local government, or teachers and registered nurses. In the private sector, highly compensated business and financial sector employees tend to receive paid family leave benefits as well. However, experts in human resource management have noted recently that these benefits might place unique burdens upon organizations. Generous benefits are considered a useful tool for attracting top performers, but increasingly organizations are challenged in managing these ever-increasing costs amid the uncertainty of the U.S. economy and the complex health care reform law.<sup>6</sup>

Nevertheless, critics of the prevailing family medical leave policy are troubled that the FMLA has not mandated paid family leave, and of the range of possibilities presented by state government initiatives, no state offers the ideal: twelve weeks (or more) of fully funded paid leave. As an alternative, privately funded family medical leave might provide a solution for minimizing costs and providing more benefits over time. These might be available to employees at all income levels, and especially for the highly skilled and well-compensated employees who might be drawn to those incentives. They might

be set up as lifestyle and life cycle funds modeled after IRAs<sup>7</sup> and which need not be employer managed and funded.<sup>8</sup> These funds could surpass what seems to be the current model of family friendly policies under the federal tax code: childcare credits and deductions for dependents.

For purposes of convenience, these new plans might be called “private family medical leave pension plans” sold through private brokerages and mutual fund companies, if not offered through employers’ plans. A participant who wants to pursue a conservative strategy might consider a selection of funds that pose low risks to loss of capital. Someone who is interested in a life cycle fund might consider when he or she might need family medical care leave income and select a fund based upon that time period, for example, within 5, 10, or 15 years of joining. Participants choose a plan; the company’s fund managers assess opportunities for investment and choose strategies. In the event of a family medical leave occurrence, the funds could be drawn upon to provide income. Proof of the event would then be required to avoid fraudulent claims.

If a participant decides to use the family medical leave pension earlier than anticipated, the participant should not be penalized; for example, a participant imagined that s/he might need the income in ten years, but instead became a stay-at-home parent in five years. Participants should be able to remove their contributions and income; but contrary to the current 401(k) model and traditional IRA model, there would not be a penalty for early withdrawals.<sup>9</sup> With the ability to remove contributions and income, but without any penalties, the plans would be quite effective. With respect to concerns that there might be insufficient time for the accounts to grow, especially if a prospective participant is a young adult at a first job with a low salary and student loans, some options may be developed. For example, investment programs might be available for those as young as 18 years of age who are planning ahead for the possibility of child rearing after marriage in their 20s or beyond. As for those without children or whose children have grown, funds might be available for wages that might be lost from providing care to others, for example, elderly relatives.

But what might distinguish a family medical leave pension plan from the traditional retirement plan is that withdrawals from the latter are expected to accrue far into the future.<sup>10</sup> For these private family medical leave pensions, the first withdrawals might occur after only 5 to 15 or 20 years.<sup>11</sup> The downside of the 401(k) and traditional IRAs models is that although taxes are deferred, they are due when withdrawals are made. However, participants can contribute provided they meet the income thresholds; they then get the benefit of a tax deduction when they contribute.<sup>12</sup> To avoid the possibility of paying taxes on withdrawals, family medical leave pension plans might be treated like Roth IRAs, where contributions are from after-tax income, and as a result, all qualified withdrawals are tax-free.<sup>13</sup>

Those participants who might be concerned about paying taxes on future income might want a private family medical leave pension fund similar to a Roth IRA. Those who prefer to take a current deduction might find the traditional IRA model to be the better choice. As it currently stands, Congress has seen fit to impose contribution limits on both

types of IRAs. I believe it should be up to individuals to determine what their financial needs are and decide accordingly how much they might want to contribute in before- or after-tax deductions. Thus, there should be no contribution limit to private family medical leave pension plans. If a contribution limit must be imposed, then current limits of \$5,500 per year, using the Roth IRA as an example, are appropriate.<sup>14</sup> However, higher contribution limits would allow individuals to build larger funds over time. For instance, if the Roth 401K model were used, an individual under the age of 50 in 2013 might contribute up to \$17,500 in after tax income, but all withdrawals would be tax-free.<sup>15</sup> Even if someone contributed \$2,400 per year at \$50 per week from the time she turned 18, with an average return of 4% per year, her savings could amount to as much as \$34,000 by the time she reached the age of 28 and had a child.<sup>16</sup> If a participant didn't use all the funds, but died with funds available in her account, they might be made part her estate. This is already possible under existing IRAs.

