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Parental Leave in the European Union and the United States - Two Flawed Systems

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Introduction

“Parental leave” is defined as an employee benefit, where a parent may take time off from work to care for their child.¹ This employee benefit is significant in both the European Union (“EU”) and the United States (“US”) because children make up a large portion of both nations’ populations. Nearly 24.3% of all EU households have children,² while children compose about 22.2% of the US’s population.³ The EU’s Work-Life Balance Directive introduced parental leave rules in relation to Article 153 of the Treaty on the Functioning of the European Union (“TFEU”)⁴ to increase women’s employment rate, incentivize fathers to take family-related leave, and promote gender equality and equal opportunities in the workforce.⁵ Similarly, the US’s Family and Medical Leave Act (“FMLA”) was enacted to help US employees balance their work and family responsibilities and to promote equal employment opportunities between men and women.⁶

The EU’s parental leave policy differs from the US’s.⁷ In the EU, each parent is entitled to at least four months of leave, of which at least two months are paid and are non-transferable between parents.⁸ In the US, both parents are only entitled to unpaid parental leave for a 3-month

¹ Cambridge University Press, *Definition of parental leave*, CAMBRIDGE ADVANCED LEARNER’S DICTIONARY & THESAURUS, <https://dictionary.cambridge.org/us/dictionary/english/parental-leave> (last visited Apr. 27, 2024).

² *Nearly 25% of EU households had at least 1 child in 2022*, EUROSTAT (Nov. 20, 2023), <https://ec.europa.eu/eurostat/web/products-eurostat-news/w/edn-20231120-1#:~:text=In%202022%2C%20in%20the%20EU,included%203%20children%20or%20more.>

³ Veera Korhonen, *Share of child population in the total U.S. population from 1950 to 2021*, STATISTA (June 2, 2023), <https://www.statista.com/statistics/457796/share-of-child-population-in-the-total-us-population/>.

⁴ Consolidated Version of the Treaty on the Functioning of the European Union art. 153, 2012 O.J. C 326/47, at 114 [hereinafter TFEU].

⁵ Directive (EU) 2019/1158 of the European Parliament and of the Council of June 20, 2019, on work-life balance for parents and carers and repealing Council Directive 2010/18/EU, 2019 O.J. L 188/79 [hereinafter Work-Life Balance Directive].

⁶ FAMILY AND MEDICAL LEAVE ACT OF 1993, 29 U.S.C. §§ 2601-2654 (1994).

⁷ *Id.*; Work-Life Balance Directive, *supra* note 5.

⁸ *Leave and Flexible Working*, YOUR EUR. (Mar. 28, 2024), [https://europa.eu/youreurope/business/human-resources/working-hours-holiday-leave/leave-flexible-working/index_en.htm#:~:text=Parental%20leave,-All%20employees%20\(regardless&text=Both%20parents%20are%20entitled%20to,entitlement%20to%20the%20ot her%20parent.](https://europa.eu/youreurope/business/human-resources/working-hours-holiday-leave/leave-flexible-working/index_en.htm#:~:text=Parental%20leave,-All%20employees%20(regardless&text=Both%20parents%20are%20entitled%20to,entitlement%20to%20the%20ot her%20parent.)

period.⁹ Furthermore, in the EU, all employees are entitled to the parental leave,¹⁰ while the US only protects eligible employees.¹¹

So, does either the EU or the US possess the ideal policy for parental leave that all other nations should follow? The answer is no, not quite. This paper asserts that neither the EU's nor the US's policy on parental leave is ideal, but that taking aspects of both policies would create the ideal parental leave law.

Part I of this paper introduces the legislative history of the Work-Life Balance Directive. Part II introduces the legislative history of the FMLA. Part III compares the parental leave provisions of the Work-Life Balance Directive and the FMLA. Part IV examines the effects of paid leave on businesses. Part V discusses the impact of unpaid leave on businesses. Part VI suggests the best solution to these parental leave laws, which is a hybrid of the EU's and US's parental leave laws. The paper concludes that change is in order regarding parental leave, and it is in the best interests of the employer, the employee, and society to do so.

⁹ 29 U.S.C. § 2612 (1994).

¹⁰ YOUR EUR., *supra* note 8.

¹¹ 29 U.S.C. § 2611 (1994).

