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A Critique of New York Paid Family Leave

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A CRITIQUE OF NEW YORK PAID FAMILY LEAVE

*Anna Petrocelli**

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INTRODUCTION

In 2013, Rachel Walsh, a thirty-two-year-old mother, was fired from her job for taking an extended leave of absence. The reason? Her baby had cancer. After her termination, Ms. Walsh’s employer cancelled her private health insurance covering her baby’s medical expenses. Ms. Walsh was faced with no choice but to obtain government insurance, which provided

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less coverage than her private insurance plan and cost significantly more money. Because of these costs, as well as her new lack of income, Ms. Walsh was forced to rely on her family's help to pay for other necessary expenses.¹ While some people can afford to leave their jobs when faced with the illness of a family member, Ms. Walsh's story is the reality for many in the United States.² Invariably, serious illnesses like cancer require long and frequent doctor's visits, which can generally endure for months or even years.³ In some circumstances, individuals with serious illnesses are unable to go to doctor's appointments alone and need to rely on family members for support.⁴ For example, children, individuals above a certain age, and significantly ill individuals on heavy doses of medication may be unable to drive themselves to appointments.⁵ The need for support, however, does not stop there. In addition to transportation to appointments, ill individuals are frequently unable to make themselves food or get to the bathroom on their own.⁶ Younger ill children, for example, cannot advocate for themselves, understand treatment options and protocols, or sign documents regarding treatments.⁷ Thus, a parent or caregiver can easily spend every minute of the day making sure an ill family member's needs are met.

Taking care of an ill family member is one of the most physically and emotionally trying experiences anyone can face. This experience is uniquely difficult, however, for low-income workers.⁸ Low-income workers dealing with ill family members often cannot afford to hire an outside caretaker, and so they are faced with the impossible choice of remaining employed or leaving their jobs to care for their loved ones.⁹ Accordingly, the U.S. government and several state governments have enacted family leave laws ensuring that employees who take time off to care for family members can

1. Alan Farnham, *Mother of Baby with Cancer Takes On Barclays*, ABC NEWS (Jan. 15, 2013), <https://abcnews.go.com/Business/cancer-babys-mom-takes-on-barclays-bank/story?id=18214605> [<https://perma.cc/EZ2D-NXXN>].

2. *See New Study: Health Insurance Coverage Declined During the Pandemic*, SANFORD SCH. PUB. POL'Y, DUKE UNIV. (Sept. 8, 2021), <https://sanford.duke.edu/story/new-study-health-insurance-coverage-declined-during-pandemic/> [<https://perma.cc/PM4C-G3PE>].

3. *Understanding Chemotherapy*, CANCER.NET, <https://www.cancer.net/navigating-cancer-care/how-cancer-treated/chemotherapy/understanding-chemotherapy> [<https://perma.cc/4D4K-PET2>] (last visited Apr. 30, 2021).

4. *See generally* AARON LEE, FAMILY MEMBERS' EXPERIENCES SUPPORTING ADULTS WITH CHRONIC ILLNESS: A NATIONAL SURVEY (2017).

5. *Id.*

6. *Id.*

7. *See How a Child Understands Cancer*, CANCER.NET, <https://www.cancer.net/coping-with-cancer/talking-with-family-and-friends/how-child-understands-cancer> [<https://perma.cc/SV6U-ZSHM>] (last visited Jan. 6, 2022); *see also* Ann McNary, *Consent to Treatment of Minors*, INNOVATIONS CLINICAL NEUROSCIENCE, Mar.–Apr. 2014, at 43, 43–45.

8. *See infra* Part II.A.

9. *See infra* Part II.

return to their jobs.¹⁰ Specifically, the federal government enacted the Family Medical Leave Act (FMLA) in 1993, a broad statute whose gaps could be filled by uniquely tailored state statutes.¹¹ In the years following, states enacted their own, more specific leave statutes to address leave for their residents.¹² The FMLA and its state corollaries, however, have done little to actually combat the issues that many low-income workers face when deciding to leave work to care for an ill family member.¹³

In recent years, the COVID-19 pandemic has shone a light on the weaknesses of both state and federal family leave laws, with politicians and family health advocates pushing for reform.¹⁴ They argue that while state family leave laws are intended to further supplement the FMLA, in reality, these laws do little more than re-emphasize the precarious situation that low-income workers already face when dealing with a family member's illness: low-income workers are forced to choose between their jobs and their family.¹⁵ Specifically, New York Paid Family Leave (NYPFL),¹⁶ albeit one of the most flexible state leave laws in the United States, leaves many low-income New Yorkers helpless when faced with a family member's illness.¹⁷

As currently structured, NYPFL does not apply to many New Yorkers at all.¹⁸ It has strict qualification requirements that many New Yorkers seeking paid leave simply do not meet.¹⁹ Even if a New Yorker does meet these qualifications, however, the paid leave ultimately granted under the law as

10. *See infra* Part I.

11. *FMLA 25: States are Covering Workers Left out of the FMLA*, BETTER BALANCE (Mar. 23, 2018), <https://www.abetterbalance.org/fmla-25-states-are-covering-workers-left-out-of-the-fmla/> [<https://perma.cc/VF6Z-JNNR>].

12. MOLLY WESTON WILLIAMSON, A FOUNDATION AND A BLUEPRINT: BUILDING THE WORKPLACE LEAVE LAWS WE NEED AFTER TWENTY-FIVE YEARS OF THE FAMILY & MEDICAL LEAVE ACT 10 (2018), <https://www.abetterbalance.org/resources/a-foundation-and-a-blueprint/> [<https://perma.cc/E6LP-7RU8>].

13. *See infra* Part II. The way in which leave laws in the United States are structured emphasizes America's free-market policy. It expects families to care for their dependents without any help but the private income that they themselves have earned. *See* Maxine Eichner, *The Free-Market Family and Children's Caretaking*, 71 FLA. L. REV. FORUM 45, 50 (2019).

14. *See infra* Part I.

15. *See infra* Part II.

16. *See New York State Paid Family Leave*, NY.GOV, <https://paidfamilyleave.ny.gov> [<https://perma.cc/9GF7-PB79>] (last visited Apr. 30, 2021); MOLLY WESTON WILLIAMSON, *NEW YORK PAID FAMILY LEAVE: A WORKER'S GUIDE: WHAT WORKING NEW YORKERS SHOULD KNOW ABOUT TAKING LEAVE AND ACCESSING BENEFITS 23* (2017) [hereinafter *INTERACTION WITH OTHER LAWS*].

17. Myles Ma, *A State-by-State Guide to Parental Leave*, POLICYGENIUS (Oct. 29, 2021), <https://www.policygenius.com/personal-finance/news/parental-leave-by-state/> [<https://perma.cc/Z8M7-LLCR>].

18. *See infra* Part II.

19. *See INTERACTION WITH OTHER LAWS*, *supra* note 16, at 12–30.

currently structured has several restraints. NYPFL places limitations on the pay that individuals may receive while taking leave, and the duration of the leave that they may take.²⁰ As a result, even if a New Yorker does qualify for leave (which, in and of itself, is a difficult task), the decision to take it, given the restraints qualifying and narrowing its application, is challenging.²¹ That is, many low-income workers who do qualify to take paid leave cannot afford to take it given the law's stringent duration requirement and the limited pay the statute allows.²²

Despite the fact that all state leave laws in the United States present difficulties for low-income workers (no state's leave law is more flexible than NYPFL),²³ and that these laws address a variety of situations for which a worker may take leave beyond caring for an ill family member,²⁴ this Note will specifically explore the issues that NYPFL presents to low-income workers dealing with ill family members. Even though NYPFL is held up as an example of one of the most flexible leave laws in the nation,²⁵ this Note argues that it still falls short in many ways and must be strengthened. This Note argues that in order for NYPFL to supplement the FMLA in a way that actually benefits low-income workers, it must be amended. Necessary reforms include: removing the requirements that bar many New Yorkers from becoming eligible to receive paid leave in the first place; modifying current requirements to increase the length of time that individuals can take leave, and the amount of pay an individual can receive while on leave; and implementing a new requirement that those who qualify for leave and need to take it, actually do so.²⁶

Part I describes both the FMLA and NYPFL and explains how these two laws work together to provide leave to New Yorkers.²⁷ Part II identifies the limitations of these laws, with a focus on the obstacles that NYPFL presents to low-income workers. It then examines the obstacles these laws present to women and people of color.²⁸ To examine the feasibility of implementing a more flexible and workable paid leave law in New York, Part III looks at

20. *See infra* Part I.B.

21. *See infra* Part II.

22. *See id.*

23. *See* Katherine Parker & Laura Fant, *New York State Enacts Paid Family Leave Law*, L. & WORKPLACE (Apr. 5, 2016), <https://www.lawandtheworkplace.com/2016/04/new-york-state-enacts-paid-family-leave-law/> [<https://perma.cc/W44W-WJ2Y>].

