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The Family and Medical Leave Act of 1993 and the Current State of Employee Protection: What Type of Protection Can an Employee Expect upon Taking Work Leave for Family or Medical Problems

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THE FAMILY AND MEDICAL LEAVE ACT OF 1993 AND THE CURRENT STATE OF EMPLOYEE PROTECTION: WHAT TYPE OF PROTECTION CAN AN EMPLOYEE EXPECT UPON TAKING WORK LEAVE FOR FAMILY OR MEDICAL PROBLEMS?

William R. Huffman

I. INTRODUCTION

On August 5, 1993, the Family and Medical Leave Act[1] [hereinafter FMLA] took effect.[2] The basic provisions of the Act require private employers of fifty or more employees to provide eligible employees up to twelve workweeks of unpaid leave in any twelve-month period because of the birth, adoption, or placement for foster care of a child; the serious health condition of a spouse, child, or parent; or the employee's own serious health condition.[3]

The FMLA resulted from a long debate over the changing demographics of American families and the proper role of the federal government in the work force.[4] Prior to the enactment of the present version of the FMLA, many other similar versions were turned away by Congress or vetoed by the then-acting President.[5] Despite the fact that many foreign countries have for years had workable legislation protecting the leave rights of employees of private businesses,[6] early versions of the FMLA were dismissed because their application to employers of fifteen or more employees was viewed as overbroad, or because of concerns over increased costs of doing business.[7]

Nevertheless, recognizing that employees in need of a leave of absence enjoyed little job protection outside of various provisions of the Civil Rights Act, President Clinton signed a bill which is very similar to bills vetoed by former President Bush in 1990 and 1992.[8] Although the FMLA is viewed by supporters as landmark

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1. 29 U.S.C. §§ 2601, 2611-2619, 2631-2636, 2651-2654 (Supp. V 1993).

2. Family Medical Leave Act, Pub. L. No. 103-3, § 405, 107 Stat. 6 (1993).

3. 29 U.S.C. § 2612(a)(1)(A)-(D). The FMLA also covers public agencies pursuant to 29 U.S.C. § 2611(4)(B), but such coverage is outside the scope of this paper.

4. Patricia Schroeder, *Is There a Role for the Federal Government in Work and the Family?*, 26 HARV. J. ON LEGIS. 299 (1989); *see also* Gerald T. Dunne, *Family and Medical Leave – Invisible Charges*, 110 BANKING L.J. 291 (1993).

5. Jill Zuckerman, *As Family Leave Is Enacted, Some See End to Logjam*, CONG. Q. WK. REP., Feb. 6, 1993, at 267-69.

6. See Stephen A. Mazurak, *Comparative Labor and Employment Law and the American Labor Lawyer*, 70 U. DET. L. REV. 531 (1993), where the author attempts to provide American labor lawyers with a general guide to the ideas which have developed in other countries' employment regulations. *See also* Nancy D. Dowd, *Envisioning Work and Family: A Critical Perspective on International Models*, 26 HARV. J. ON LEGIS. 311 (1989) (providing a critical analysis of the family and work policies in Sweden and France).

7. Dunne, *supra* note 4, at 291; Maria L. Ontiveros, *The Myths of Market Forces, Mothers and Private Employment: The Parental Leave Veto*, 1 CORNELL J.L. & PUB. POL'Y 25 (1992); Zuckerman, *supra* note 5, at 267.

8. Zuckerman, *supra* note 5, at 267.

legislation, its limited scope and potential business ramifications present concerns for lawmakers and employers.[9] Moreover, some ambiguities in the Act's provisions might invite more immediate problems in the courtrooms.

The primary purposes of this Comment are to serve as a guide to the potential leave benefits available to employees of private sector employers and to provide a background for interpreting some of the FMLA's primary provisions. The Comment begins with a discussion of prior federal legislation and cases which laid the groundwork and determined the need for the FMLA, followed by a detailed analysis of its provisions. Next, this Comment explains which provisions of the Act will most likely be subjects of litigation. Finally, a study is made of existing state legislation which will have an effect on the total leave benefits available to employees.

II. PRIOR FEDERAL LAW

Prior to the enactment of the FMLA, federal law on the issue of maternity and medical leave was scarce.[10] The primary federal influence on the subject came through amendments to Title VII of the Civil Rights Act of 1964.[11] This legislation, known as the Pregnancy Discrimination Act [hereinafter PDA],[12] was limited to providing equal employment rights to female employees who became pregnant and could not fulfill their work requirements.[13] Generally, Title VII made it unlawful for an employer to discriminate in the hiring or discharge of an employee on the basis of race, color, religion, sex, or national origin,[14] and, further, the legislation made it unlawful for an employer to classify employees in any way which tended to deprive them of employment opportunities.[15] The PDA amendments clarified the Civil Rights Act with respect to the issue of pregnancy by expressly prohibiting discrimination on the basis of pregnancy or a related medical condition.[16]

Many cases providing consistent interpretations of the Civil Rights Act and the PDA can be found throughout the federal court system. Following are several cases which address the issues of pregnancy and medical leave.

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9. Julia Lawlor & Rhonda Richards, *Landmark Act Leaves Some Businesses Fuming*, USA TODAY, Feb. 8, 1993, at B4.

10. Dowd, *supra* note 6, at 313.

11. 42 U.S.C. §§ 2000e to 2000e-17 (1988).

12. Act of Oct. 31, 1978, Pub. L. No. 95-555, 92 Stat. 2076 (codified at 42 U.S.C. § 2000e(k)).

13. 42 U.S.C. § 2000e(k).

14. 42 U.S.C. § 2000e-2(a)(1).

15. 42 U.S.C. § 2000e-2(a)(2).

16. 42 U.S.C. § 2000e(k). This section states in pertinent part:

> The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work . . . .

Id. It has been recognized that the PDA was a direct result of the Court's decision in General Elec. Co. v. Gilbert, 429 U.S. 125 (1976). Amy K. Berman, *H.R. 4300, The Family and Medical Leave Act of 1986: Congress' Response to the Changing American Family*, 35 CLEV. ST. L. REV. 455, 463 (1987).