Part I: Background on the Work-Life Balance Directive

A. The Proposal of the Work-Life Balance Directive

The formation of the Work-Life Balance Directive began with a 2017 study on the costs and benefits of potential EU contributions to the work-life balance of parents and carers.¹² The study suggested that the largest impact on work-life balance, in terms of parental leave, would be achieved by a mandated four-month parental leave that may be taken until the child is twelve years old, paid at least at sick pay level, and entirely non-transferable between parents.¹³ The study also asserted that the key issue the EU must solve regarding work-life balance is the low participation of women in the labor market, which is linked to the unequal sharing of parental responsibilities between men and women.¹⁴

Taking into consideration the 2017 study, the Commission's Impact Assessment of the Proposal stated that the EU has previously addressed the gender employment gap through a few actions including the Maternity and Parental Leave Directives, and the European Semester.¹⁵ However, even with these enactments, improvements to the female labor force participation will continue to evolve at a "slow and uneven pace" without further EU action.¹⁶ The Impact Assessment predicted that the solution suggested by the 2017 study will encourage a much higher take-up of parental leave by men and therefore will have the highest positive impact on female

¹² ICF and Cambridge Economics, *Study on the costs and benefits of possible EU measures to facilitate work-life balance for parents and care givers*, EUR. COMM'N 1 (Feb. 2017), <https://ec.europa.eu/social/BlobServlet?docId=17646&langId=en>. The study was commissioned by the Directorate-General for Justice and Consumers and the Directorate-General for Employment, Social Affairs and Inclusion to inform the Commission's Impact Assessment of the Directive's Proposal. See Nora Milotay, *A new directive on work-life balance*, EUR. PARLIAMENTARY RSCH. SERV. 1, 4-5 (July 2019), [https://www.europarl.europa.eu/RegData/etudes/BRIE/2018/614708/EPRS_BRI\(2018\)614708_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2018/614708/EPRS_BRI(2018)614708_EN.pdf).

¹³ ICF and Cambridge Economics, *supra* note 12, at 34.

¹⁴ *Id.* at ii.

¹⁵ Commission Staff Working Document Impact Assessment Accompanying the document Proposal for a Directive of the European Parliament and of the Council on work-life balance for parents and carers and repealing Council Directive 2010/18/EU, COM (2017) 253 final (April 26, 2017), at 5 [hereinafter Impact Assessment].

¹⁶ *Id.* at 49.

employment.¹⁷ Significantly increasing the non-transferable period between parents also has considerable benefits such as increased household incomes and individual well-being.¹⁸

The Commission presented its Proposal for the Work-Life Balance Directive on April 26, 2017.¹⁹ It was introduced in relation to Article 153 of the TFEU, which concerns equality between men and women,²⁰ and promoting the improvement of working environments and social exclusion.²¹ The Proposal recognized that the gender employment gap in the labor market is most distinct for parents and other carers, and aimed to close the gender employment gap by providing a work-life balance.²² The Proposal aimed to establish a minimum period of parental leave for at least four months, at least one month of which cannot be transferred between parents, until the child reaches the age of at least twelve.²³ The leave should be at least equivalent to sick leave pay.²⁴ The Proposal also gave Member States discretion to decide on the length of the notice period and length of service qualification that workers must give their employer before qualifying for parental leave.²⁵ Member States were also able to decide whether to adjust the conditions of

¹⁷ Impact Assessment, *supra* note 15, at 7 (citing *Policy Brief: Parental Leave, where are the fathers*, ORG. FOR ECON. COOP. & DEV. 1 (Mar. 2016), <https://www.oecd.org/policy-briefs/parental-leave-where-are-the-fathers.pdf>. Higher take-up of parental leave by fathers results in an increase of employment rates for mothers. *Id.*

¹⁸ *Id.* at 13. These benefits apply to mothers, fathers, and children. *Id.*

¹⁹ Commission Proposal for a Directive of the European Parliament and of the Council on work-life balance for parents and carers and repealing Council Directive 2010/18/EU, COM (2017) 253 final [hereinafter Proposal]. The Proposal would repeal Directive 2010/18 on parental leave. *Id.* The Commission believed that the previous Parental Leave Directive should be repealed because of the specific legal nature and basis of the previous Directive, and for simplification purposes, so that there is a single act to regulate these particular parental rights while building on and strengthening the parental leave rights. *Id.*

²⁰ TFEU, *supra* note 4, art. 153, 2012 O.J. C 326/47, at 114.

²¹ 2 SMIT & HERZOG ON THE LAW OF THE EUROPEAN UNION § 153.01 (2023).

²² Proposal, *supra* note 19, at 1.

²³ *Id.* art. 5, at 7.

²⁴ *Id.* art. 8, at 8.

²⁵ *Id.* The Proposal did not specify a maximum length of service qualification that Member States could impose, which is distinguished from the amendments to the Directive found later in this paper.

parental leave for disabled parents,²⁶ but the Proposal did not mention specific protections for single parents.²⁷

B. The General Approach of the Report Adopted by the Council

The Council of the European Union adopted its General Approach on June 21, 2018²⁸ affirming the four-month guarantee of parental leave for each parent before the child reaches a given age.²⁹ The General Approach allowed the Member States' legislation to determine the maximum age the child can be for parents to take parental leave.³⁰ However, the General Approach opted to allow the Member States to decide the allowance of the pay for the parental leave.³¹ The General Approach also agreed with the Commission's Proposal on the non-transferability of parental leave,³² but it broadened the amount of time for non-transferability, holding that two months of parental leave cannot be transferred from one parent to another.³³ Regarding employer protection, the Council held that Member States may require a length of service qualification for the right to parental leave which cannot exceed one year, and can establish a period of notice that a worker must give to their employer before exercising their right to parental leave.³⁴ The General Approach also agreed with the Proposal allowing Member States to provide adaptive measures for

²⁶ Proposal, *supra* note 19, art. 8, at 8.