24. While there are many reasons why people may need to leave their jobs to care for a family member, for instance the old age of a family member, the birth of a child, and a family member's disability, this Note is focused on illness.

25. *See* Parker & Fant, *supra* note 23; Myles Ma, *supra* note 17.

26. *See infra* Part IV.

27. *See infra* Part I.

28. *See infra* Part II.

flexible private paid leave programs, the costs for corporations to implement these leave policies, and lenient approaches to paid leave adopted by other countries.²⁹ Part IV recommends specific changes to NYPFL.³⁰

I. UNDERSTANDING THE FMLA AND NYPFL

Part I first describes the history of paid family leave in New York. Next, it compares and contrasts the FMLA and the NYPFL. Finally, it reviews recent updates to paid family leave laws in the wake of COVID-19.

A. The History of Paid Family Leave in New York

In 1993, Congress enacted the FMLA — the nation’s first federal paid family leave law.³¹ The FMLA entitles certain employees to “take unpaid, job-protected leave for specified family and medical reasons with continuation of group health insurance coverage under the same terms and conditions as if the employee had not taken leave.”³²

The law’s application to *all* employees, irrespective of gender, was a major triumph for women. The Supreme Court emphasized the law’s goal of attacking gender stereotypes in the workplace in *Nevada Department of Human Resources v. Hibbs*.³³ The Court noted that by setting a minimum standard of family leave for all eligible employees, irrespective of gender, the FMLA would attack the stereotype that only women are responsible for family caregiving, thus reducing employers’ discriminatory incentives.³⁴ As the Court noted, women have historically taken on the burden of caregiving in the United States.³⁵ This impediment to women achieving equal rights in the workplace is an issue the FMLA aimed to combat.³⁶ The law sought to

29. *See infra* Part II.

30. *See infra* Part IV.

31. *See* Family and Medical Leave Act, 42 U.S.C.A. § 12631 (1993); Megan A. Sholar, *The History of Family Leave Policies in the United States*, ORG. AM. HISTORIANS, <https://www.oah.org/tah/issues/2016/november/the-history-of-family-leave-policies-in-the-unitedstates/#:~:text=The%20earliest%20version%20of%20the,or%20the%20employee's%20own%20disability> [<https://perma.cc/T78D-ZX7D>] (last visited Sept. 19, 2022).

32. *Family and Medical Leave Act*, U.S. DEP’T OF LAB., <https://www.dol.gov/agencies/whd/fmla> [<https://perma.cc/5HCT-PV6H>] (last visited Apr. 30, 2021).

33. 538 U.S. 721, 730 (2003).

34. *Id.* at 737.

35. *See id.* at 736; *see also Women and Caregiving: Facts and Figures*, FAM. CAREGIVER ALL., <https://www.caregiver.org/resource/women-and-caregiving-facts-and-figures/> [<https://perma.cc/7KRL-N4HA>] (last visited Jan. 5, 2022) (“Women provide the majority of informal care to spouses, parents, parents-in-law, friends and neighbors, and they play many roles while caregiving—hands-on health provider, care manager, friend, companion, surrogate decision-maker and advocate.”).

36. *Id.* at 736–37.

minimize this burden in at least two respects. Allowing all employees to take leave, including men, would reduce the stigma around women's caregiving responsibilities, and it would encourage men to share some of the caregiving responsibilities that traditionally have been shouldered by women.³⁷

Given that it is a federal statute, the FMLA inevitably left some gaps in its coverage. To fill in these gaps,³⁸ in 2016, then-Governor Cuomo signed into law the NYPFL.³⁹ In advocating for the law's enactment, Governor Cuomo emphasized that the unpaid leave set forth in the FMLA was inadequate. He said, "there are many people in this state who don't have the choice—a parent is dying, a child is sick, they can't take off work . . . [w]e should have a paid leave program paid by employees who can get 12 weeks of pay."⁴⁰ While NYPFL certainly filled in some of the FMLA's gaps, it left many untouched, therefore leaving many New Yorkers with the same choice that Governor Cuomo aimed to end with its enactment.

B. Comparing and Contrasting the FMLA and NYPFL

The FMLA has basic requirements that lay the groundwork for states to supplement with their own, more substantive leave laws. As such, NYPFL has a requirement that leave must be taken concurrently with FMLA leave, where possible.⁴¹ A New Yorker may receive the benefits of the FMLA and NYPFL at the same time.

To be eligible for leave under the FMLA, a worker must either be a government employee or an employee of a private company with fifty or more employees, who has worked for that private employer for at least 12 months, for a minimum of 1250 hours (or 156 days) during those past 12 months.⁴² The FMLA's eligibility requirement thus excludes many

37. *See Hibbs*, 538 U.S. at 722–23.

38. *See Parker & Fant*, *supra* note 23.

39. N.Y. WORKERS' COMP. § 380 (McKinney 2021); *see also* Lisa Lewis, *New York State Passes 12-Week Paid Family Leave Law*, LAB. & EMP. L. BLOG (Apr. 5, 2016), <https://www.laboremploymentlawblog.com/2016/04/articles/new-york-employment-legislation/new-york-state-passes-12-week-paid-family-leave-law/> [<https://perma.cc/9VPV-7AWJ>].

40. *Governor Cuomo Champions Paid Family Leave for New York*, A BETTER BALANCE (Jan. 12, 2016), <https://www.abetterbalance.org/governor-cuomo-champions-paid-family-leave-for-new-york/> [<https://perma.cc/2RQP-S5HP>].

41. *See* INTERACTION WITH OTHER LAWS, *supra* note 16, at 27.

42. *See Family Medical Leave Act*, ROMANO L., <https://www.romanolaw.com/employment-law/family-medical-leave-act/> [<https://perma.cc/2M95-JAHH>] (last visited Aug. 10, 2022).

employees of larger private employers,⁴³ ultimately covering only around six in ten U.S. citizens.⁴⁴

By contrast, NYPFL does not automatically cover public employees, meaning many who work for the federal or state governments are not covered.⁴⁵ Because many government employees are only covered under the FMLA, New Yorkers enrolled in government jobs may not benefit from any of the payment options afforded under NYPFL. NYPFL does, however, cover far more New York private employers than the FMLA, as it applies to private employers regardless of the number of employees.⁴⁶ New York's law also applies to part time employees and those who have worked for their employer for less than a year.⁴⁷ So long as a private employee has worked at least 20 hours per week for just 26 weeks, or six and a half months, that employee is covered under NYPFL.⁴⁸ Additionally, employees who work fewer than 20 hours per week are eligible for NYPFL after just 175 days of work.⁴⁹ While this requirement is far less stringent than that of the FMLA, thereby expanding coverage to more workers, it still leaves many workers uncovered, including those who were laid off or otherwise did not have employment before starting their current jobs.

The FMLA covers workers with their own serious health needs, as well as those who are dealing with the birth of a child, the adoption of a child, the care of a spouse, and the care of a child or parent who has a serious health condition. It also covers workers who have a qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is a military member on covered active duty.⁵⁰

Unlike the FMLA, NYPFL covers only employees who are caring for family members. It does not cover employees' own health needs.⁵¹ NYPFL permits employees to take paid leave "to bond with a newly-born, adopted or foster child; [t]o care for a close relative [meaning a child, parent, parent-

43. See *Fact Sheet #28: The Family and Medical Leave Act*, U.S. DEP'T LAB., <https://www.dol.gov/agencies/whd/fact-sheets/28-fmla> [<https://perma.cc/7N3K-UU5V>] (last visited Sept. 19, 2022).

44. Eichner, *supra* note 13.

45. See INTERACTION WITH OTHER LAWS, *supra* note 16, at 14. City or state government employees, though not automatically covered, may be covered by their employer should employer elect to do so (non-union) or if (union) their union negotiated for this coverage through collective bargaining. See *id.*

46. *Eligibility: Who is Eligible for Paid Family Leave?*, NY.GOV, <https://paidfamilyleave.ny.gov/eligibility> [<https://perma.cc/9JTN-RL3R>] (last visited Sept. 19, 2022).

47. See INTERACTION WITH OTHER LAWS, *supra* note 16, at 14.

48. See *id.*

49. See *id.* at 31.

50. See *id.* at 21.

51. See *id.* at 10.

in-law, spouse, domestic partner, grandchild, or grandparent], with a serious health condition; or [t]o assist when a family member is deployed abroad on active military service.”⁵²

Each statute allows for qualifying employees to take 12 weeks of leave in a one year period.⁵³ The one exception, however, is that the FMLA allows family members of covered servicemembers to take an extra fourteen weeks in that same one year period to care for their ill or injured family member.⁵⁴ In other words, if a servicemember has the same injury or illness as a civilian in the United States, their family members may take more than double the amount of family leave than those of that civilian. Thus, the FMLA treats family leave as a reward, rather than a right, applying a more reasonable length to individuals it deems most deserving.