In *Scherr v. Woodland School Community Consolidated District No. 50*,[17] the Seventh Circuit clarified the theories upon which a Title VII case may be brought. In *Scherr*, female school teachers in two separate districts filed suit alleging that their school districts' maternity leave policies violated Title VII, as amended by the PDA, by discriminating against pregnant women.[18] The plaintiffs based their claims on both disparate treatment and disparate impact theories.[19] In determining whether the plaintiffs could proceed under these theories, the court stated: "Title VII prohibits two types of employment discrimination. First, it prohibits disparate treatment – intentional discriminatory treatment of employees based on impermissible criteria. Second, it prohibits disparate impact – facially neutral practices that nevertheless have a discriminatory impact and are not justified by business necessity."[20] Accordingly, the Seventh Circuit opened the door to hear Title VII cases brought under either of these theories.

An example of disparate treatment in employment practices can be found in *Maddox v. Grandview Care Center*.[21] The plaintiff in *Maddox*, a female employee who experienced medical problems during a pregnancy, requested a six-month leave of absence.[22] However, since company policy limited maternity leave to three months, the plaintiff was forced to resign.[23] The Eleventh Circuit found the policy to be facially discriminatory due to the fact that leaves for "illness" could be taken for an indefinite duration.[24]

Clarification as to the scope of the PDA was provided in the Supreme Court decision of *California Federal Savings & Loan Ass'n v. Guerra*.[25] In *Guerra*, the Supreme Court was asked to determine the validity of a California statute which required employers to provide pregnancy leave to female employees who were "disabled on account of pregnancy, childbirth, or related medical conditions."[26]

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17. 867 F.2d 974 (7th Cir. 1988).

18. *Id.* at 975-76.

19. *Id.* at 976.

20. *Id.* at 979 (citations omitted).

21. 780 F.2d 987 (11th Cir. 1986).

22. *Id.* at 988.

23. *Id.* at 989.

24. *Id.* at 991. Prior to arriving at its conclusion, the court described the necessary requirements for prevailing in a Title VII case, stating:

> In order to prevail on a claim of disparate treatment under Title VII . . . a plaintiff must prove that her employer unlawfully discriminated against her because of her protected classification. There are several methods by which a plaintiff can achieve this. . . . Under the "pretext theory," a plaintiff must establish a prima facie case, which gives rise to a rebuttable presumption of unlawful discrimination. . . . A defendant can then rebut this presumption by articulating a "legitimate, nondiscriminatory reason" for its actions. . . . Under the "facial discrimination" theory, the plaintiff establishes a presumption that the case is one of facial discrimination by showing that the "policy by its terms applies only to women or pregnant women." The employer can rebut this presumption by showing that in spite of its appearance of differential treatment, the policy is neutral in that it equally affects all employees or that it is a bona fide occupational qualification.

Id. at 989-90 (quoting Hayes v. Shelby Memorial Hosp., 726 F.2d 1543, 1548 (11th Cir. 1984)) (footnote omitted) (citations omitted). *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) (holding that plaintiff had the burden of proof of showing a prima facie case of discrimination).

25. 479 U.S. 272 (1987).

26. *Id.* at 276.

The statute applied only to medical problems associated with pregnancy, and, therefore, male employees could not avail themselves of its provisions.[27] The petitioner claimed that the statute violated Title VII and the PDA by discriminating against men.[28] The Supreme Court, however, disagreed,[29] holding that the PDA provided " 'a floor beneath which pregnancy disability benefits may not drop – not a ceiling above which they may not rise.' "[30] The PDA does not prohibit employment practices which provide preferential treatment to pregnant women.[31] Accordingly, the California statute was found not to violate Title VII or the PDA.[32]

While the issue of whether discrimination on the basis of pregnancy was clearly prohibited by the PDA amendments with respect to women,[33] it became necessary for the courts to determine the extent to which Title VII and the PDA applied to male employees. This latter issue has been addressed in several contexts.

In *Newport News Shipbuilding & Dry Dock Co. v. EEOC*,[34] the Supreme Court shed some light on the extent to which the PDA applied to spouses of male employees. After the adoption of the PDA, many employers modified their health insurance plans to cover female employees who face pregnancy and related conditions.[35] In *Newport News*, the employer's plan provided a specified level of medical benefits to both male and female employees.[36] Spouses received identical benefits, except that less extensive coverage was provided to the spouses of male employees who endured pregnancy-related conditions than were provided to female employees who endured the same.[37] The Supreme Court made clear that under the PDA and Title VII "discrimination based on a woman's pregnancy is, on its face, discrimination because of her sex."[38] The Court then reasoned that since a male employee's spouse will always be of the opposite sex, "discrimination against female spouses in the provision of fringe benefits is also discrimination against male employees."[39] Accordingly, the employer's plan was held to violate Title VII.[40]

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27. *Id.*

28. *Id.* at 284.

29. *Id.* at 285.

30. *Id.* (quoting California Fed. Sav. & Loan Ass'n v. Guerra, 758 F.2d 390, 396 (9th Cir. 1985)). In Greenspan v. Automobile Club, 495 F. Supp. 1021 (E.D. Mich. 1980), the court determined that the proper inquiry in a case concerning employment discrimination based on pregnancy "must be whether the employment opportunities of [an employer's] female employees were hampered in ways that the opportunities of similarly situated males were not." *Id.* at 1054.

31. California Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 287 (1987).

32. *Id.* at 290. The Court emphasized that "the statute was narrowly drawn to cover only the period of actual physical disability on account of pregnancy, childbirth, or related medical conditions." *Id.*

33. *See generally supra* notes 17-32 and accompanying text.

34. 462 U.S. 669 (1983).

35. *See id.* at 671.

36. *Id.* at 684.

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.* at 685.