²⁷ *See generally id.*

²⁸ General Approach of Council on the proposal for a directive of the European Parliament of the Council on work-life balance for parents and carers and repealing Council Directive 2010/18/EU, COM (2017) 253 final (June 18, 2018) [hereinafter General Approach].

²⁹ *Id.*, art. 5, at 16.

³⁰ *Id.* This differs from the Proposal which established that parental leave may be taken until the child is at least twelve years old. *See* Proposal, *supra* note 19, art. 5, at 7.

³¹ General Approach, *supra* note 28, art. 8, at 18. This differs from the Proposal which established the parental leave pay should be equivalent to that of sick leave pay. *See* Proposal, *supra* note 19, art. 8, at 8.

³² General Approach, *supra* note 28, art. 8, at 18.

³³ General Approach, *supra* note 28, art. 8, at 18. This differs from the Proposal which mandated that one month of parental leave be nontransferable between parents. *See* Proposal, *supra* note 19, art. 5, at 7.

³⁴ General Approach, *supra* note 28, art. 5, at 16. The General Approach modified the Proposal by clarifying that the service period cannot exceed one year. *See* Proposal, *supra* note 19, art. 5, at 7.

disabled parents' parental leave because of their particularly disadvantaged situations.³⁵ The General Approach did not mention single parents and potentially extending parental leave for them.³⁶

C. The Draft Report of the Work-Life Balance Directive - Amendments to the Proposal

After the Commission submitted the proposed directive, the European Parliament ("EP") also drafted the Parliament's Draft Legislative Resolution ("Draft Report")³⁷ and delivered its opinion during its first and only hearing on August 23, 2018.³⁸ The Draft Report considered both the Committee on Legal Affairs ("JURI") and the Committee on Women's Rights and Gender Equality ("FEMM") opinions with respect to the proposed Directive.³⁹ The most prominent amendments to the Directive included broadening the availability of parental leave to various parents and including justifications for specific provisions of the Directive, both of which were found in the JURI and FEMM opinions.⁴⁰

The first prominent amendments in the Draft Report expressed that although work-life balance remains challenging for all parents, there is a particular adverse effect on female employment.⁴¹ The Draft Report included statistics on the employment gap between men and

³⁵ General Approach, *supra* note 28, art. 5, at 17. The General Approach also allowed Member States to provide adaptive measures for adoptive parents, and parents with children with a disability or long-term illness. *Id.*

³⁶ See General Approach, *supra* note 28. This is aligned with the Proposal, which also did not mention adaptive measures for single parents. See Proposal, *supra* note 19.

³⁷ Draft European Parliament legislative resolution on the proposal for a directive of the European Parliament and of the Council on work-life balance for parents and carers and repealing Council Directive 2010/18/EU, COM (2017) 253 draft (August 23, 2018) [Draft Report].

³⁸ Legislative Observatory, *Work-life balance for parents and carers key events*, EUR. PARLIAMENT, [https://oeil.secure.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=en&reference=2017/0085\(OLP\)](https://oeil.secure.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=en&reference=2017/0085(OLP)) (last visited Apr. 27, 2024).

³⁹ Opinion of the Committee on Legal Affairs on the proposal for a directive on work-life balance for parents and carers and repealing Council Directive 2010/18/EU, COM (2017) 253 final (May 5, 2018) [hereinafter JURI opinion]; Opinion of the Committee on Women's Rights and Gender Equality on the proposal for a directive on work-life balance for parents and carers and repealing Council Directive 2010/18/EU, COM (2017) 253 final (May 30, 2018) [hereinafter FEMM opinion]. The JURI rapporteur was Joëlle Bergeron, and the FEMM rapporteur was Agnieszka Kozłowska-Rajewicz. See JURI opinion; FEMM opinion.

⁴⁰ See Draft Report, *supra* note 37; JURI opinion, *supra* note 39; FEMM opinion, *supra* note 39.