In contrast to the FMLA, NYPFL is, as its name suggests, paid. New York employers collect the cost of Paid Family Leave through payroll deductions.⁵⁵ Eligible employees who take leave are entitled to 67% of their average weekly wage, up to a cap of 67% of the current statewide average weekly wage of \$1,594.⁵⁷⁵⁶

NYPFL was drafted to “phase in” the policy, or allow for an increasingly long period of leave each year.⁵⁷ Therefore, employees were not entitled to a full twelve weeks until 2021, five years after its enactment.⁵⁸ In 2018, the law allowed workers eight weeks of paid leave, and in 2019 and 2020, it provided for ten weeks.⁵⁹ Unlike the FMLA, it does not grant a longer duration of leave for servicemembers or other employees with special status. Thus, while NYPFL does fill in gaps left by some provisions of the FMLA,

52. *New York State Paid Family Leave Act*, N.Y.C. BAR, <https://www.nycbar.org/get-legal-help/article/employment-and-labor/family-medical-leave-act-fmla/new-york-state-paid-family-leave-act/> [<https://perma.cc/2GDZ-GVLS>] (last visited Aug. 10, 2022) [hereinafter NYPFLA].

53. *See id.*

54. *Fact Sheet #28M(a): Military Caregiver Leave for a Current Servicemember under the Family and Medical Leave Act*, U.S. DEP’T LAB., <https://www.dol.gov/sites/dolgov/files/WHDLegacy/files/whdfs28ma.pdf> [<https://perma.cc/7XD3-ZYRQ>] (last visited Sept. 19, 2022).

55. *See New York Paid Family Leave*, JUSTWORKS (Jan. 25, 2022), <https://help.justworks.com/hc/en-us/articles/360004529451-New-York-Paid-Family-Leave> [<https://perma.cc/GSU8-9H6Y>].

56. *New York Paid Family Leave Benefit Level and Premium Rate Updates Announced for 2022*, HARTER, SECREST & EMERY LLP (Nov. 9, 2021), <https://hselaw.com/news-and-information/legalcurrents/new-york-paid-family-leave-benefit-level-and-premium-rate-updates-announced-for-2022/> [<https://perma.cc/GEF9-A52W>].

57. *See New York State Paid Family Leave: Employee Facts*, NY.GOV, https://www.ny.gov/sites/default/files/atoms/files/PaidFamilyLeave_EmployeeFactSheet.pdf [<https://perma.cc/5B93-PWWR>] (last visited Sept. 19, 2022).

58. NYPFLA, *supra* note 52, at 3.

59. *See New York State Paid Family Leave: Employee Facts*, *supra* note 57.

it also ignores other provisions altogether, resulting in an incongruous relationship between the two laws.

Similar to NYPFL's duration rule, its pay requirement also "phased in" over the past few years. In 2018, employees were only allowed to make 50% of their average weekly wage, capped at 50% of the state weekly wage.⁶⁰ In 2019, employees were required to make 55% of their average weekly wage, capped at 55% of the state weekly wage. And in 2021, the law "phased in" completely, allowing employees to make the current 67% amount.⁶¹ Because NYPFL is now fully "phased in," there will be no new developments in the amount of pay allowed under law unless the law is amended.

Both NYPFL and FMLA give covered employees full job protection, meaning they are entitled to their jobs or comparable jobs when they return to work.⁶² Both laws also allow for continued health insurance coverage⁶³ and permit workers to take their twelve weeks of leave intermittently.⁶⁴ The FMLA is enforceable in state and federal courts, and plaintiffs suing under the FMLA are entitled to jury trials.⁶⁵ NYPFL, however, is only enforceable administratively through the Workers' Compensation Board.⁶⁶ An employee may simultaneously pursue an FMLA claim in court and an administrative action under the NYPFL.⁶⁷

Neither the FMLA nor NYPFL prevent businesses from enacting their own, more flexible leave policies. In this way, these laws allow private businesses to enact more comprehensive coverage than is expressly required by the statutes themselves. Big corporations have enacted family leave policies that allow employees to take leave for several months and still receive their full salaries.⁶⁸ These generous leave policies are typically seen

60. *Benefits Schedule*, NY.GOV (Nov. 19, 2021), <https://paidfamilyleave.ny.gov/benefits> [<https://perma.cc/LAT2-524G>].

61. *Id.*

62. *See* INTERACTION WITH OTHER LAWS, *supra* note 16, at 32.

63. *Id.*

64. *See Family and Medical Leave Act (FMLA), Paid Family Leave and Other Benefits*, NY.GOV, <https://paidfamilyleave.ny.gov/paid-family-leave-and-other-benefits> [<https://perma.cc/3E4X-BQYG>] (last visited Sept. 23, 2022).

65. *See* *Frizzell v. Southwest Motor Freight*, 154 F.3d 641 (6th Cir. 1998) (holding that although the "FMLA does not expressly provide for the right to a jury trial[.]" the statute's legislative history reveals an intent by Congress to create a jury trial in the FMLA).

66. INTERACTION WITH OTHER LAWS, *supra* note 16, at 36.

67. *See supra* notes 64–65.

68. *See, e.g., Peace of Mind: Inclusive Culture + Paid Family Leave*, DELOITTE, <https://www2.deloitte.com/us/en/pages/about-deloitte/articles/inclusion-family-leave-well-being-parental-caregiver.html> [<https://perma.cc/8ZZ7-BCPB>] (last visited Aug. 10, 2022):

Deloitte's paid family leave program gives our eligible professionals up to 16 weeks of paid leave, which can be used for happy occasions—to bond with family

in corporations that employ high-income professionals.⁶⁹ Furthermore, and as discussed below, these corporations disproportionately hire white individuals, thus leaving people of color largely out of the most generous leave benefits afforded in the United States.⁷⁰ The inflexibility of the FMLA and NYPLA allows corporations to take on the role of policymaker, letting the free-market system dictate who deserves to take leave, rather than enacting systemic change by creating equitable leave policies for all individuals, regardless of their income-status, gender or race.

C. Recent Developments in Family Leave Law

Recently, both the New York State government and the federal government have made efforts to expand their respective family leave laws, as well as implement new, more flexible laws. Since the outbreak of the COVID-19 pandemic in the United States, legislators and advocates alike have made efforts to create more flexible family leave laws, recognizing the importance of paid family leave for employees with ill family members.⁷¹ Senator Kirsten Gillibrand of New York, as an example, stated that the pandemic was “a unique moment in time . . . [n]ot only is paid leave understood, it’s something supported by the majority of Americans – Democrats and Republicans.”⁷²

At the start of the pandemic in 2020, Congress implemented its first federal *paid* leave act, the Families First Coronavirus Response Act,⁷³ which allowed those taking care of family members who had coronavirus to take paid leave. Specifically, it granted workers “[t]wo weeks (up to 80 hours) of

after the arrival of a child—or for challenging ones, like the illness or incapacity of a spouse, partner, sibling, parent, or grandparent.

See also, e.g., *Make the Most of Life*, MICROSOFT, <https://careers.microsoft.com/us/en/usbenefits> [<https://perma.cc/2BMH-VW9R>] (last visited Aug. 10, 2022) (offering twelve weeks of full paid family leave to care for an ill family member).

69. For example, “salaries at Deloitte range from an average of \$56,707 to \$138,210 a year.” See *Average Salary for Deloitte Employees*, Payscale, <https://www.payscale.com/research/US/Employer=Deloitte/Salary> [<https://perma.cc/3EVS-JQJE>] (last visited Aug. 10, 2022).

70. See *infra* Part II.

71. “Covid has made it absolutely clear that caregiving needs are not always anticipated and that everyone at some point in their lives will need to give or receive care. It’s a universal benefit.” Alicia Adamczyk, *There’s Still No Paid Leave for US Workers—But Advocates Aren’t Giving Up*, CNBC (Nov. 3, 2021), <https://www.cnbc.com/2021/11/03/still-no-paid-leave-for-us-workers.html> [<https://perma.cc/N7SL-BDQJ>].

72. Miranda Bryant, *Congress is ‘Better Poised than Ever’ to Pass Paid Family Leave Bill*, *Lawmakers Say*, GUARDIAN (Feb. 6, 2021), <https://www.theguardian.com/us-news/2021/feb/06/paid-family-medical-leave-bill-congress> [<https://perma.cc/TLK8-QXQF>].