An additional context with respect to the PDA's application to male employees was presented in *Schafer v. Board of Public Education*.[41] In that case, Schafer, a male employee, sought to invoke a provision of a bargaining agreement which permitted only female employees to take maternity leave of up to one year following the birth of a child.[42] The agreement specifically allowed females to take leave for "personal reasons relating to childbearing or childrearing [sic]," but no corresponding provision was set out for male employees.[43] Accordingly, Schafer was denied leave to care for his son and was forced to resign.[44] Noting that the PDA allowed a company to provide beneficial treatment to females who face medical problems due to pregnancy or a related condition, the Third Circuit found that the agreement violated Title VII because it effectively extended this beneficial treatment to child rearing.[45] Such treatment amounted to a prima facie case of discrimination against male employees.[46]

What should be made clear from *Schafer* is that the court did not interpret the PDA to prohibit employers from treating pregnant employees more beneficially than other employees.[47] Rather, the *Schafer* Court treated pregnancy the same as any other physical disability and only found a violation when the beneficial treatment provided to pregnant employees extended beyond the pregnancy or related medical condition, such as into the area of child rearing.[48]

Despite the benefits which Title VII and the PDA provide to pregnant employees, the legislation is ineffective to protect employees who desire leave for the purpose of child rearing and family illnesses. At most, this legislation prohibits discrimination on the basis of pregnancy; it does not require employers to provide for maternity leaves.[49] Consequently, additional legislation on the federal and state levels has developed for the purpose of protecting employees' employment rights when maternity or other medical concerns necessitate employee leave periods.

III. THE FAMILY AND MEDICAL LEAVE ACT OF 1993

The federal response to the deficiencies in employee leave rights was the Family and Medical Leave Act of 1993. The following subsections outline the FMLA's provisions.

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41. 903 F.2d 243 (3d Cir. 1990).

42. *Id.* at 244-45.

43. *Id.* at 245 n.1.

44. *Id.*

45. *Id.* at 248. The court interpreted *Guerra*, *supra*, to permit favorable treatment of employees during the period of actual physical disability related to pregnancy. *Id.* at 247.

46. *Id.* at 247.

47. *Id.* at 248.

48. *Id.* *See* Melissa B. Kessler, *Civil Rights – Childrearing Policy and Employment Discrimination Under Title VII* – Schafer v. Board of Public Education, 64 TEMP. L. REV. 1047 (1991); *see also* California Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 290 (1987) (permitting favorable treatment of pregnant employees for the period of actual disability); Harness v. Hartz Mountain Corp., 877 F.2d 1307, 1310 (6th Cir. 1989) (holding that Kentucky's state law counterpart to the PDA permitted an employer's policy allowing female employees up to one year of leave for maternity-related purposes, while providing only 90 days of leave for non-pregnancy related disabilities), *cert. denied*, 493 U.S. 1024 (1990).

49. *See generally supra* notes 25-32 and accompanying notes.

A. Employers

The Act applies to any entity engaged in commerce or affecting commerce and employing "[fifty] or more employees for each working day during each of [twenty] or more calendar workweeks in the current or preceding calendar year."[50]

B. Eligible Employees

An employee is covered by the FMLA if he or she has been employed for at least twelve months by the same employer and has worked a minimum of 1250 hours during the previous twelve-month period.[51] An employee is excluded if the employer employs less than fifty employees at a worksite and less than fifty workers within a seventy-five mile radius.[52]

C. Leaves of Absence

Eligible employees are allowed to take up to twelve workweeks of leave in any twelve-month period in case of (1) "the birth of a son or daughter of the employee in order to care for such son or daughter;" (2) "the placement of a son or daughter with the employee for adoption or fostercare;" (3) a need to care for a spouse, child, or parent of the employee who suffers from a "serious health condition;" or (4) a "serious health condition" of the employee which renders "the employee unable to perform the functions of such employee."[53]

D. Types of Leave

Generally, leave may be taken intermittently or on a reduced schedule for any leave taken pursuant to Part III.C above.[54] However, in the case of birth, adoption, or foster care, intermittent leave or leave on a reduced schedule may only be taken upon agreement with the employer.[55] Such leave will "not result in a reduction in the total amount of leave" allowed.[56] Also, "if an employee requests intermittent leave or leave on a reduced schedule, . . . the employer may require the employee to transfer temporarily" to another position if that position has equivalent pay and benefits and better accommodates irregular employment periods.[57]

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50. 29 U.S.C. § 2611(4)(A)(i).

51. 29 U.S.C. § 2611(2)(A)(i)-(ii).

52. 29 U.S.C. § 2611(2)(B)(ii).

53. 29 U.S.C. § 2612(a)(1).

54. 29 U.S.C. § 2612(b)(1).

55. 29 U.S.C. § 2612(b).

56. 29 U.S.C. § 2612(b)(1).

57. 29 U.S.C. § 2612(b)(2). Some insight into the purpose of this provision can be found in Senate Report 103-3, which states:

> This provision gives employers greater staffing flexibility by enabling them temporarily to transfer employees who need intermittent leave or leave on a reduced schedule to positions that are more suitable for recurring periods of leave. At the same time, this provision ensures that employees will not be penalized for their need for leave by requiring that they receive equivalent pay and benefits during the temporary transfer.