⁴¹ Draft Report, *supra* note 37, amend. 11, at 11.

women.⁴² According to Commission data from October 2017, the male employment rate in the EU was 71.9% versus the female employment rate of 61.4%.⁴³ The amendment concluded that a determining factor contributing to women's underrepresentation in the labor market, besides discrimination in access to work and wage discrimination, is the difficulty in balancing work and family responsibilities.⁴⁴ When women have children, they tend to work fewer hours in paid employment to spend more time fulfilling unpaid caretaking.⁴⁵ Therefore, the Draft Report included another amendment explaining in more detail the benefits of paid, non-transferable parental leave for each parent.⁴⁶ The amendment stressed that reserving parental leave that is exclusively available to men prompts fathers to take it, which promotes fatherhood and, in turn, promotes mothers' reintegration to work after her own parental leave.⁴⁷ These amendments are aligned with the FEMM opinion.⁴⁸ The FEMM rapporteur expressed her wish for the Directive to focus its objective on increasing women's employment.⁴⁹ The rapporteur said to achieve that objective, the Directive must include non-transferability of parental leave to ensure an equal share of parental leave between women and men as a tool to increase women's presence in the labor market.⁵⁰ Therefore, the Draft Report was aligned with the FEMM opinion in its goal to increase women's employment rate through the non-transferability of parental leave.

⁴² Draft Report, *supra* note 37, amend. 10, at 11.

⁴³ *Id.* amend. 10, at 11. The amendment stressed that these statistics exist even though women have a higher level of education than men in the EU. *Id.*

⁴⁴ *Id.* amend. 11, at 11.

⁴⁵ *Id.*

⁴⁶ *Id.* amend. 26, at 19.

⁴⁷ *Id.* This view on incentivizing fathers into taking parental leave by offering paid leave is also reflected in the Impact Assessment, the Proposal, and the General Approach. *See* Impact Assessment, *supra* note 15, at 7; Proposal, *supra* note 19, at 2; General Approach, *supra* note 28, at 5.

⁴⁸ FEMM opinion, *supra* note 39.

⁴⁹ *Id.* at 3.

⁵⁰ *Id.*

Other significant amendments in the Draft Report broadened the availability of parental leave to more parents, including adoption and stillbirths as eligible for parental leave.⁵¹ Furthermore, the Draft Report extended protection for parents with mental and chronic illnesses.⁵² The amendment stressed specific measures that Member States could implement, such as facilitating access to part-time work upon a worker's return to the workplace or extending the length of parental leave.⁵³ The JURI opinion is aligned with these amendments, since the JURI rapporteur also suggested that Member States assess whether parental leave should be extended beyond the proposed amount for single parents.⁵⁴ Unlike the Draft Report and the JURI opinion, FEMM decided not to introduce an extended leave right for single working parents because the Directive's objectives focus on increasing women's presence in the labor market.⁵⁵ The FEMM rapporteur said that extending leave periods for single parents may prolong the absence of single mothers from employment and, therefore, undermine the objective of the Directive with detrimental effects on these women's financial independence.⁵⁶ Therefore, the Draft Report was much more aligned with the JURI opinion than the FEMM opinion regarding heightened protection for certain parents.

⁵¹ Draft Report, *supra* note 37, amend. 24, at 18.

⁵² *Id.* amend. 65, at 38. This broadening of types of parents allowed to take parental leave also occurred during the Proposal and General Approach stages to the Directive. *See* Proposal, *supra* note 19, art. 8, at 8; General Approach, *supra* note 28, art. 5, at 17.

⁵³ Draft Report, *supra* note 37, amend. 65, at 38; Proposal, *supra* note 19, art. 8, at 8; General Approach, *supra* note 28, art. 5, at 17.

⁵⁴ JURI opinion, *supra* note 39, amend. 40, at 7.

⁵⁵ FEMM opinion, *supra* note 39, at 4.

⁵⁶ *Id.* This is an important aspect of the opinion because previous versions of the Directive also did not include heightened protections for single parents, but only the FEMM opinion provided justification for the exclusion. *See* Proposal, *supra* note 19; General Approach, *supra* note 28.

Another prominent amendment in the Draft Report was mandating that parental leave pay should be at least equivalent to 78% of the worker's gross wage.⁵⁷ This amendment is not aligned with either the JURI and FEMM opinions, since the JURI rapporteur recommended that parental leave pay should increase to the same compensation as sick leave pay,⁵⁸ and the FEMM rapporteur expressed that parental leave allowances should be at least equivalent to 80% of the worker's gross wage.⁵⁹

The last prominent amendment in the Draft Report was requiring a notice period and length of service qualification to protect the interests of small employers.⁶⁰ This is aligned with the JURI rapporteur's main concern on the requirements and constraints on employers, however – particularly in small companies composing of two or three people – because granting parental leave can put these companies in a challenging position.⁶¹ With the aim of guaranteeing employers better protection in mind, the JURI suggested that the right to parental leave should be contingent on submitting supporting documents and completing a minimum period of employment of no more than nine months.⁶² The FEMM rapporteur also emphasized the need for clear notice periods and qualifying periods for leaves to ensure the proper functioning of businesses, similar to the JURI rapporteur.⁶³ Therefore, the Draft Report was aligned with both the JURI and FEMM opinions

⁵⁷ Draft Report, *supra* note 37, amend. 31, at 22-23. The EP clarified that to incentivize men to take advantage of parental leave, they should be paid at least equivalent to 78% of their gross wage instead of sick leave pay, which was the level of pay suggested in the Proposal. *Id.*; see Proposal, *supra* note 19, art. 8, at 8.