73. Families First Coronavirus Response Act of 2020, Pub. L. No. 116-127, 134 Stat. 178.

paid sick leave at two-thirds the employee's regular rate of pay because the employee is unable to work because of a bona fide need to care for an individual subject to quarantine."⁷⁴

Additionally, President Joe Biden has made efforts to create a federal benefit that provides paid leave for workers with ill family members who have illnesses other than the coronavirus.⁷⁵ Nevertheless, President Biden's original proposal, guaranteeing 12 weeks of paid leave to Americans, has since been reduced to four weeks, as a result of continued disagreement within Congress.⁷⁶ Negotiations still continue, and as such, the bill still has potential to be reduced to even less than one-third of the amount originally proposed by Congress.⁷⁷ Around 80% of American voters support the idea of a national paid leave program.⁷⁸

On November 1, 2021, the New York State Legislature amended the NYPFL, expanding the definition of who someone could take off work to care from immediate family members to include "biological or adopted siblings, half-siblings and step-siblings."⁷⁹ Governor Kathy Hochul, in signing the bill into law, said "fighting to expand paid family leave is personal to me and so many others, and I am proud to work with advocates and legislators to make sure that New Yorkers can now take care of their siblings without fear of losing their jobs or income."⁸⁰

74. *Families First Coronavirus Response Act: Employee Paid Leave Rights*, U.S. DEP'T LAB., <https://www.dol.gov/agencies/whd/pandemic/ffcra-employee-paid-leave> [<https://perma.cc/FZF4-3D44>] (last visited Jan. 5, 2022).

75. See Katie Lobosco, *Americans May Finally Get Paid Family Leave. Here's What to Know*, CNN (Oct. 26, 2021), <https://www.cnn.com/2021/10/26/politics/paid-family-leave-biden/index.html> [<https://perma.cc/VRZ5-YEDA>].

76. See *id.*

77. See *id.* Speaking about the importance of paid family leave, President Biden has said:

I think the single most difficult thing for a parent or a son or daughter taking care of a parent is to look at that person in need and know there's not a damn thing you can do to help them . . . It's just simply the right thing to do.

Joe Biden Makes an Emotional Appeal for Paid Family Leave, OBSERVER (Jan. 29, 2016), <https://observer.com/2016/01/joe-biden-makes-an-emotional-appeal-for-paid-family-leave/> [<https://perma.cc/L854-SKMP>].

78. See Annie Nova, *Workers Could Get 12 Weeks of Paid Leave Under Biden's Plan. Here Are the Details*, CNBC (Apr. 28, 2021), <https://www.cnbc.com/2021/04/28/paid-leave-of-up-to-4000-a-month-for-12-weeks-part-of-biden-proposal.html> [<https://perma.cc/Y948-F5FR>].

79. *Changes to NYPFL*, JDSUPRA (Nov. 3, 2021), <https://www.jdsupra.com/legalnews/changes-to-new-york-paid-family-leave-1236317/> [<https://perma.cc/L8HJ-DBMD>].

80. *New Legislation Expands New York State's Paid Family Leave to Include Siblings*, WGRZ (Nov. 1, 2021), <https://www.wgrz.com/article/news/local/new-legislation-expands-new-york-states-paid-family-leave-to-include-siblings-gov-kathy-hochul/71-5179a701-a6f1-4058-b769-d3b2fda79ffd> [<https://perma.cc/BEH6-N6MX>].

While legislators have spoken optimistically about NYPFL's enactment and the various reforms that have been put in place over the years, as will be explained in Part II, these steps still fall short of what is needed for low-income New Yorkers to actually take leave without the burden of financial instability.

II. THE DISCRIMINATORY IMPACT OF NYPFL

While NYPFL is meant to help relieve some of the pain and stress that employees with sick family members endure, its strict protocols render it toothless, and sometimes actually detrimental, to low-income workers. Part II first explains how NYPFL impacts all low-income workers, because of its eligibility requirements, the duration of leave it allows, and the amount of pay it affords during that time. Next, it describes the particularly negative impact that NYPFL has on low-income women. Finally, it hones in on the ways in which the law affects people of color in New York.

A. Negative Impact on All Low-Income Workers

NYPFL's stringent eligibility, duration, and pay requirements significantly disadvantage low-income workers in the United States by forcing them to make the impossible choice between surviving financially or caring for their ill family members.

First, the law's requirement that an individual must have worked at a company for either 26 weeks or 175 days, depending on their hours, to be eligible for paid leave benefits is an unrealistic burden on low-income workers. An abundance of research shows that the occupations of SNAP⁸¹ or Medicaid participants are statistically less stable than occupations held by those who do not receive government benefits.⁸² For example, more than half of all employed welfare recipients spend less than one year on the job.⁸³ As such, low-income New Yorkers disproportionately fail to meet NYPFL's job tenure requirement.

81. "SNAP" refers to the federal Supplemental Nutrition Assistance Program, which "provides nutrition benefits to supplement the food budget of needy families so they can purchase healthy food and move towards self-sufficiency." *Supplemental Nutrition Assistance Program*, USDA, <https://www.fns.usda.gov/snap/supplemental-nutrition-assistance-program> [<https://perma.cc/6JLW-D2BT>] (last visited Jun. 19, 2022).

82. See Kristin F. Butcher & Diane Whitmore Schanzenbach, *Most Workers in Low-Wage Labor Market Work Substantial Hours*, in *Volatile Jobs*, CTR. BUDGET & POL'Y INST. (July 24, 2018), <https://www.cbpp.org/research/poverty-and-inequality/most-workers-in-low-wage-labor-market-work-substantial-hours-in> [<https://perma.cc/SE7K-5TEK>].

83. See Ann O'Leary, *How Family Leave Laws Left Out Low-Income Workers*, 28 BERKELEY J. EMP. & LAB. L. 1, 44 (2007).

While this has been a longstanding problem in New York, the number of low-income workers experiencing job instability has increased substantially in the past few years given the COVID-19 pandemic.⁸⁴ Nearly a third of low-income New Yorkers say that they or a member of their household lost their job since the pandemic.⁸⁵ This is largely because the “hardest hit sectors,” such as restaurants, hotels, retail, and personal care services, are major employers of low-income workers.⁸⁶ During the COVID-19 pandemic, many of these industries closed due to a lack of customers, and those that stayed open drastically reduced the size of their workforces.⁸⁷ NYPFL’s stringent job tenure requirements do not recognize this reality, leaving many low-income workers in New York unable to qualify for paid family leave, even in the midst of a global pandemic.

Second, twelve workweeks are not nearly enough time for most employees to adequately care for a sick family member. While many different types of illnesses may qualify as a “serious health condition” under NYPFL, and some of these conditions may endure less than 12 weeks, the reality is that many “serious” health conditions endure for months, if not years.⁸⁸ NYPFL’s language recognizes this.⁸⁹ Its definition of “serious health condition,” which closely tracks the definition of “serious illness” provided in the FMLA, is “an illness, injury, impairment, or physical or mental condition that involves: inpatient care in a hospital, hospice, or residential health care facility; or continuing treatment or continuing supervision by a health care provider.”⁹⁰ On New York State’s website, the state defines a health condition requiring “continuing treatment or supervision” as a “chronic serious health condition that continues over an extended period,” and “long-term or permanent period of treatment.”⁹¹

84. See Jenna M. Wilson, *Job Insecurity and Financial Concern During the COVID-19 Pandemic Are Associated With Worse Mental Health*, 62 J. OCCUPATIONAL & ENV’T HEALTH 686, 686 (2020) (“In the week that COVID-19 was declared a pandemic, U.S. unemployment increased by 1.4 million people.”).

85. See, e.g., Irene Lew, *The Pandemic Economy: COVID-19 Fallout Continues to Hit Low-Income New Yorkers the Hardest*, CMTY. SERV. SOC’Y (Nov. 19, 2020), <https://www.cssny.org/news/entry/pandemic-economy-covid-fallout-low-income-new-yorkers> [<https://perma.cc/M2EH-AUH4>].

86. *Id.*

87. See Carl Campanile, *New York Lost 1 Million Jobs in 2020 Due to COVID-19*, N.Y. POST (Jan. 22, 2021) <https://nypost.com/2021/01/22/new-york-lost-1-million-jobs-in-2020-due-to-covid-19/> [<https://perma.cc/3R5U-J5NM>].

88. *Paid Family Leave for Family Care, What is a Serious Health Condition?*, NY.GOV, <https://paidfamilyleave.ny.gov/paid-family-leave-family-care> [<https://perma.cc/H3LY-ZJ9G>] (last visited Apr. 30, 2021).

89. *Id.*

90. *Id.*

91. *Id.*

Specific examples of health conditions that qualify include “cancer (chemotherapy and radiation), severe arthritis (physical therapy), or kidney disease (dialysis).”⁹² Yet just one course of chemotherapy lasts three months or longer.⁹³ Severe arthritis is a chronic and incurable condition.⁹⁴ And individuals in chronic or end stage kidney failure require dialysis for the rest of their lives.⁹⁵ Though legislators recognize how long illnesses can endure, they have seemingly undermined their own logic in capping NYPFL at 12 weeks. In fact, until this year, the law did not even allow for 12 weeks of paid leave.