### **Assessing the Benefits of Private Funding**

Without question, plans like these might tend to benefit those who work for large companies that can create their own plans for their employees, as well as the more sophisticated and highly compensated workers who can afford to put aside relatively large sums of money into a private pension plan. What, then of those who can't afford to participate?<sup>17</sup> States might offer their own plans through disability insurance, as California has done, but the tax benefits that might follow a private pension plan, for example, in using a Roth IRA model, might even be more appealing to workers.

Private pension plans available to more workers might make moot the debates over higher income parents being able to afford unpaid leave that other parents cannot. This debate would become less significant, but only if state government plans were also available to low income workers. If higher income parents are more likely to have a solid cushion of savings to support them during the course of their parental leaves, perhaps lower income women need the support of government-sponsored paid leave even more. But should higher income women be able to access paid family medical leave when they have a private pension plan? Some would argue that it hardly seems fair that they might be required under law to contribute but be barred from gaining the benefits. Nonetheless, if this issue of fairness were incorporated into the policy, there might be a sliding scale of decreasing benefits for those who already have their own private plans, with state benefits cutting off at a certain income.

Others have argued that private pensions don't help lower income workers, but that they achieve the best type of savings through tax incentives like the Earned Income Tax Credit and childcare credits that help working parents offset some of their tax liability and receive a refund.<sup>18</sup> Yet in all likelihood, the ideal low income participant in a private family leave pension plan is one who does not yet have any children, similar to the young worker who might be a few years out of college and in the early stages of a career.<sup>19</sup> Such an individual could contribute to a tax-free private family medical leave pension and accrue savings. But contrary to the Earned Income Tax Credit, there would be no income limitation to participating in a private family medical leave pension.

Some might object to these types of plans because many people don't know whether they will ever have children or need to take a family medical leave. However, we all experience caretaking at some time in our lives; when we were children and others took care of us, or if we offer caretaking to others, children or other dependents, before we might finally need care ourselves as elderly people. The mere existence of private family medical leave pensions would facilitate significant conversations about caretaking in families and throughout the lifespan.<sup>20</sup> Moreover, the possibilities to be found in public service advertising campaigns on the values of saving for the long term are certainly worthwhile.<sup>21</sup> These can be adapted to inspire young adults to consider private family medical leave pension plans as a new vehicle for saving and investing towards family medical leave events.

Another objection might be that such plans are unnecessary, as people can save for their own needs. However, as Thaler and Sunstein noted, prior to the subprime mortgage crisis, "In 2005 the personal savings rate for Americans was negative for the first time since 1932 and 1933—the Great Depression years. On average, American households spent more than they earned and borrowed more than they saved."<sup>22</sup> In addition, when people save, they might not get the same tax incentives as those possible from private family medical leave pensions. Interest income on savings accounts is taxed, as are dividends. The interest from federal government bonds is considered income as well.

Insights from the field of behavioral economics address other reasons to support these types of plans. The Corporation for Enterprise Development wants to understand the behaviors and attitudes that influence economic activity and supports local grassroots groups that attempt to help lift low income people out of poverty. They challenge the argument that investment accounts like the one proposed are not of benefit to low income Americans.<sup>23</sup> Other efforts at using behavioral economics to support financial security include encouraging young adults to think about saving more for their retirement. As younger adults tend to be present-oriented, they don't save as much as they should.<sup>24</sup> One means of broadening their self-conceptualization can include virtual reality labs that help participants envision what their future selves might be like at retirement age. Once they do so, they think more about their future needs. Merrill Edge is already using this strategy in their "face retirement campaign: meet the future you."<sup>25</sup>

Private family medical leave pension plans address the needs of those individuals that Thaler and Sunstein call the "Econs," the "sensible spenders and savers. These put money away not only for a rainy day, but for retirement as well, and they invest that money as if they had MBAs."<sup>26</sup> Those they describe as "Humans" do the opposite. These individuals are less likely to plan for the future, and if they do plan, they don't do a good job of it. Like the "nudges" Thaler and Sunstein proposed, employer-sponsored private medical leave pensions could to avoid the problem of "inertia" as individuals make no choices whatsoever. These workers might be pushed into programming as a matter of default, as numbers of workplace retirement plans do. If employees don't opt out, they might be brought into a plan of automatic contributions into the most conservative of plans and at the most conservative sums.