⁵⁸ JURI opinion, *supra* note 39, amend. 24, at 15.

⁵⁹ FEMM opinion, *supra* note 39, amend. 17, at 14. The FEMM opinion expressed a very similar reasoning to that of the Draft Report regarding the level of pay for parental leave. The FEMM clarified that in order to incentivize parents, particularly men, to take parental leave, the pay should be equivalent to at least 80% of a worker's gross wage. *Id.*

⁶⁰ Draft Report, *supra* note 37, amend. 27, at 20.

⁶¹ JURI opinion, *supra* note 39, at 3.

⁶² *Id.* amend. 38, at 20.

⁶³ FEMM opinion, *supra* note 39, amend. 13, at 12.

with respect to notice period and a length of service qualification that workers need to satisfy in order to protect employers.

In sum, the Draft Report of the Work-Life Balance Directive created by the EP contained significant amendments to the Commission's proposed directive,⁶⁴ which were in conjunction with both the JURI and FEMM opinions.⁶⁵ These amendments broadened the availability of parental leave to various parents and justified specific provisions of the Directive.⁶⁶

D. The Provisional Agreement Reached

The Commission, the Council, and the EP reached a Provisional Agreement in January 2019.⁶⁷ The Provisional Agreement reached some key elements of the Proposal, encouraging men and women to take an equal share in family-related responsibilities.⁶⁸ Coreper I endorsed the Provisional Agreement in February 2019.⁶⁹ The Provisional Agreement's main elements align with the Council's General Approach and the EP's Draft Report,⁷⁰ affirming the four-month guarantee of parental leave for each parent before the child reaches a given age, and allowing Member States to decide to enact a notice period and length of service qualification for workers.⁷¹ The Provisional Agreement also expanded the types of parents able to take the leave, similarly to both the Council's and EP's drafts, holding that parental leave can also be taken in the case of stillbirth. Member States also must assess whether the leave arrangements and the flexible working hours should be

⁶⁴ See Draft Report, *supra* note 37.

⁶⁵ See JURI opinion, *supra* note 39; FEMM opinion, *supra* note 39.

⁶⁶ See Draft Report, *supra* note 37.

⁶⁷ *Timeline – Work-life balance*, COUNCIL OF THE EU (Jan. 11, 2024), <https://www.consilium.europa.eu/en/policies/work-life-balance/timeline-work-life-balance/>.

⁶⁸ *Id.*

⁶⁹ *Coreper I*, COUNCIL OF THE EU (Mar. 4, 2024), <https://www.consilium.europa.eu/en/council-eu/preparatory-bodies/coreper-i/>. This body is composed of each country's deputy permanent representatives. *Id.*

⁷⁰ *Better work-life balance for EU citizens: Presidency reaches provisional agreement with the European Parliament*, COUNCIL OF THE EU (Feb. 7, 2024), <https://www.consilium.europa.eu/en/press/press-releases/2019/01/24/better-work-life-balance-for-eu-citizens-presidency-reaches-provisional-agreement-with-the-european-parliament/>.

⁷¹ Work-Life Balance Directive, *supra* note 5, art. 5, at 9.

adjusted to certain needs, for example single parents, adoptive parents, disabled parents, parents with disabled children or a long-term illness, or premature births or multiple births.⁷² Lastly, the Provisional Agreement stated that payment during parental leave should be at sick pay level for the minimum time period of the leave, following the Commission’s Proposal.⁷³

This Directive should contribute to the Treaty-based goals of Article 153.⁷⁴ These Treaty-based goals discuss equality between men and women regarding “labor market opportunities, equal treatment at work, and the promotion of a high level of employment in the Union.”⁷⁵ Furthermore, there is a need to contribute to “equal sharing of caring responsibilities between men and women” and to close the gender gaps in earnings and pay.⁷⁶

E. When the Directive Entered into Force

The European Parliament voted on the Provisional Agreement in April 2019: four hundred ninety voted in favor, eighty two voted against, and forty eight abstained from voting,⁷⁷ and the final act was signed in June 2019.⁷⁸ The Directive entered into force on August 1, 2019.⁷⁹ Member States had to bring its provisions into their national laws by August 2, 2022, except for specific requirements on parental leave payment, which must be in force by August 2024.⁸⁰

⁷² Nora Milotay, *A new directive on work-life balance*, EUR. PARLIAMENTARY RSCH. SERV. 1, 9 (July 2019) [https://www.europarl.europa.eu/RegData/etudes/BRIE/2018/614708/EPRS_BRI\(2018\)614708_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2018/614708/EPRS_BRI(2018)614708_EN.pdf).