The FMLA itself recognizes this shortcoming. It allows family members of ill servicemembers to leave work for 26 weeks, thus acknowledging the fact that adequate caregiving for ill family members extends beyond 12 weeks.⁹⁶ As a result, New Yorkers who are taking care of family in the service may take paid leave under New York Family Leave for 12 weeks and continue to take unpaid leave for another 14 weeks under the FMLA. Legislators have chosen to provide extended leave only to the people in society they deem the worthiest of being taken care of, while simultaneously casting low-income workers aside. NYPFL’s inflexible duration is a stark showing of the law’s disregard and distrust in low-income individuals, forcing most to go back to work instead of caring for a loved one, while allowing other, more “worthy” individuals to benefit from a longer leave time.

Third, the law’s requirement that employees may only receive up to 67% of their average weekly wage, capped at \$1,594.57,⁹⁷ is problematic. This requirement once again perpetuates the impossible catch twenty-two of forcing low-income workers to choose between providing financially for their families or providing care to their loved ones. 67% of one’s average weekly wage is far below minimum wage for many low-income individuals. The entire purpose of creating a minimum wage requirement was to ensure that individuals could meet basic needs, such as food and living expenses.⁹⁸ The people who are supposed to benefit most from paid family leave (those

92. *Id.*

93. *See Understanding Chemotherapy, supra* note 3.

94. *See Arthritis*, MAYO CLINIC, <https://www.mayoclinic.org/diseases-conditions/arthritis/symptoms-causes/syc-20350772> [<https://perma.cc/DK2S-5NTP>] (last visited June 19, 2022).

95. *See Dialysis & Covid-19*, NAT’L KIDNEY FOUND. (Mar. 23, 2021), <https://www.kidney.org/atoz/content/dialysisinfo> [<https://perma.cc/KTM9-RWSU>].

96. *See supra* Part I.B.

97. *See, e.g., New York Paid Family Leave, supra* note 55.

98. *See Minimum Wage*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/minimum_wage [<https://perma.cc/C2BC-RBGW>] (last visited Apr. 30, 2021).

who are low-income),⁹⁹ are also those who are intended to benefit from minimum wage laws. Yet NYPFL undermines this goal with its complete disregard of minimum wage—people’s basic needs simply cannot be met if employees are making only a proportion of it.

Further, minimum wage, meant to ensure that people meet their most “basic” needs, does not guarantee that people will be able to afford living essentials in the communities where they live. United for ALICE, a research project centered in New Jersey, created a threshold to determine which households might be above the poverty line in each U.S. state, but still are “Asset Limited, Income Constrained, Employed” (ALICE).¹⁰⁰ As of 2018, the ALICE threshold in New York was \$27,312.¹⁰¹ This is far more than the 67% of the minimum wage in New York. Accordingly, NYPFL’s requirement falls significantly short in ensuring that low-income individuals may be able to afford to live stably while taking leave to care for an ill family member.

For example, the NYPFL makes no mention of how it covers workers in the service industry, despite its unique income structure. New York minimum wage law states that restaurants “can pay their waitstaff less than minimum wage on the condition that the employees will make at least minimum wage per hour after receiving their tips from customers.”¹⁰² Many low-income workers are employed in the service industry, specifically people of color.¹⁰³ Under the current wording of New York Paid Family Law, it is altogether possible that employers may pay employees in the service industry even less than 67% of minimum wage while they are out on paid leave. Thus, the same people who have been disproportionately impacted by COVID layoffs, if lucky enough to even qualify for NYPFL, may still make only a small portion of their original salaries. As such, many low-income individuals are further dissuaded from taking family leave under

99. See Pamela Winston, *Work-Family Supports for Low-Income Families: Key Research Findings and Policy Trends*, U.S. DEP’T HEALTH & HUM. SERVS., OFF. ASS’T. SEC’Y FOR PLANNING & EVAL. (Mar. 2014), https://aspe.hhs.gov/sites/default/files/private/pdf/76856/rpt_WorkFamily.pdf [<https://perma.cc/8T2S-EGZM>].

100. See *New York 2018 State Overview*, UNITED FOR ALICE, <https://www.unitedforalice.org/state-overview/new-york> [<https://perma.cc/83SZ-RHKY>] (last visited Jan. 5, 2022).

101. See *ALICE in New York*, UNITED FOR ALICE, https://www.unitedforalice.org/Attachments/AllReports/2020ALICEReport_NY_FINAL.pdf [<https://perma.cc/PK67-KN43>] (last visited Jan. 5, 2022).

102. *Minimum Wage*, WAITER PAY (Dec. 31, 2020), <https://waiterpay.com/top-ten-violations/minimum-wage> [<https://perma.cc/RGL8-XXLG>].

103. See *New York Paid Family Leave Benefit Level and Premium Rate Updates Announced for 2022*, *supra* note 56.

New York's law, as their pay would fall so far below what would be necessary to meet their basic needs.

A more reasonable solution for these workers might be to take temporary leave and collect unemployment. After all, unemployment benefits in New York do not end after 12 weeks and can amount to far more than 67% of minimum wage.¹⁰⁴ Nevertheless, temporarily collecting unemployment is an impossible solution for low-income families in this position. NYPFL offers two things that unemployment cannot: job security and insurance security.¹⁰⁵ While job security may be worth the risk for some, the risk of losing insurance for those with sick family members is significant. New York unemployment does not provide health insurance benefits, and the solutions it does offer in replacement are costly.¹⁰⁶ Furthermore, because taking temporary unemployment does not guarantee job security as NYPFL does, taking paid family leave is a more viable option for many low-income individuals.

Finally, and most crucially, NYPFL in its current state precludes workers who leave from also receiving unemployment benefits. While one can technically receive unemployment benefits while on family leave,¹⁰⁷ the standards that employees must meet to qualify for unemployment paint a different reality. Unemployment is only for those “ready, willing and able to work, and [a]re actively seeking work.”¹⁰⁸ Obviously, those who are leaving work to care for an ill family member cannot meet such requirements. That is exactly why they are leaving work in the first place. As such, low-income New Yorkers' only true choice when dealing with the illness of a family member is to take the minimal “benefits” provided in

104. The maximum benefit rate during normal times is \$504. Nevertheless, unemployment assistance can last for up to twenty-six weeks. During the pandemic, unemployment assistance increased by “[a]dditional [payments of] \$600 per week” was added to unemployment benefits “for [the] benefit weeks ending 4/5/2020 to 7/26/2020, and [an additional] \$300 per week for the benefit weeks ending 1/3/2021 to 9/5/2021 while unemployed.” See *Coronavirus Aid, Relief, and Economic Security (CARES) Act*, U.S. DEP'T LAB., <https://dol.ny.gov/coronavirus-aid-relief-and-economic-security-cares-act> [<https://perma.cc/E65X-ME5C>] (last visited Aug. 31, 2022).

105. See *Get Unemployment Assistance*, NY.GOV, <https://www.ny.gov/services/get-unemployment-assistance> [<https://perma.cc/CMK6-VB35>] (last visited Apr. 30, 2021).

106. *Unemployment: Health Insurance Options*, NY.GOV, https://www.dfs.ny.gov/consumer/csb_health_unemp.htm [<https://perma.cc/FS3K-M8GQ>] (last visited Apr. 30, 2021).

107. See *Unemployment Insurance Benefits and COVID-19*, LEGAL ASSISTANCE OF W. N.Y., INC., <https://www.lawny.org/node/356/unemployment-insurance-benefits-and-covid-19> [<https://perma.cc/CX2G-RJFJ>] (last visited Oct. 4, 2022).

108. See *Before You Apply for Unemployment Frequently Asked Questions*, NY.GOV, <https://dol.ny.gov/you-apply-unemployment-frequently-asked-questions> [<https://perma.cc/3E3C-RY44>] (last visited Sept. 23, 2022).

NYPFL and suffer economically, or not take time off at all to adequately care for that family member.

B. NYPFL's Particular Impact on Low-Income Women

Not only does NYPFL disadvantage low-income families generally, but also its shortcomings primarily fall on women. As the Court noted in *Hibbs*, a prevailing stereotype in the United States is “that only women are responsible for family caregiving and that men lack domestic responsibilities.”¹⁰⁹ The traditional narrative in the United States is that women choose to leave the workplace to care for their children.¹¹⁰ Unfortunately, this “choice” is a luxury that low-income women do not have.¹¹¹ The reality is that many low-income women are forced to leave the workplace when their family members need care. Though NYPFL was created after the FMLA in order to fill in some of FLMA’s gaps, it does nothing to change the many gendered issues that the FMLA intended to alleviate. By leaving room for workers to make any sort of “choice” as to whether they should leave work to care for an ill family member, NYPFL leaves the gendered issues created by the FMLA even more entrenched.