S. REP. No. 3, 103d Cong., 1st Sess. 27 (1993), *reprinted in* 1993 U.S.C.C.A.N. 3, 29.

The Act gives employers discretion to adopt policies concerning whether leaves of absence will be paid or unpaid.[58] When an employer grants paid leave for only a part of the twelve-week period, additional leave may be taken without pay for the remainder of the period.[59] Substitution of accrued paid leave may be applied to any part of the twelve-week period when required by the employer or requested by the employee.[60] However, nothing shall require an employer to provide paid leave where he would not otherwise do so.[61]

In the case of a foreseeable leave due to birth or placement of a child, the employee must provide not less than thirty days notice to the employer prior to the intended leave period.[62] When leave is necessitated by foreseeable medical treatment, in addition to thirty days notice, the employee must make a reasonable attempt to schedule the treatment so that the employer's operations will not be disrupted.[63]

Where both a husband and wife are employed by the same employer, the aggregate leave of both employees may be limited to twelve weeks in a twelve-month period for all cases except when leave is necessitated by a serious medical condition of the employee.[64]

E. Certification of Family or Health Concern

If an employer requires, an employee must provide in a timely manner sufficient certification of a serious health condition.[65] Moreover, if an employer has reason to doubt the validity of a certification, the employer may require that the employee obtain a second opinion.[66]

F. Protection of Employment and Benefits

Except as explained below, upon return from any leave taken under the FMLA, an eligible employee is entitled to be restored to his or her previous position or an "equivalent position with equivalent employment benefits, pay and other terms and conditions of employment."[67]

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58. 29 U.S.C. § 2612(c).

59. 29 U.S.C. § 2612(d)(1).

60. 29 U.S.C. § 2612(d)(2)(A). Insight into the purpose of this provision can be found in Senate Report 103-3, which states:

> The purpose of section [2612(d)] is to provide that specified paid leaves which have accrued but have not yet been taken, may be substituted for the unpaid leave under the [A]ct in order to mitigate the financial impact of wage loss due to family and temporary medical leaves. The employer may not trade shorter periods of paid leave for the longer periods of unpaid leave prescribed by the [A]ct.

S. REP. No. 3, 103d Cong., 1st Sess. 28 (1993), *reprinted in* 1993 U.S.C.C.A.N. 3, 30.

61. 29 U.S.C. § 2612(d)(2)(B).

62. 29 U.S.C. § 2612(e)(1).

63. 29 U.S.C. § 2612(e)(2).

64. 29 U.S.C. § 2612(f) (limiting leave of a husband and wife where the leave is due to childbirth, adoption, foster care, or serious health condition of a family member, but not where the employee herself becomes ill). Senate Report 103-3 states that "[t]his provision is intended to eliminate any employer incentive to refuse to hire married couples." S. REP. No. 3, 103d Cong., 1st Sess. 28 (1993), *reprinted in* 1993 U.S.C.C.A.N. 3, 30.

65. 29 U.S.C. § 2613(a)-(b).

66. 29 U.S.C. § 2613(c)-(e).

67. 29 U.S.C. § 2614(a)(1)(A)-(B).

Leave taken under the Act "shall not result in the loss of any employment benefit accrued prior to the date on which the leave commenced."[68] However, an employee is not entitled to the accrued seniority or other employment rights or benefits which would have accrued except for the leave.[69]

The employer may have a uniform policy requiring certification as a condition of restoration after leave.[70] The employer may further require employees on leave to periodically report to the employer about the "status and intention of the employee to return to work."[71]

If a person on leave is a "highly compensated employee," the employer may deny restoration if denial will "prevent substantial and grievous economic injury to the operations of the employer."[72] Such exception applies to a "salaried eligible employee who is among the highest paid [ten] percent of the employees employed by the employer within [seventy-five] miles of the facility at which the employee is employed."[73]

The employer must maintain health coverage under a "group health plan" while an employee is on leave.[74] However, if an employee fails to return to work after the leave period due to reasons not "beyond the control of the employee," the employer may recover the amount of the premiums paid for the health plan.[75]

G. Interference and Discrimination by the Employer

An employer is subject to civil liability if she interferes with any rights or proceedings provided for under the FMLA or if the employer discriminates against any employee who opposes "any practice made unlawful by the Act."[76]

H. Special Rules for Educational Agencies

The FMLA provides for special rules regarding leave and restoration with respect to educational agencies and employees of these agencies.[77] The Act covers

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68. 29 U.S.C. § 2614(a)(2).
69. 29 U.S.C. § 2614(a)(3).
70. 29 U.S.C. § 2614(a)(4).
71. 29 U.S.C. § 2614(a)(5).
72. 29 U.S.C. § 2614(b)(1).
73. 29 U.S.C. § 2614(b)(2).
74. 29 U.S.C. § 2614(c)(1).
75. 29 U.S.C. § 2614(c)(2).
76. 29 U.S.C. § 2615(a)-(b); 29 U.S.C. § 2617. According to § 2617, any employer who interferes with the rights provided under § 2615 will be liable for damages including wages and/or monetary loss. 29 U.S.C. § 2617(a)(1)(A)(i). The court will have authority to award additional attorney's fees. 29 U.S.C. § 2617(a)(3). Additionally, an employer will be assessed a civil fine of not more than $100 for failing to post a summary of the provisions of the FMLA. 29 U.S.C. § 2619. Senate Report 103-3 summarizes § 2617:

> Rights established under the FMLA are enforceable through civil actions. Under section [2617] a civil action for damages or equitable relief may be brought against an employer in any [f]ederal or [s]tate court of competent jurisdiction by the Secretary of Labor or by an employee, except that an employee's right to bring such an action terminates if the Secretary of Labor files an action seeking monetary relief with respect to that employee. Actions for relief must be brought not later than 2 years after the date of the last event constituting the alleged violation, or within 3 years of the last event if the violation is willful.

S. REP. No. 3, 103d Cong., 1st Sess. 35 (1993), *reprinted in* 1993 U.S.C.C.A.N. 3, 37.
77. 29 U.S.C. § 2618.

any "local educational agency," any "private elementary or secondary school," and all eligible employees of these institutions, regardless of the size of the institution.[78] The primary application of the special rules concerns intermittent leave taken during an academic year.[79]

I. Commission on Leave

The Act provides for a commission to study such issues as employer leave policies, potential costs of leave to businesses, and the impact of leave on employers and families.[80]

J. Miscellaneous Provisions

The Act was not intended to override any of the provisions of the Civil Rights Act and accordingly should not be "construed to modify or affect any [f]ederal or [s]tate law prohibiting discrimination on the basis of race, religion, color, national origin, sex, age, or disability."[81] Where state or local laws provide for family or medical leave, such laws will not be superseded by the FMLA to the extent that they provide rights greater than those provided by the Act.[82]

An employer must still comply with any collective bargaining agreements or programs which require greater family and medical leave rights than those provided for in the FMLA.[83] Bargaining agreements and employment programs which require less protection than what the FMLA provides are prohibited.[84] Moreover, employment policies providing for more beneficial leave rights are expressly encouraged.[85]

IV. INTERPRETING THE FMLA

The FMLA contains many definitions and provisions which are unique to its issue of legislation. Though many of its terms are adequately defined within the Act itself, some terms will likely be the subject of much litigation.[86] Part IV.A explains the sort of illness which constitutes a "serious health condition" with respect to the Act. Part IV.B explains the rights to reinstatement to equivalent employment to which an employee is entitled upon returning to work.