⁷³ See Proposal, *supra* note 19, art. 8, at 8. Both the Council’s General Approach and the EP’s Draft Report disagreed on mandating the allowance of sick pay for the parental leave. See General Approach, *supra* note 28, art. 8, at 18; Draft Report, *supra* note 37, amend. 31, at 22-23.

⁷⁴ Work-life Balance Directive, *supra* note 5.

⁷⁵ *Id.* The goals also discuss the need for employee protection from dismissal for any reason connected with the right to parental leave following the birth or adoption of a child. *Id.* at 1.

⁷⁶ *Id.*

⁷⁷ Legislative Train Schedule, *New Start for Working Parents*, EUR. PARLIAMENT (Nov. 20, 2019), <https://www.europarl.europa.eu/legislative-train/theme-new-boost-for-jobs-growth-and-investment/file-new-start-for-working-parents#:~:text=The%20EP%20voted%20on%20the,years%20to%20transpose%20the%20laws.>

⁷⁸ *Id.*

⁷⁹ Milotay, *supra* note 72, at 10.

⁸⁰ *Id.*

F. Scope of the Directive

The Directive applies to all workers with employment contracts or other employment relationships, including part-time workers, fixed-term contract workers, or employees at a temporary agency.⁸¹ The Directive gives Member States the ability to define marital and familial status.⁸² Member States may also require a notice period that workers must provide to their employers when applying for parental leave and to decide whether parental leave may only be available to employees after a certain period of service.⁸³ There is nothing in the Directive that states that small businesses are exempt from ensuring its employees of the right to parental leave.⁸⁴

Part II: Background on FMLA

A. FMLA's Legislative History

President Bill Clinton signed the Family and Medical Law Act into law on February 5, 1993, as his first act as President of the United States.⁸⁵ He said the FMLA addressed a “substantial and growing need” of a changing workforce.⁸⁶ American workers would apparently no longer have to choose between “the job they need and the family they love.”⁸⁷ The FMLA mandates that public and private employers with at least fifty workers provide their employees with family and medical leave for up to twelve weeks of unpaid leave to care for a newborn or newly adopted child.⁸⁸ It also sets the minimum length of service requirements before an employee becomes eligible to take advantage of the FMLA.⁸⁹

⁸¹ Work-Life Balance Directive, *supra* note 5, at 3.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *See generally id.*

⁸⁵ William J. Clinton, *Statement on Signing the Family and Medical Leave Act of 1993*, THE AM. PRESIDENCY PROJECT (1993).

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ 29 U.S.C. §§ 2601-2654 (1994).

⁸⁹ *Id.*

Amendments to the FMLA between 2008 and 2010 extended the law's provisions to provide employees with family members serving in the US military leave for reasons related to a family member's service.⁹⁰ The purpose of these amendments was to provide extra protection to those families “who have given so much of themselves” to protect the United States.⁹¹ Furthermore, the amendments from 2008 and 2010 established an “hours of service eligibility” requirement for airline flight attendants and crew members, so airline flight crew employees could fully take advantage of the FMLA's benefits, given their unique work schedules.⁹²

Then, in early 2015, preceding the Supreme Court ruling in *Obergefell v. Hodges*,⁹³ which gave federal recognition of the right for same-sex couples to marry, the US Department of Labor published a final rule in the FMLA updating the regulatory definition of "spouse" to clarify that employees in legal same-sex marriages can take FMLA leave.⁹⁴ The final rule clarified that the Department of Labor had moved from a "state of residence" rule to a "place of celebration" rule for the definition of "spouse" to ensure that same-sex couples, no matter where they lived, could exercise full FMLA benefits.⁹⁵ If *Obergefell* had preceded the FMLA final rule, the amendment would not have been necessary because that Supreme Court case had legalized same-sex marriage in all fifty states.⁹⁶

The FMLA provides US workers with twelve weeks of unpaid, job-protected leave for qualifying reasons.⁹⁷ Those qualifying reasons include the birth or adoption of an employee's child

⁹⁰ *Final Rule to Implement Statutory Amendments*, U.S. DEP'T LAB., <https://www.dol.gov/agencies/whd/fmla/2013-rule> (last visited Apr. 27, 2024).

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Obergefell v. Hodges*, 574 U.S. 1118 (2015).

⁹⁴ *Final Rule to Revise the Definition of “Spouse” Under the FMLA*, U.S. DEP'T LAB., <https://www.dol.gov/agencies/whd/fmla/spouse> (last visited Apr. 27, 2024).

⁹⁵ *Id.*

⁹⁶ *See generally Obergefell*, 574 U.S. 1118.