Notably, men historically earn more than women,¹¹² and, as a result, it often makes more economic sense for women in two-parent families to take unpaid leave and forgo their lower salary.¹¹³ Women make up the majority of part-time workers, taking low-paying shift jobs so they can work while also staying available at certain times to take care of their families.¹¹⁴ While the idea of providing a completely gender-neutral paid leave program may be a good idea in practice, it does nothing to mitigate this issue. It instead puts more pressure on women in heterosexual low-income two-parent households to stay home, because 67% of their salaries is likely to be less than 67% of their partners’.¹¹⁵

109. *Nev. Dep’t of Hum. Res. v. Hibbs*, 538 U.S. 721, 737 (2003).

110. Anna Faber et al., *Family and Medical Leave Act*, 19 *GEO. J. GENDER & L.* 305, 325 (2018).

111. Kirsten K. Davis, *Extending the Vision: An Empowerment Identity Approach to Work-Family Regulation as Applied to School Involvement Leave Statutes*, 16 *WM. & MARY J. WOMEN & L.* 613, 622 (2010).

112. Amanda Barroso & Anna Brown, *Gender Pay Gap in U.S. Held Steady in 2020*, PEW RSCH. CTR. (May 25, 2021), <https://www.pewresearch.org/fact-tank/2021/05/25/gender-pay-gap-facts/> [<https://perma.cc/7QLB-XCK9>].

113. Catherine Albiston & Lindsey Trimble O’Connor, *Just Leave*, 39 *HARV. J.L. & GENDER* 1, 64 (2016).

114. Courtney Connley, *The Coronavirus Pandemic Further Highlights Why Women Workers Need Equal Pay*, CNBC (Mar. 31, 2020, 11:33 AM), <https://www.cnbc.com/2020/03/31/how-the-pay-gap-hurts-low-wage-women-workers-impacted-by-the-coronavirus.html> [<https://perma.cc/K3L8-UNM5>].

115. See Albiston & O’Connor, *supra* note 113, at 65.

And, when it comes to low-income single-parent households, women inevitably bear the brunt of the consequences of family leave. The narrative set forth in *Hibbs* and perpetuated by lawmakers that women make the choice to leave their jobs assumes that households in the United States have a second wage earner whose income can support their family. Yet, there are a staggering number of low-income single mother households in the United States, as well as in New York. In the United States, there are five times as many single-mother households than single-father households,¹¹⁶ over 40,000 of which are under the poverty-line in New York.¹¹⁷ And almost 80% of single-mother households in New York do not meet the ALICE threshold.¹¹⁸ Of low-income single mothers in the United States, the majority hold service jobs, such as waitressing, personal care aides, and customer service jobs.¹¹⁹ Unlike women in two-parent households, single mothers do not have the freedom to decide who in their families can and should take leave. Single mothers who need to take leave but cannot afford to do so are forced to choose between taking care of their sick child or losing their only source of income.¹²⁰ They, unlike parents in two-parent families, do not have another parent figure to rely on to take on responsibilities.

Finally, taking time off to care for a family member is not a choice at all for most women, but rather a product of social conditioning. Women tend to disproportionately take leave because of the social burden to do so.¹²¹ Because women have traditionally taken primary responsibility for care work, an emphasis on family care entrenches gendered patterns of leave-taking.¹²² For example, numerous studies have shown that women in traditional heterosexual relationships typically rationalize their roles as caretakers, pointing to barriers in men's participation in the family.¹²³ This shows how challenging it is to uproot the status quo.¹²⁴ As the Supreme

116. See *Number of Children Living with a Single Mother or a Single Father in the U.S. from 1970 to 2020*, STATISTA, <https://www.statista.com/statistics/252847/number-of-children-living-with-a-single-mother-or-single-father/> [<https://perma.cc/76X9-KJ3X>] (last visited Aug. 8, 2022).

117. *Single Mothers with Young Children Living in Poverty*, INST. FOR CHILD., POVERTY, & HOMELESSNESS, <https://www.icphusa.org/wp-content/uploads/2016/04/Single-Mothers.pdf> [<https://perma.cc/U6JU-3AF7>] (last visited Aug. 8, 2022).

118. *ALICE in New York*, *supra* note 101, at 17.

119. *Single Mothers Hit Hard by Job Losses*, PEW CHARITABLE TRS. (May 26, 2020), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2020/05/26/single-mothers-hit-hard-by-job-losses> [<https://perma.cc/CCP9-8YVY>].

120. See Faber et al., *supra* note 110, at 326.

121. Naomi Cahn, *The Power of Caretaking*, 12 YALE J.L. & FEMINISM 177, 206–07 (2000).

122. *Id.* at 207.

123. *Id.*

124. *Id.* at 207–08.

Court noted in *Hibbs*, “even where state [leave] laws and policies were not facially discriminatory, they were applied in discriminatory ways.”¹²⁵ Without more flexible leave requirements, New York Paid Family Law does not provide sufficient incentive for these patterns to ever change. The history and culture of women being caregivers in the United States perpetuates a gendered application of NYPFL, disproportionately disadvantaging low-income women.

C. NYPFL’s Impact on People of Color

NYPFL also creates a disparate impact on people of color, particularly Black and Latinx people.¹²⁶ Between 2016 and 2019, more than half of Black and Latinx adults in New York City were in poverty or were low-income, while only 34% of white New Yorkers were.¹²⁷ Further, 60% of Black and Latinx households in New York are under the ALICE threshold.¹²⁸ The choice between making only 67% of this already insufficient income by taking NYPFL, or not taking leave at all to care for an ill family member, is an unjust burden that falls disproportionately on people of color.

Perhaps the most troubling aspect of this information is that if any group needs access to leave to give care to family members, it is people of color, particularly Black Americans. This is because the American health care system creates inequalities that disproportionately impact people of color, including “gaps in health insurance coverage, uneven access to services, and poorer health outcomes among certain populations.”¹²⁹ Further, many preconditions that heighten the risk of serious illness from COVID-19, including, but not limited to, obesity, asthma and hypertension, disproportionately impact Black Americans.¹³⁰ A study done in 2020 found that almost 14% of African Americans reported having fair or poor health

125. Nev. Dep’t of Hum. Res. v. Hibbs, 538 U.S. 721, 732 (2003).

126. “[P]eople of color [is] a term commonly associated with non-White racial minorities in modern American society.” Kate Sablosky Elengold, *Branding Identity*, 93 DENV. L. REV. 1, 3 (2015).

127. ABRAHAM ARRIAGA ET AL., THE STATE OF POVERTY AND DISADVANTAGE IN NEW YORK CITY 5 (2021), https://www.robinhood.org/wp-content/themes/robinhood/images/poverty-tracker/pdfs/Annual_Report_Vol_3.pdf [<https://perma.cc/8FXB-WHT6>].

128. See *ALICE in New York*, *supra* note 101.

129. Jamila Taylor, *Racism, Inequality, and Health Care for African Americans*, CENTURY FOUND. (Dec. 19, 2019), <https://tcf.org/content/report/racism-inequality-health-care-african-americans/> [<https://perma.cc/SK85-Z4PE>].

130. *People with Certain Medical Conditions*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html> [<https://perma.cc/L8AN-XNCN>] (last updated May 2, 2022).

compared with 8% of whites.¹³¹ 80% of African American women are overweight or obese compared to almost 65% of white women.¹³² In 2017, almost 13% of African American children had asthma compared with less than 8% of white children.¹³³ And while 42% of African American adults over age twenty suffer from hypertension, less than 30% of white adults do.¹³⁴ Yet the United States continuously fails to address this issue by giving these workers the bare minimum of family leave assistance.

And while Latinx Americans face less health disparities than Black Americans, many Latinx Americans are also disproportionately impacted by NYPFL due to their immigration status. Of the 725,000 undocumented immigrants who make up 4% of the total population of New York,¹³⁵ over half of these workers are Latinx.¹³⁶ New York's website states that "citizenship and/or immigration status do not impact [employee] eligibility" for paid family leave.¹³⁷ Nevertheless, each form required to become eligible for NYPFL asks for a social security number or Taxpayer Identification Number.¹³⁸ Undocumented immigrants do not have social security numbers, and many do not have Taxpayer Identification Numbers.¹³⁹ The law as enacted merely adds to the burden these populations shoulder without offering any reasonable solution.

131. *Health Disparities by Race and Ethnicity*, CTR. FOR AM. PROGRESS (May 7, 2020), <https://www.americanprogress.org/article/health-disparities-race-ethnicity/> [https://perma.cc/ET4Y-5FAT].