These types of prompts are not new. The Treasury Department “directed the Internal Revenue Service to issue a series of rulings...that defined, approved and promoted the use of automatic enrollment in 401(k) and other retirement savings.”<sup>27</sup> In addition, the Pension Protection Act “offers employers an incentive to match employee contributions, automatically enroll them in the plan, and automatically increase their contributions over time.”<sup>28</sup> If anything, employers should support plans such as these, and brokerage houses should as well. Private family medical leave pension plans could contribute to employees resisting the temptation to quit work if they don’t have paid leave or if they don’t have enough money to take care of their financial needs upon taking family leave. In addition, the possibility of a match could provide an incentive to begin saving in the hope of earning more.

### **Conclusion: New Frontiers**

Innovative companies have put themselves at the forefront of creating family friendly policies that draw potential employees purely as a matter of competing for talent, notwithstanding the FMLA not requiring employers to offer paid leave. For 26 years, *Working Mother* magazine has reported on the top 100 workplaces for working mothers. The 2011 Working Mother 100 Best Companies employ 2.5 million people in 18 industries at more than 37,700 worksites nationwide. Of these employees, 1.21 million are women.<sup>29</sup> These are companies in the following fields: accounting, apparel, chemicals, consumer products, education, financial services, hospitals/healthcare, hospitality, insurance, legal, management consulting, manufacturing, media, internet & advertising, pharmaceutical, professional services, technology, telecommunications, and utilities.<sup>30</sup> All of them provide paid maternal leave and 76% provide paternal leave.<sup>31</sup> Yet, in the past year, the numbers of partially-paid weeks of maternity leave increased, while the numbers of fully-paid weeks of maternity leave declined.<sup>32</sup> Thus, employees in those companies still need alternative sources of funding for family leave.

The Institute for Women’s Policy Research explained further: In 2012, 16% of companies on the list “offered paid maternity leave of more than 12 weeks and 8% provided 11-12 weeks of paid leave.”<sup>33</sup> The greatest majority offered between 1-2 weeks (12%), 3-4 weeks (13%), 5-6 weeks (23%), or 7-8 weeks (15%).<sup>34</sup> As for paternal leave, most companies offered leave between 1-2 weeks (51%) or 3-4 weeks (11%).<sup>35</sup> Nonetheless, “such policies are not the rule among companies that present themselves as family-friendly.”<sup>36</sup> These elite companies’ “paid parental leave policies fall short of families’ needs, with some not offering any paid maternity leave at all and 30 percent offering no more than 4 weeks of paid maternity leave. The share of companies with such low family leave provisions grew from 24 percent to 30 percent in 2012.”<sup>37</sup>

Companies that offer paid leave and believe that government intervention is unnecessary, because they are capable of attracting desirable talent through incentives, might offer such benefits as part of their traditional benefits packages and pay for the plans themselves. However, one possibility includes Congress leading the effort and authorizing private family medical leave pension plans offered as part of compensation

packages and paid through employee contributions. Private family medical leave pensions might be troublesome if one adheres to the position that employers have an obligation to employees to provide a decent standard of living with adequate benefits throughout a worker's lifespan. Such pensions would be of no cost to employers; employees would bear all the costs of their own leave without employers contributing in any fashion. It is true that private family medical leave pensions emphasize the individual's efforts. Yet, if a match were possible, as exists under the 401(k) retirement plan, employers would bear some costs and gain the benefit of workers experiencing better work-family balance.

Supporters of paid family leave have long operated under the presumption that the federal government should provide funding. It is certainly understandable: in the modern world, federal government funding has traditionally been seen as the ideal, dating back to the system of federal retirement pensions developed by Congress in the Social Security Act of 1935.<sup>38</sup> But such programs are not free. In a time of fiscal austerity stemming from rising deficits, it will be difficult for supporters of paid family leave to overcome longstanding cultural presumptions that families undertake the management of their parenting responsibilities and make their own arrangements. Thus, we need to consider newer ways of thinking about funding for family medical leave: privately funded family medical leave pensions as a form of "self-investment." It is time to think outside the box. **✕**

*Bernie D. Jones is Associate Professor, Suffolk University Law School, and the editor of *Women Who Opt Out: The Debate over Working Mothers and Work-Family Balance* (NYU Press, 2012). A longer version of this article, with acknowledgments, will be available: 35 Northern Illinois University Law Review (fall 2014), and thereafter, on <http://www.ssrn.com>.*

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<sup>1</sup> 26 U.S.C. 401(k) (1978).

<sup>2</sup> 26 U.S.C. 408 (1986).

<sup>3</sup> 26 U.S.C. 408A (1997).