⁹⁷ 29 U.S.C. §§ 2601-2654 (1994).

and other familial reasons.⁹⁸ Before the FMLA, no guarantee of parental leave existed at the federal level.⁹⁹

B. Scope of the FMLA

FMLA leave is available only to workers of public agencies, public and private elementary schools and secondary schools, and companies with fifty or more employees within seventy-five miles.¹⁰⁰ The law does not cover employees until they have worked for their employer for at least twelve months and at least 1,250 hours during the twelve months before the start of leave.¹⁰¹

Part III: Parental Leave Provisions in the Work-Life Balance Directive versus the FMLA

A. Parental Leave in the Work-Life Balance Directive

In the EU's Work-Life Balance Directive, all employees (regardless of gender) are entitled to parental leave on the birth or adoption of a child, irrespective of their employment contract (part-time, full-time, etc.).¹⁰² Both parents are entitled to at least four months of leave each, of which at least two months are paid and are non-transferable.¹⁰³ Employees may take parental leave at any time until the child is eight years old, but this age limit may be lower in some countries under national law.¹⁰⁴ The Directive does not explicitly protect parental leave for same-sex parents – the Directive allows each Member State to decide whether same-sex parents will receive the same parental leave protections as heterosexual parents.¹⁰⁵

⁹⁸ 29 U.S.C. § 2601(b)(2).

⁹⁹ Lawrence M. Berger & Jane Waldfogel, *Maternity Leave and the Employment of New Mothers in the United States*, 17 J. POP. ECON. 331, 332 (2004).

¹⁰⁰ *Fact Sheet #28: The Family and Medical Leave Act*, U.S. DEP'T LAB. (Feb. 2023), <https://www.dol.gov/agencies/whd/fact-sheets/28-fmla>.

¹⁰¹ *Id.*

¹⁰² YOUR EUR., *supra* note 8.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ Directorate-General for Employment, Social Affairs and Inclusion Publications Office, *Leave policies and practice for non-traditional families*, EUR. COMM'N (2019).

In the EU, about 10% of employed women and 12% of employed men are ineligible for parental leave.¹⁰⁶ Unemployment, self-employment, and an insufficient length of service are the main reasons for the ineligibility.¹⁰⁷ Additionally, in eleven Member States, same-sex couples are not eligible for parental leave.¹⁰⁸

B. Parental Leave in the FMLA

The US's FMLA entitles eligible employees of covered employers to take unpaid, job-protected leave in a twelve-month period for 1) the birth of a child and to care for the newborn child within one year of birth; and 2) the adoption or fostering of a child within one year of placement.¹⁰⁹ Leave is available only to workers of employers with fifty or more employees.¹¹⁰ The law does not cover employees until they have worked for their employer for at least twelve months and at least 1,250 hours during the twelve months before the start of the leave.¹¹¹

In the US, 44% of employees are ineligible for parental leave.¹¹² These employees are ineligible for a variety of reasons – 21% of employees are ineligible because they did not work the minimum number of hours or for an insufficient period with their employer, 15% of employees

¹⁰⁶ *Gender Equality Index*, EUROPA, <https://eige.europa.eu/gender-equality-index/thematic-focus/work-life-balance/parental-leave-policies> (last visited Apr. 27, 2024).

¹⁰⁷ *Id.*

¹⁰⁸ Same-sex couples are not eligible for parental leave in Croatia, Cyprus, Greece, Latvia, Lithuania, Malta, Poland, Portugal, Romania, Slovenia, and Slovakia. See European Institute for Gender Equality, *Eligibility for parental leave in EU Member States*, LUXEMBOURG: PUBLICATIONS OFF. EUR. UNION 1, 18 (2020), https://eige.europa.eu/sites/default/files/documents/mh0219002enn_002.pdf.

¹⁰⁹ *FMLA Frequently Asked Questions*, U.S. DEP'T LAB., <https://www.dol.gov/agencies/whd/fmla/faq#3> (last visited Apr. 27, 2024).

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² Scott Brown, et al., *Employee and Worksite Perspectives of the FMLA – Who is Eligible*, ABT ASSOCS. 1, 2 (July 2020), https://www.dol.gov/sites/dolgov/files/OASP/evaluation/pdf/WHD_FMLA2018PB1WhoIsEligible_StudyBrief_Aug2020.pdf.

are ineligible because their place of work is too small, and 7% of employees are ineligible because of a combination of these two reasons.¹¹³

C. A Comparison of Parental Leave Laws in the EU versus the US

As seen above, the EU mandates paid parental leave, while the US only mandates unpaid parental leave.¹¹⁴ Another difference between the two laws is that the EU entitles employees to a lengthier time of parental leave – four months in the EU compared to three months in the US.¹¹⁵ Furthermore, the EU does not mandate employees to work for a company of a specific size to enjoy the parental leave law,¹¹⁶ while the US requires employees to work for a company with at least fifty employees to enjoy parental leave.¹¹⁷ The EU protects all workers, regardless of the type of employment contract they possess, and Member States have discretion to decide if there should be a notice period and length of service qualification to qualify for parental leave, while the US does not protect employees unless they have worked for their current company for at least twelve months and at least 1,250 hours during the twelve months before the start of leave.¹¹⁸ The last key difference is that the EU allows Member States to decide whether to afford same-sex parents parental leave rights, while the US explicitly protects same-sex parents' rights to parental leave.¹¹⁹