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78. 29 U.S.C. § 2618(a)(1).

79. 29 U.S.C. § 2618(c) (limiting leave where the employee is employed as an instructor and the leave period would extend for more than 20% of the academic period).

80. 29 U.S.C. §§ 2631-2636.

81. 29 U.S.C. § 2651(a).

82. 29 U.S.C. § 2651(b).

83. 29 U.S.C. § 2652(a).

84. 29 U.S.C. § 2652(b).

85. 29 U.S.C. § 2653.

86. Dorothy J. Stephens, *How the New Family and Medical Leave Act Affects Employee Health Leave and Benefits*, 4 HEALTHSPAN 16 (1993) (suggesting litigation concerning the definitions of "equivalent position," "serious health condition," and "health care provider"); Michele Galen, *Sure, 'Unpaid Leave' Sounds Simple, but . . . the Family & Medical Leave Act May Give Employers a Headache*, BUS. WK., Aug. 9, 1993, at 32 (suggesting likely litigation on issues of equivalent employment and serious health condition).

A. Serious Health Conditions

The FMLA defines a "serious health condition" as any "illness, injury, impairment, or physical or mental condition that involves (A) inpatient care in a . . . medical care facility; or (B) continuing treatment by a health care provider."[87] Although this definition may seem clear, legislative history suggests that it is more limited than it may at first appear. Senate Report 103-3, which concerns the FMLA, begins by stating that the Act is intended to cover "various types of physical and mental conditions,"[88] but later clarifies this statement:

> The term "serious health condition" is not intended to cover short-term conditions for which treatment and recovery are very brief. It is expected that such conditions will fall within even the most modest of sick leave policies. Conditions or medical procedures that would not normally be covered by the legislation include minor illnesses which last only a few days and surgical procedures which typically do not involve hospitalization and require only a brief recovery period. . . . It is intended that in any case where there is doubt whether coverage is provided by this [A]ct, the general tests set forth in this paragraph shall be determinative.[89]

The tests referred to in the above quotation would work to find a "serious health condition" where a condition or illness "affect[s] an employee's [or an employee's spouse, child, or parent's] health to the extent that he or she must be absent from work on a recurring basis or for more than a few days for treatment or recovery."[90] Interestingly, where the Senate Report lists examples of serious health conditions, it refers to "most cancers," suggesting that the illness must be severe for it to fall under the test.[91] As a possible explanation of its position, the report states:

> An employee with early-stage cancer may . . . be physically and mentally capable of performing her job, and indeed may continue to work while receiving treatment. However, if the employee must be physically absent from work from time to time in order to receive the treatment, it follows as a matter of common sense that the employee is, during the time of the treatments, temporarily "unable to perform the function of his or her position" for the purposes of [the FMLA] and therefore eligible for leave . . . .[92]

Regulations proposed by the Secretary of Labor provide additional information as to the scope of a serious health condition. The Secretary suggests that in cases not requiring inpatient care, absences should be for a minimum of three days before a condition should be considered serious.[93] The Secretary points out that continuing treatment by a health care provider is also necessary in such cases.[94]

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87. 29 U.S.C. § 2611(11).
88. S. REP. No. 3, 103d Cong., 1st Sess. 28 (1993), *reprinted in* 1993 U.S.C.C.A.N. 3, 30.
89. *Id.*
90. *Id.*
91. *Id.* at 29.
92. *Id.* at 25.
93. 58 Fed. Reg. 31,799 (1993) (to be codified at 29 C.F.R. pt. 825) (proposed June 4, 1993).
94. *Id.*

Furthermore, voluntary treatments such as unnecessary cosmetic surgery should not be included.[95] However, treatment for substance abuse may be included, especially if inpatient care is needed.[96]

B. Equivalent Employment

Under the FMLA, upon return after a leave, an employee is entitled to be restored to the same position he had held before the leave, or an equivalent position.[97] At a minimum, for a position to be equivalent, it must provide equivalent employment benefits, pay, and other terms and conditions of employment.[98] The Senate Report indicates two important points about this standard: "First, the standard of 'equivalence'—not merely 'comparability' or 'similarity'—necessarily requires a correspondence to the duties and other terms, conditions[,] and privileges of an employee's previous position. Second, the standard encompasses all 'terms and conditions' of employment, not just those specified."[99]

The Senate Report further explains that on the subject of job equivalence, the FMLA should be interpreted as broadly as similar provisions in Title VII,[100] thereby providing an avenue to apply existing legal precedent to early FMLA litigation.