<sup>4</sup> Society for Human Resource Management, *Employee Benefits: Examining Employee Benefits Amidst Uncertainty* 35 (2011).

<sup>5</sup> Bureau of Labor Statistics, *National Compensation Survey*, Table 33 (March 2011).

<sup>6</sup> Society for Human Resource Management, 3 (2011).

<sup>7</sup> See ie., the National Association of Government Defined Contribution Administrators, *Guide to Lifestyle/Lifecycle Funds for Asset Allocation*, [http://www.nagdca.org/content.cfm/id/lifestyle\\_funds](http://www.nagdca.org/content.cfm/id/lifestyle_funds): "Lifestyle funds (also called 'risk-based' funds) are designed to offer each individual investor a simplified choice of preferred risk



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exposure. Lifecycle funds (also called 'target-date' or 'age-based' funds)...are usually offered in 10-year or 5-year increments. Funds with a long time horizon are initially invested in a risky allocation, and then over time the allocation is gradually tempered to a more conservative allocation.”

<sup>8</sup> See ie., ERISA sets forth rules and guidelines for regulating private pension fund management as well as health insurance plans: United States Department of Labor, *Employee Retirement Income Security Act (ERISA), Retirement Plans, Benefits & Savings*, <http://www.dol.gov/dol/topic/retirement/erisa.htm>.

<sup>9</sup> Department of the Treasury, Internal Revenue Service, *Topic 424—401(k) plans*, <http://www.irs.gov/taxtopics/tc424.html>. Early withdrawal penalties apply to those under the age of 59 ½; not only are they subject to a 10% penalty, but the withdrawals are taxed as ordinary income.

<sup>10</sup> For example, T. Rowe Price has a listing of the retirement funds in their portfolio spanning a 50 year period from 2005 through 2055, and in five year increments to match a large span of retirement dates, from those in their seventies who retired eight years ago to those in their twenties who might anticipate retiring forty-two years from now: T. Rowe Price, *Retirement Funds*, <http://individual.troweprice.com/public/Retail/Mutual-Funds/Retirement-Funds>.

<sup>11</sup> An example might be found in Coverdell education savings accounts. They use a shorter investing period, 5 to 10 or 15 years, which might prove ideal for a family medical leave pension. Only a maximum of \$2000 can be contributed per year, these are not tax deductible, but withdrawals for qualified educational expenses are not taxable. It should be easy to ensure that funds are spent only on family medical leave expenses, such as compensation for lost wages: forms and receipts might be submitted by participants to their plan managers. See ie., Department of the Treasury, Internal Revenue Service, *Topic 310 - Coverdell Education Savings Accounts*, <http://www.irs.gov/taxtopics/tc310.html>.

<sup>12</sup> Department of the Treasury, Internal Revenue Service, *401(k) Plans*, [http://www.irs.gov/Retirement-Plans/401\(k\)-Plans](http://www.irs.gov/Retirement-Plans/401(k)-Plans); Department of the Treasury, Internal Revenue Service, *Traditional IRAs*, <http://www.irs.gov/Retirement-Plans/Traditional-IRAs>

<sup>13</sup> Department of the Treasury, Internal Revenue Service, *Roth IRAs*, <http://www.irs.gov/Retirement-Plans/Roth-IRAs>.

<sup>14</sup> Id.

<sup>15</sup> Department of the Treasury, Internal Revenue Service, *Roth Comparison Chart*, <http://www.irs.gov/Retirement-Plans/Roth-Comparison-Chart>.

<sup>16</sup> See ie., [http://www.moneychimp.com/calculator/compound\\_interest\\_calculator.htm](http://www.moneychimp.com/calculator/compound_interest_calculator.htm).

<sup>17</sup> See ie., Lynn Stuart Parramore, *Everything You've Been Told About Personal Finance is Dead Wrong—Here's the Truth*, ALTERNET, March 5, 2013, <http://www.alternet.org/economy/everything-youve-been-told-about-personal-finance-dead-wrong-heres-truth>. See also, Crystal C. Hall, *Behavioral Decision Research, Social Class, and*

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*Implications for Public Policy*, in *FACING SOCIAL CLASS* 177 (Fiske and Markus, eds., 2012). In addition, the lessons of the recent recession might have been lost on many: A.C.S., *Too Thin A Cushion*, *THE ECONOMIST*, at <http://www.economist.com/blogs/freeexchange/2013/04/saving>, or John Glower, *Savings: 5 signs Americans are forgetting the lessons of 2008*, *CHRISTIAN SCIENCE MONITOR*, at <http://www.csmonitor.com/Business/2013/0207/Savings-5-signs-Americans-are-forgetting-the-lessons-of-2008/Debt-remains-at-distressing-levels>. Yet, one can argue that in the wake of the recession, Americans might be finding it harder to save.