132. *Id.*

133. *Id.*

134. *Id.*

135. *Immigrants in New York*, AM. IMMIGR. COUNCIL, <https://www.americanimmigrationcouncil.org/research/immigrants-in-new-york> [https://perma.cc/Z8E7-2B3N] (last visited Aug. 8, 2022).

136. According to the Migration Policy Institute, 36% of undocumented immigrants in New York were born in Mexico and Central America, and eighteen percent were born in South America. See *Profile of the Unauthorized Population: New York*, MIGRATION POL'Y INST., <https://www.migrationpolicy.org/data/unauthorized-immigrant-population/state/NY> [https://perma.cc/9L22-BME3] (last visited Aug. 8, 2022).

137. *New York State Paid Family Leave: Employee Facts*, NY.GOV, https://www.ny.gov/sites/default/files/atoms/files/PaidFamilyLeave_EmployeeFactSheet.pdf [https://perma.cc/N49Q-MUZL] (last visited Aug. 8, 2022).

138. *How to Request Paid Family Leave to Care for a Family Member with a Serious Health Condition*, NY.GOV, <http://docs.paidfamilyleave.ny.gov/content/main/forms/PFLDocs/PFL3.pdf> [https://perma.cc/7H6E-6MZT] (last visited Aug. 8, 2022).

139. See *IRS Gives Taxpayer Identification Numbers (ITIN) to Undocumented Workers*, WORKING IMMIGRS. (Feb. 12, 2006), <https://www.workingimmigrants.com/2006/02/irs-gives-taxpayer-identification-numbers-itin-to-undocumented-workers/> [https://perma.cc/E9UD-U5T8].

Higher-income workers, who are disproportionately white, are unlikely to have the same worries about taking paid family leave in the first place.¹⁴⁰ They either work at companies that have their own leave policies that far outmatch NYPFL, or they can afford to take leave from their jobs at 67% of their current wage because of their savings and/or other sources of income. Those who ultimately must make the difficult choice between caregiving and meeting basic needs are most often people of color,¹⁴¹ while those who are awarded full pay and hearty benefits from large corporations, or benefit from other income streams, are disproportionately white.¹⁴²

Finally, low-income women and people of color, specifically Black Americans, are disadvantaged by NYPFL because, as stated before, the New York law does not apply to government jobs.¹⁴³ “[W]omen and African Americans constitute a disproportionately large share of the state and local public-sector workforce.”¹⁴⁴ As such, many women and Black people in New York seeking leave from their jobs may only qualify for leave under the FMLA and therefore, under New York’s stringent requirements, be paid nothing at all to take care of a sick family member.

III. FLEXIBLE LEAVE POLICIES HAVE BEEN PROVEN TO BE FEASIBLE AND PRACTICAL

Flexible voluntary business policies implemented by corporations across the United States, as well as other countries’ generous paid leave laws are examples of how amending NYPFL is not only possible, but also beneficial to corporations and low-income workers alike. Part III looks to paid leave programs that corporations already have in place, the effects of turnover and training costs on corporations, and finally, paid leave policies overseas.

A. Corporations Take Action Based on the Proven Benefits of Paid Family Leave

Voluntary business policies in the United States are persuasive in showing that NYPFL can and should be expanded.¹⁴⁵ While most private companies in New York are required to comply with NYPFL, they are not prohibited from enacting even more flexible workplace policies. As a result, many large

140. *See supra* Part I.

141. *See supra* Part II.C.

142. *See id.*

143. *See* INTERACTION WITH OTHER LAWS, *supra* note 16, at 14.

144. David Cooper et al., *The Public Sector Jobs Crisis*, ECON. POL’Y INST., <https://www.epi.org/publication/bp339-public-sector-jobs-crisis/> [https://perma.cc/3H7T-YWAB] (last visited Aug 23, 2022).

145. Marianne DelPo Kulow, *Legislating A Family-Friendly Workplace: Should It Be Done in the United States?*, 7 NW. J.L. & Soc. POL’Y 88, 111 (2012).

corporations have gone far beyond the limited policies that NYPFL requires. This is because many companies recognize the benefits both to business and employees that such policies provide. Nevertheless, as is evident from Part II, workers who benefit from these policies are mainly those who are already financially well-off.¹⁴⁶ Unfortunately, while corporate leave policies are informative in that they show that NYPFL can and should be expanded, they also reveal that the state disfavors low-income workers by allowing corporations to dictate policy where the law has left gaps. The United States' culture values "corporate freedom" over robust social policy.

Studies show that providing flexible work arrangements and time off to take care of personal and family needs can help limit unscheduled absences. Employees with flexible work arrangements report less work-life stress and thus have fewer unscheduled absences and increased productivity.¹⁴⁷ These policies help not only the employees, but also the productivity and culture of the companies themselves. In fact, several corporations in the United States have begun to enact unlimited sick and vacation leave policies.¹⁴⁸

NYPFL codifies the inherent distrust that America has in low-income workers. These companies have noted "[t]he unlimited sick day policy indicates to our employees that we trust them, and that, we believe, intrinsically motivates them to give back to the company in terms of loyalty, higher performance, and increased productivity."¹⁴⁹ Yet, NYPFL imposes strict restrictions on paid time off, indicating a state belief that low-income workers in jobs without voluntary leave policies do not have the capability to be more productive and motivated when given more flexibility in the workplace. Even more, it codifies the distrust that America has in people of color, continuing to put obstacles in the way of their employment opportunities.

Data proves that flexible leave policies are not only economically feasible for corporations, but also economically prudent. Under current leave laws, those who are faced with the burden of ill family members often must permanently leave work to be caregivers, because job security set forth in the NYPFL does not last for the duration of caregiving responsibilities. Accordingly, corporations are faced with turnover and training costs, which

146. *See supra* Part II.

147. DelPo Kulow, *supra* note 145, at 106–07.

148. Companies with unlimited paid time off policies include Netflix, Grubhub, and Oracle, among a number of others. *See* K. Jared Wright, *Need a Vacation? These 8 Companies Offer Unlimited PTO*, EMP. BENEFIT NEWS (July 7, 2021, 4:11 PM), <https://www.benefitnews.com/list/8-companies-that-offer-unlimited-paid-time-off> [<https://perma.cc/Y4R9-L24B>].

149. Paula Santonocito, *Offering Unlimited Sick Days*, 23 EMP. ALERT 3, 3 (2006).

are comparable, if not greater, than the cost of paying an employee who is out on Paid Family Leave.¹⁵⁰

Training costs in America can be extensive and are a less-than-adequate alternative to the cost of providing a more flexible paid leave program. “In 2020, across all industries, organizations with 100-999 employees spent about \$1,678 per employee, organizations with 1,000-9,999 employees spent about \$581 per employee, and companies with 10,000 employees or more spent \$924 per employee on training.”¹⁵¹ While higher-skilled jobs do, of course, have higher training costs, training costs are certainly not limited to these jobs.¹⁵² In all jobs, even low-skilled ones, hidden training costs are prevalent.¹⁵³ Companies still must pay upfront costs, such as recruitment and administrative hours spent on new hires.¹⁵⁴

It is a common misconception that low-income workers’ jobs require low skill or minimum training.¹⁵⁵ In many jobs, potential costs include instruction materials, equipment and time for formal training, and the cost of a mentor’s time.¹⁵⁶ Loss of productivity until a new hire masters the job and the cost of time and travel for employees to network and collaborate also significantly contributes to training costs.¹⁵⁷ In fact, it can take up to six months or more for a company to break even on its investment in a new hire.¹⁵⁸ In 2020–21, employees in the US spent an average of 64 hours in

150. *See supra* pp. 34–35.

151. Derek Smith, *What’s the Real Cost of Training Programs for Employees?*, BIZ LIBR. (Nov. 25, 2019), <https://www.bizlibrary.com/blog/training-programs/cost-of-training-employees/> [https://perma.cc/7DRK-NBUJ].

152. Tess C. Taylor, *The Costs of Training New Employees, Including Hidden Expenses*, ADP (Oct. 4, 2018), <https://www.adp.com/spark/articles/2018/10/the-costs-of-training-new-employees-including-hidden-expenses.aspx> [https://perma.cc/N6DG-8PQ9].

153. *Id.*

154. *Id.*

155. Byron Auguste, *Low Wage, Not Low Skill: Why Devaluing Our Workers Matters*, FORBES (Feb. 7, 2019, 10:00 AM), <https://www.forbes.com/sites/byronauguste/2019/02/07/low-wage-not-low-skill-why-devaluing-our-workers-matters/?sh=1d6a9eca716d> [https://perma.cc/ZA3P-257R]:

Restaurant servers juggle five or six tables at a time, preempting customers’ needs and keeping a high-stakes, continuously recalibrating to-do list in their heads. Caregivers administer drugs and nurse our loved ones through what can be the most difficult times of their lives. Migrant workers acquire, deploy and pass on a deep understanding of the crop patterns of various fruits, vegetables and trees in a range of soil conditions.