Additionally, as the Secretary of Labor indicates, an employee upon return to work should be given reasonable time to attain educational or licensing requirements which have lapsed during leave.[101] Moreover, the employee should receive any pay increases or benefit changes which became effective during the leave period.[102]

As to the geographic location and shift schedule of reinstatement, the Secretary's proposed regulations provide insight by stating that

> [t]he employee must be restored to the same worksite from which the employee commenced leave, or to a geographically proximate location. If the employee's original worksite has closed or moved, and other employees were transferred to another worksite, the employee must have the same rights for transfer as would have been available had the employee not taken leave. The employee is entitled to be returned to the same shift or equivalent schedule, and have the same opportunity for bonuses, profit-sharing and other non-discretionary payments.[103]

The proposed regulations go on to indicate that the right to equivalent employment should not extend to unmeasurable aspects of employment conditions such as

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95. *Id.*
96. *Id.*
97. 29 U.S.C. § 2614(a)(1).
98. 29 U.S.C. § 2614(a)(1)(B).
99. S. REP. No. 3, at 32.
100. *Id.*
101. 29 C.F.R. § 825.215(b) (1993).
102. 29 C.F.R. § 825.215(c) (1993).
103. *Id.*

"diminished opportunities for promotion."[104] The proposed regulations and the Senate Report both stress that the employee's right to reinstatement is whatever it would have been had the employee been continuously employed during the leave period.[105]

Special rules concerning "highly compensated employees," which allow an employer not to reinstate a "highly compensated employee" if "grievous economic injury" will result, do not apply to regular employees.[106] Therefore, a regular employee will have an unqualified right to reinstatement. The rationale for the distinction between "highly compensated employees" and regular employees is not made clear; the interim regulations merely state that "[t]his provision is designed to ensure that employers do not experience financial difficulties when highly specialized or compensated essential workers request family or medical leave."[107]

V. POTENTIALLY GREATER BENEFITS OF STATE LAWS

The FMLA provides that where the FMLA and state leave laws conflict, an employee is entitled to whichever law provides greater benefits.[108] A variety of state statutes have developed to protect employees' interests when pregnancy or other medical problems necessitate leaves of absence.[109] This section analyzes several state statutes with the purpose of demonstrating the types of benefits available to private sector employees. Comparison will be made between state laws and the FMLA so as to indicate where state laws may provide greater benefits. This section is not intended to provide an exhaustive explanation of any one state statute.

Currently, at least eighteen states, the District of Columbia, and Puerto Rico have statutes affecting the family and medical leave of private sector employees.[110] Most state statutes have provisions similar to the FMLA. Many, however, differ in their definition of covered employers and eligible employees, in the amount of leave provided, in the types of leave allowed, and in an employee's rights upon returning to work. Each of these issues is addressed separately in this section.

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104. *Id.*

105. S. REP. No. 3, at 32; 29 C.F.R. § 825.216(a) (1993).

106. 29 U.S.C. § 2614(b). *See supra* notes 72-73 and accompanying text.

107. 58 Fed. Reg. 31,794, 31,805 (1993) (quoting Congresswoman Marge Roukema's floor statement when the bill passed the House in 1991).

108. 29 U.S.C. § 2651(b).

109. *See infra* notes 110-34 and accompanying text.

110. Terry A. M. Mumford & Lisa D. Tobin, *Employer Questionnaire: Family and Medical Leave Act of 1993*, C840 ALI-ABA 55 (1993) (listing California, Colorado, Connecticut, District of Columbia, Hawaii, Iowa, Louisiana, Maine, Massachusetts, Minnesota, Montana, New Jersey, New York, Oregon, Puerto Rico, Rhode Island, Tennessee, Vermont, Washington, and Wisconsin as jurisdictions that have leave laws affecting private sector employees). Also, Kentucky has a limited statute providing leave rights for public sector employees. *Id.* at 75.

A. Covered Employers and Eligible Employees

Due to the FMLA's applicability only to employers with fifty or more employees,[111] employees of smaller businesses might find themselves unprotected by its provisions. Similarly, most state statutes have limited application but may be more broad or more narrow than the FMLA. For instance, in Maine, "employer" is defined to include any person or other business entity which employs twenty-five or more employees.[112] An employee of such an employer would, therefore, be covered under the Maine statute, but would not be covered under the FMLA. Other states have taken an all-inclusive approach to the definition of employer. By the provisions of the Connecticut statute, " 'employer' means a person engaged in any activity, enterprise or business who has employees."[113] Such definition includes any employer regardless of size.

Some states have taken a different approach by defining employer even more narrowly than the FMLA. In Hawaii and New Jersey, an employer is not covered by the state's leave statute unless she employs 100 or more employees.[114] Accordingly, an employee in either of these states will have a better chance of being covered under the FMLA than the respective state statute.

Like the definition of employer, the definition of eligible employee in state statutes may be more or less inclusive than the FMLA. The District of Columbia and Minnesota, like the FMLA, require that an employee be employed for twelve consecutive months before he will become eligible for leave benefits.[115] But in Massachusetts, an employee need only be employed for three consecutive months before he becomes eligible.[116] Other states, such as California, fail to address the issue of who constitutes an eligible employee.[117] In such states, the definition must be determined in the courts.

B. Length of Leave

State statutes vary widely in the length of leave allowed. The differences arise mainly because several state statutes, unlike the FMLA, accrue leave over a two-year period rather than a twelve-month period.[118] Consequently, an employee may take all of the allowed leave in the first year and be without a right to take leave in the second year. The FMLA, on the other hand, accrues leave over a twelve-

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111. 29 U.S.C. § 2611(4)(A).

112. ME. REV. STAT. ANN. tit. 26, § 843(3)(A) (West 1991).

113. CONN. GEN. STAT. § 31-51cc(a)(2) (1993).

114. HAW. REV. STAT. § 398-3 (1993); N.J. STAT. ANN. § 34:11B-3(e) (West 1993).

115. D.C. CODE ANN. § 36-1301(1) (1992); MINN. STAT. ANN. § 181.940(1) (West 1993).

116. MASS. GEN. LAWS ANN. ch. 149, § 105D (West 1992).

117. CAL. GOV'T CODE § 12945.2 (West 1992).

118. Examples can be found in CAL. GOV'T CODE § 12945.2(a) (West 1992) (allowing four months leave in a 24-month period); D.C. CODE ANN. § 36-1303(a) (1992) (allowing 16 weeks of leave in a 24-month period); ME. REV. STAT. ANN. tit. 26, § 844(1) (West 1991) (allowing 10 consecutive weeks of leave in a two-year period); N.J. STAT. ANN. § 34:11B-4 (West 1993) (providing for 12 weeks of leave in a 24-month period); OR. REV. STAT. § 659.570(1) (1991) (allowing 12 weeks in a two-year period); R.I. GEN. LAWS § 28-48-2(a) (1992) (allowing 13 weeks in a two-year period); WASH. REV. CODE ANN. § 49.78.30 (West 1992) (allowing 12 weeks of leave in a 24-month period).