<sup>18</sup> See *ie.*, Department of the Treasury, Internal Revenue Service, *EITC Income Limits, Maximum Credit Amounts and Tax Law Updates*, <http://www.irs.gov/Individuals/EITC-Income-Limits.-Maximum-Credit--Amounts-and-Tax-Law-Updates>. See also, Vada Lindsey, *Encouraging Savings Under the Earned Income Tax Credit: A Nudge in the Right Direction*, 44 *U. Mich. J. L. Reform* 83 (2010) (Suggesting that the EITC might be used as a retirement savings vehicle among low income workers).

<sup>19</sup> This strategy might resonate among certain groups of low income workers described by Joan C. Williams as pursuing the politics of respectability and adhering to the notion of a “disciplined self” as they are “enacting the importance of a world in moral order...the central organizing principle in working-class life” dedicated to “routine...to protect their families from falling from middle-class status,” Joan C. Williams, *The Class Culture Gap*, in *FACING SOCIAL CLASS* 41 (Fiske and Markus, 2012). She notes that in this cohort religious conservatism provides stability, as does an emphasis on marriage and family.

<sup>20</sup> See, for example, Martha Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 *YALE J. L. & FEMINISM* 1-23 (2008). See also, *See ie.*, PHILIP SIMMONS, *LEARNING TO FALL: THE BLESSINGS OF AN IMPERFECT LIFE* (2000); MURIEL R. GILICK, *THE DENIAL OF AGING: PERPETUAL YOUTH, ETERNAL LIFE, AND OTHER DANGEROUS FANTASIES* (2006); GEORGE E. VAILLANT, *AGING WELL* (2002); DONALD CAPPS, *THE DECADES OF LIFE: A GUIDE TO HUMAN DEVELOPMENT* (2008); ROBERT N. BUTLER, *THE LONGEVITY REVOLUTION: THE BENEFITS AND CHALLENGES OF LIVING A LONG LIFE* (2008).

<sup>21</sup> See *ie.*, the Ad Council, *About Us: Effecting Positive Social Change*, <http://www.adcouncil.org/About-Us> and Ad Council, *Financial Literacy*, <http://www.adcouncil.org/Our-Work/Current-Work/Education/Financial-Literacy>.

<sup>22</sup> Thaler and Sunstein, 103.

<sup>23</sup> Corporation for Enterprise Development, *I've got 99 Problems and Helping People to Save is One: A Summary of 99 Challenges Identified in Proposals to the BETA Project*, [http://cfed.org/assets/pdfs/99Problems\\_final.pdf](http://cfed.org/assets/pdfs/99Problems_final.pdf).

<sup>24</sup> See *ie.*, Jason Zweig, *Meet 'Future You.' Like What You See? New 'Virtual Reality' Techniques Could Help Solve The Age-Old Problem of Saving for Retirement*, *WALL ST. J.*, March 26, 2011, <http://online.wsj.com/article/SB10001424052748703410604576216663758990104.html>.

<sup>25</sup> See Merrill Edge, *Face Retirement*, <http://faceretirement.merrilledge.com/>.

<sup>26</sup> Thaler and Sunstein, 101.

<sup>27</sup> Id., 115. See as well, the recent federal retirement plan: Tara Siegel Bernard, *Obama Orders Creation of 'MyRA' Savings Accounts*, N.Y. TIMES, January 30, 2014, at B2.

<sup>28</sup> Thaler and Sunstein, 115-116.

<sup>29</sup> Working Mother, *100 Best Companies 2011: Executive Summary*, at 6 (October 2011).

<sup>30</sup> Id.

<sup>31</sup> Id., 9

<sup>32</sup> Id., 12

<sup>33</sup> Institute for Women's Policy Research, *Fact Sheet: Maternity, Paternity, and Adoption Leave in the United States*, at 1 (May 2011).

<sup>34</sup> Id., 3

<sup>35</sup> Id.

<sup>36</sup> Id., 2

<sup>37</sup> Id., 2

<sup>38</sup> Pub. Law 271, 74<sup>th</sup> Congress (1935).