156. *Taylor, supra* note 152.

157. *Id.*

158. Annie Muller, *The Cost of Hiring a New Employee*, INVESTOPEDIA (Apr. 8, 2022), <https://www.investopedia.com/financial-edge/0711/the-cost-of-hiring-a-new-employee.aspx/> [https://perma.cc/FA6U-35BB].

job training.¹⁵⁹ Accordingly, the significant costs of hiring and training a new employee highlight the feasibility and practicality of implementing more flexible leave laws.

B. International Approaches Amplify the Feasibility of Paid Leave Policies

Since wealthy corporations have shown not only that they benefit from flexible paid leave policies, but also that their workers are advantaged by them, state and federal governments should also implement these policies.¹⁶⁰ And flexible leave policies have not only been proven to work in private corporations, but also in countries that enforce flexible workplace laws overseas. Of the 19 Organization for Economic Cooperation and Development¹⁶¹ countries who have statutes specifically curated to address paid leave to care for ill family members, 11 countries provide paid leave to care for children's health needs, and eight provide paid leave to care for adult family members.¹⁶² Countries with flexible leave statutes have shown that fewer requests for flexible workplace arrangements were made than expected, most requests were acceptable to employers, and costs were not a major issue in implementation.¹⁶³

Countries that have enacted paid leave policies specifically meant for individuals who must care for an ill family member also show much more leniency in their statutes than either NYPFL or the FMLA.¹⁶⁴ In Belgium, workers are allowed to take 52 weeks in their life to care for a severely ill family member.¹⁶⁵ In Italy, workers may take two years over the course of their lifetime to care for a seriously ill family member.¹⁶⁶ In Japan, workers may take 93 days for each family member who is ill.¹⁶⁷ Finally, in Sweden,

159. *Id.*

160. *See supra* Part III.A

161. *Paid Family Leave Across OECD Countries*, BIPARTISAN POL'Y CTR. (Jan. 2020), https://bipartisanpolicy.org/download/?file=/wp-content/uploads/2020/01/PFL6-FInal_.pdf [<https://perma.cc/R75-VJ4V>].

162. *See* DelPo Kulow, *supra* note 145, at n.93 (citing *Raising the Global Floor: Unprecedented New Study Finds that Family-Friendly Workplace Policies and Protections Support Jobs, Enhance Competitiveness*, NAT'L P'SHIP FOR WOMEN & FAMS. (Nov. 17, 2009), <https://www.nationalpartnership.org/our-impact/news-room/press-statements/raising-the-global-floor.html> [<https://perma.cc/6LR5-2LNT>]).

163. *Id.* at 106.

164. *See Paid Family Leave Across OECD Countries*, *supra* note 161.

165. *Id.*

166. *Id.*

167. *Id.*

each worker gets 100 days “per episode” to care for a seriously ill family member.¹⁶⁸

Policies that impact all workers in a country equally and do not require companies to make up their own, more flexible paid leave policies, enhance equity among a nations’ workers. They show that low-income workers can be trusted and provide respect for those workers who must deal with pressing issues surrounding the health of their family members. Other countries’ success in implementing flexible workplace policies is all-the-more reason that the United States can and should do so as well.

IV. NYPFL SHOULD BE EXPANDED

The fact that New York and the United States as a whole have maintained ungenerous and narrow family leave laws in the face of these proven policies make it clear that they value maintaining a homogenous, free-market society over changing problematic societal norms. This forces low-income workers to choose if and how they can leave work when faced with a family member’s illness, which disproportionately burdens women and people of color. America’s free market system puts corporations in the role of policymaker, rather than the government, thus making it clear that the nation places its emphasis on maximizing profits rather than changing problematic current social norms.¹⁶⁹

NYPFL should expand its requirements to be far more flexible. The statute should be amended to include: (1) no qualifying amount of time in employment; (2) a leave period that at least matches the 26 weeks afforded to servicemembers’ families under the FMLA; (3) pay that puts workers above the ALICE threshold; and (4) a requirement that employees must take leave in certain situations. While these recommendations may seem far-fetched based on the structure of the statute as it currently stands, the examples in Part III show that they are not.

To begin with, if one has gone through the interview and employment process to become officially employed, that alone should qualify the worker to receive benefits under NYPFL. The stringent time-in-employment requirement completely disregards the reality of job mobility for low-income workers.

Furthermore, the FMLA recognizes 12 weeks is not enough time for many workers to take care of their family members, thus allowing for at least 26

168. *Id.*

169. Lisa Bornstein, *Inclusions and Exclusions in Work-Family Policy: The Public Values and Moral Code Embedded in the Family and Medical Leave Act*, 10 COLUM. J. GENDER & L. 77, 91 (2000).

weeks of leave for some workers. And even completely unlimited leave is already implemented by many companies across the United States and has been shown to be effective across the board. It is a signal to low-income workers that they can be trusted and their needs are respected, and as a result, will improve productivity in private companies statewide. Moreover, pay that ensures employees will meet the ALICE thresholds for their families, rather than 67% of minimum wage (or even less for service workers), must be implemented to not only help them meet their basic needs, but also show trust and respect for low-income workers. A requirement that provides low-income workers with only a proportion of the minimum wage, the baseline amount of money needed to meet basic needs in America, undermines the stated purpose of the NYPFL.

Importantly, this will also help New York abide by another policy objective: leveling the playing field for people of color. A law that does not allow for low-income workers to take leave during the full time needed in situations where they must care for an ill family member unduly disadvantages people of color, a disproportionately low-income population. People of color are disproportionately affected by chronic illnesses, and therefore must take leave more than other populations in New York. A law that forces low-income people to choose between caring for their families and working to meet their basic needs is one that directly forces people of color to make this choice. Changes to the duration and pay requirements of NYPFL will help to mitigate systemic racism in New York State, as they will allow people of color to succeed in the economy while also taking care of their families during times of need.

Once these policy changes are implemented, the law should impose a requirement that employees take leave in certain situations, rather than just *allow* employees to do so. If a qualifying family member under NYPFL needs to be cared for, that alone should be enough for a person to be required to take leave to do so. “[I]t is notable that only nine states and the District of Columbia have mandated leave for employees to attend their children’s school-related activities and that no state requires leave to attend to a child’s short-term, moderate illness.”¹⁷⁰ Without a leave requirement, working men and women will continue to feel pressure to forgo their rightful leave benefits. Equity between men and women in the workplace demands that the NYPFL consider the reality that women are largely the ones who take leave because of societal norms.¹⁷¹ If all employees, male and female, are required to take leave in situations when family members are ill, the original

170. DelPo Kulow, *supra* note 145, at 96.

171. *See supra* Part II.B.

goal of family leave will finally become a reality—women and men will take leave at equal rates.

The idea that leave is only permissive during a person’s most difficult life experience disregards the idea that New York tries to put forth in its law: that New York cares about its citizens. Requiring those who need to take paid leave to do so will normalize the notion of paid leave in general. There should be no reason why employees should ever have to make a choice of whether to care for ill family member. As mentioned, corporations in the United States as well as foreign laws recognize this and have thus implemented leave requirements. In fact, the United States is the only nation out of forty-one nations with leave programs that does not mandate paid leave.¹⁷² Although NYPFL promises job security, this requirement will alleviate any stressors about retaliation from an employee’s company.

CONCLUSION

The FMLA sets out to reconcile family integrity with business interests.¹⁷³ Yet, it accomplishes neither by setting forth a constrained and incoherent policy that gives American workers little to no benefit when faced with a family member’s illness. While the NYPFL attempts to remedy some of the limitations of the FMLA, it ultimately does little to change the reality that low-income workers, specifically people of color and women, are at an extreme disadvantage in the policy and application of the law.

New York should amend the NYPFL to remove its tenure conditions, allow for more than a mere 12 weeks of leave with full pay, and implement a requirement that those who must care for ill family members actually leave work. It is undeniable that childcare and illness burden families in many ways. Accordingly, laws that in practice add to that burden on the federal and state level under the façade of mitigating it, must be amended. New York’s website advertises the law by saying “working families would [no] longer have to choose between caring for their loved ones and risking their economic security.”¹⁷⁴ Without changes to the law, this statement will never be true.

172. Gretchen Livingston & Deja Thomas, *Among 41 Countries, Only U.S. Lacks Paid Parental Leave*, PEW RSCH. CTR. (Dec. 16, 2019), <https://www.pewresearch.org/fact-tank/2019/12/16/u-s-lacks-mandated-paid-parental-leave/> [<https://perma.cc/M8LN-6KZH>].

173. Bornstein, *supra* note 169, at 90–91.

174. *New York State Paid Family Leave*, NY.GOV, <https://paidfamilyleave.ny.gov> [<https://perma.cc/9GF7-PB79>] (last visited Aug. 23, 2022).