month period, with a new twelve-month period beginning twelve months from the first day of leave taken under the Act.[119]

The total allowed leave provided for in state statutes is generally less than the twelve-week leave allowed by the FMLA. Many states, such as Hawaii, which grants only four weeks of leave, limit total available leave to less than twelve weeks.[120] Other states, such as Vermont, have taken a view which corresponds with the FMLA and provide twelve weeks of leave.[121] A few states have taken a more generous approach and grant in excess of twelve weeks total leave.[122]

Of those jurisdictions allowing more than twelve weeks leave, California and the District of Columbia allow the most, providing for a total of sixteen weeks of leave over a two-year period.[123] In either of these jurisdictions, an employee can take sixteen weeks of continuous leave and be without a state-guaranteed right to take leave in the remaining twenty months of the two-year period. However, under the provisions of the FMLA, the employee will be entitled to an additional twelve weeks of leave after the first twelve-month period has run.[124] An employee in either California or the District of Columbia, therefore, potentially could take up to twenty-eight full weeks of leave over a two-year period. Such a possibility indicates the potential for greater benefits where these statutes are in place.

An additional difference between the FMLA and state statutes is that some states allow differing leave periods depending on the reason for the leave. In Wisconsin, a shorter two-week leave period is allowed to care for a family member with a serious health condition, and a longer period of six weeks is allowed for leave necessitated by the birth or adoption of a child.[125] In contrast, the FMLA uniformly provides for twelve weeks of leave for any leave taken under the Act's provisions.[126]

C. Types of Leave

Leave statutes contain two types of leave protection—parental and medical leave. Parental leave includes leave for the purpose of the birth of a child or related medical condition, and adoption or foster care placement of a child.[127] Medical leave includes leave for the purpose of caring for a sick family member or the

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119. 29 U.S.C. § 2612(a)(1).

120. HAW. REV. STAT. § 398-3(a) (1993) (four weeks). *See also* KY. REV. STAT. ANN. § 337.015 (Michie/Bobbs-Merrill 1993) (six weeks); LA. REV. STAT. ANN. § 23:1008(2)(a)(ii) (West 1992) (six weeks); MASS. GEN. LAWS ANN. ch. 149, § 105D (West 1992) (eight weeks); MINN. STAT. ANN. § 181.941(1) (West 1993) (six weeks).

121. VT. STAT. ANN. tit. 21, § 472 (1992) (providing for 12 weeks of leave during a 12-month period). *See also* N.J. STAT. ANN. § 34:11B-4 (West 1993) (providing for 12 weeks of leave in a 24-month period); OR. REV. STAT. § 659.570(1) (1991) (allowing 12 weeks in a two-year period); WASH. REV. CODE ANN. § 49.78.30 (West 1992) (allowing 12 weeks of leave in a 24-month period). However, because these statutes toll leave over a two-year period, the actual benefits will be different from those provided in the FMLA.

122. *See supra* note 118 and accompanying text.

123. CAL. GOV'T CODE § 12945.2(a) (West 1992) (allowing four months leave in a 24-month period); D.C. CODE ANN. § 36-1303(a) (1992) (allowing 16 months leave in a 24-month period).

124. 29 U.S.C. § 2612(a)(1).

125. WIS. STAT. ANN. § 103.10 (West 1992).

126. 29 U.S.C. § 2612(a).

127. 29 U.S.C. § 2612(a)(1)(A)-(B).

employee herself.[128] Several of the states which have statutes covering leaves of absence only address parental leave and do not cover medical leave.[129] For example, Louisiana's statute covers only "the pregnancy, childbirth, or related medical condition of any female employee."[130] Moreover, of the states providing only parental leave, none extend this privilege beyond leave necessitated by the birth or adoption of a child and, therefore, do not cover the placement of a foster child.[131]

Of the many states allowing for leave due to a serious medical condition of a family member, the applicable statute will usually extend the coverage to include parental leave.[132] Vermont is one example. In that state, the pertinent provisions cover (1) the birth of a child; (2) the initial placement for adoption of a child age sixteen or younger; and (3) the serious illness of a family member, including a foster child.[133] In comparison, the FMLA provides coverage for leave rights exercised due to childbirth, the adoption of a child of any age, the placement of a foster child, and the serious medical condition of a family member, including a spouse, parent, and a son or daughter.[134]

Of those states allowing for leave due to a medical condition of the employee herself, the majority provide only for leave due to maternity disability.[135] In the few states allowing leave for purposes other than maternity disability, any serious health condition will enable the employee to leave.[136] The FMLA, likewise,

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128. 29 U.S.C. § 2612(a)(1)(C)-(D).

129. *See, e.g.*, COLO. REV. STAT. ANN. § 19-5-211(1.5) (West 1993) (covering only adoption leave); KY. REV. STAT. ANN. § 337.015 (Michie/Bobbs-Merrill 1993) (providing for leave due to adoption only); LA. REV. STAT. ANN. § 23:1008(A)(1) (West 1992) (providing for leave due to pregnancy, childbirth, or related medical condition of a female employee); MASS. GEN. LAWS ANN. ch. 149, § 105D (West 1992) (providing for leave due to childbirth or adoption); MINN. STAT. ANN. § 181.941(1) (West 1993) (providing for leave due to childbirth or adoption); TENN. CODE ANN. § 4-21-408 (1993) (covering only maternity leave taken by a female employee).

130. LA. REV. STAT. ANN. § 23:1008(A)(1) (West 1992) (providing for leave due to pregnancy, childbirth, or related medical condition of a female employee).

131. *See supra* note 129.

132. *See, e.g.*, CAL. GOV'T CODE § 12945.2(b)(3) (West 1992) (providing for leave due to childbirth, adoption, and serious illness of a family member); CONN. GEN. STAT. § 31-51cc(b) (1993) (providing for leave due to childbirth, adoption, or serious illness of a family member and the employee); D.C. CODE ANN. § 36-1302(a) (1992) (providing for leave for purposes of childbirth, adoption, foster care, or the serious health condition of a family member); HAW. REV. STAT. § 398-3(a) (1993) (providing leave for childbirth, adoption, or a serious medical condition of a family member); ME. REV. STAT. ANN. tit. 26, § 843(4) (West 1991) (providing for leave due to serious illness of the employee, childbirth, and adoption); N.J. STAT. ANN. § 34:11B-4 (West 1993) (providing for leave due to childbirth, adoption, or the serious health condition of a family member); R.I. GEN. LAWS § 28-48-1(d)-(e) (1992) (providing leave due to childbirth, adoption, or serious illness of a family member); VT. STAT. ANN. tit. 21, § 472 (1992) (providing for leave due to childbirth, adoption, or the serious illness of a child); WASH. REV. CODE ANN. § 49.78.30 (West 1992) (providing for leave due to childbirth, adoption, and the terminal illness of a child); WIS. STAT. ANN. § 103.10 (West 1992) (providing leave for birth, adoption, and the serious medical condition of a family member).

133. VT. STAT. ANN. tit. 21, § 472 (1992) (providing for leave due to childbirth, adoption, or the serious illness of a child).

134. 29 U.S.C. § 2612(a)(1).

135. *See supra* note 132. Also, for examples of statutes providing express coverage of the employee's health conditions unrelated to maternity, see CONN. GEN. STAT. § 31-51cc(b) (1993); ME. REV. STAT. ANN. tit. 26, § 843(4) (West 1991). A possible explanation for a state not to expressly provide coverage to an employee for disabilities not related to childbirth is that most employment policies and collective bargaining agreements cover this issue. *See* 29 U.S.C. § 2652.

136. *See generally supra* note 135.

covers any serious health condition which renders the employee unable to perform her work requirements.[137]

D. Rights upon Returning to Work

State statutes are generally consistent in the rights each allows to employees upon their return to work after a period of leave. With a few exceptions, employees must be reinstated to their original or an equivalent position.[138] One exception to this general provision is evident in Colorado and Louisiana, where the statutes merely require that an employer not discriminate against employees who take leave.[139] A second exception present in many statutes allows the employer to be excused from her duty to reinstate employees returning from leave if legitimate business circumstances make reinstatement unreasonable.[140]

By comparison, the FMLA requires employers to reinstate employees who return from a valid leave period to the position that the employee held prior to the leave period or to an equivalent position.[141] The FMLA, however, allows an employer to be excused from this duty in limited circumstances concerning only highly compensated employees.[142]

E. General Conclusions of the FMLA and State Comparison[143]

Where both the FMLA and a state statute are applicable, the employee will enjoy the protection of whichever statute provides the greater benefits.[144] As the preceding study indicates, state statutes might apply to a wider range of employees than will the FMLA because of a broader definition of covered employers and eligible employees. Consequently, employees of businesses with fifty or more employees will often find protection in both the FMLA and applicable state statutes. Employees in businesses with fifty or *less* employees, however, will only find protection in applicable state statutes. Additionally, because state laws generally provide lesser benefits than does the FMLA, leave protection for employees of these small businesses is further limited. Before seeking a leave of absence, an employee should always compare the FMLA to applicable state statutes to distinguish the exact protection allowed under each option.

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137. 29 U.S.C. § 2612(a)(1)(D).

138. *See infra* note 140.

139. COLO. REV. STAT. ANN. § 19-5-211(1.5) (West 1993); LA. REV. STAT. ANN. § 23:1008(A)(1) (West 1992).

140. *See, e.g.*, HAW. REV. STAT. § 398-7(a) (1993) (providing exception where conditions necessitate employee layoffs or where employee otherwise would have lost her job); ME. REV. STAT. ANN. tit. 26, § 843(4) (West 1991) (providing exception if the employer can prove that the employee was not restored for conditions unrelated to the employee's exercising of his rights provided for in the statute); MASS. GEN. LAWS ANN. ch. 149, § 105D (West 1992) (providing exception where other employees are laid off); OR. REV. STAT. § 659.570(7) (1991) (providing exception where the employer's condition has so changed that the employee cannot be reinstated).

141. 29 U.S.C. § 2614(a)(1).

142. 29 U.S.C. § 2614(b).

143. *See generally supra* notes 108-42.

144. 29 U.S.C. § 2651(b).

VI. CONCLUSION

With the adoption of the FMLA, employees now have three avenues by which they may seek relief from an employer who discriminates in family or medical leave policies. First, limited relief may be gained from Title VII of the Civil Rights Act as amended by the PDA. Second, an employee may find relief from a state statute which expressly provides for family or medical leave; however, these statutes vary widely in their scope and may not provide relief for both parental and medical needs. Finally, the FMLA provides the greatest overall protection.

The FMLA was developed to protect employees necessitating leave from employment due to the birth of a child, placement of an adopted child or foster child, or the serious medical illness of an employee or family member.[145] Although some state statutes provide for similar relief, the FMLA generally provides for longer leave periods and covers more situations necessitating leave than do state laws. Moreover, where state and federal laws provide conflicting benefit protection, the FMLA expressly allows an employee to take advantage of whichever law provides the greater benefits.[146]

Some provisions of the FMLA, however, are not adequately defined and will most likely be the subject of litigation. The two most probable subjects of litigation are centered around the scope of the FMLA's provisions concerning a "serious health condition" and an "equivalent position." Federal regulations determining the scope of these issues are still pending.[147]

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145. 29 U.S.C. § 2612(a)(1)(C)-(D).

146. 29 U.S.C. § 2651(b).

147. 59 Fed. Reg. 20,615 (1993) (indicating that final actions on regulations would occur in August of 1994).