The similarities between the EU's and the US's parental leave laws are that both entitle workers to parental leave for either the birth or adoption of a child.¹²⁰ Also, the reasoning behind

¹¹³ *Id.*

¹¹⁴ See Work-Life Balance Directive, *supra* note 5, art. 5, at 9; 29 U.S.C. §§ 2601-2654 (1994).

¹¹⁵ See Work-Life Balance Directive, *supra* note 5, art. 5, at 9; 29 U.S.C. §§ 2601-2654 (1994).

¹¹⁶ See Work-life balance directive, *supra* note 5.

¹¹⁷ See 29 U.S.C. §§ 2601-2654 (1994).

¹¹⁸ See *id.*; Work-Life Balance Directive, *supra* note 5.

¹¹⁹ See U.S. DEP'T LAB., *supra* note 94; EUR. COMM'N, *supra* note 105.

¹²⁰ See Work-Life Balance Directive, *supra* note 5, art. 5, at 9; 29 U.S.C. §§ 2601-2654 (1994).

the parental leave laws is similar – they both want to promote a work-life balance, so employees do not have to choose between their work and their families.¹²¹

In sum, the main differences between the EU’s and US’s parental leave laws are the length of the parental leave, whether the leave is paid or unpaid, the specific requirements on whether certain employees and employers are exempt from the policies, and whether same-sex parents are afforded protection.¹²² The main similarities between the policies are the broad definitions of the types of parents allowed to take the leave, and the general reasoning for the policies.¹²³

Part IV: The Effects of Paid Parental Leave on Businesses

A. Worker Retention and Productivity

Every parent will need time away from work to care for their family at one point or another, and if they can utilize time off to do so, this will increase worker retention and productivity.¹²⁴ Replacing workers usually costs businesses 40% of annual wages and can cost as much as 150% in some industries.¹²⁵ Luckily, studies have shown that paid parental leave improves worker retention and productivity without increasing operating costs.¹²⁶ In a 2016 Deloitte survey, 77% of employees who responded said that whether a firm offered paid parental leave had some bearing

¹²¹ See Work-Life Balance Directive, *supra* note 5; 29 U.S.C. § 2601 (1994).

¹²² See Work-Life Balance Directive, *supra* note 5; 29 U.S.C. §§ 2601-2654 (1994).

¹²³ See Work-Life Balance Directive, *supra* note 5; 29 U.S.C. §§ 2601-2654 (1994).

¹²⁴ *Paid Medical and Family Leave is Good for Business*, NAT’L P’SHIP FOR WOMEN & FAMS. 1 (Oct. 2023), <https://nationalpartnership.org/wp-content/uploads/2023/02/paid-leave-good-for-business.pdf>.

¹²⁵ Kate Bahn & Carmen Sanchez Cumming, *Improving US labor standards and the quality of jobs to reduce the costs of employee turnover in US companies*, WASH. CTR. FOR EQUITABLE GROWTH 1, 1-2 (December 2020), <https://equitablegrowth.org/wp-content/uploads/2020/12/122120-turnover-costs-ib.pdf>.

¹²⁶ See *Parental Leave Survey*, DELOITTE (2016), <https://www2.deloitte.com/content/dam/Deloitte/us/Documents/about-deloitte/us-about-deloitte-paternal-leave-survey.pdf>; Kelly Bedard & Maya Rossin-Slater, *The Economic and Social Impacts of Paid Family Leave in California: Report for the California Employment Development Department*, CAL. EMP. DEV. DEP’T 1,7 (Oct. 13, 2016), https://www.edd.ca.gov/disability/pdf/PFL_Economic_and_Social_Impact_Study.pdf.

on where they chose to work.¹²⁷ This statistic suggests that paid parental leave does matter for employees' loyalty.

In a study conducted by the Institute for the Study of Labor ("IZA") in Bonn, Germany,¹²⁸ researchers found that paid parental leave does have a positive impact on the worker retention rate – 77% of mothers who had access to paid parental leave returned to the same job they worked before they took the leave, compared to only 73% of mothers who did not have access to paid parental leave.¹²⁹ This result is also prevalent in American employee statistics. California's Paid Family Leave program provides up to eight weeks of paid parental leave for employees.¹³⁰ Before the enactment of paid family leave, California mothers typically took about three weeks of parental leave, and after the implementation of the program, the overall use of parental leave increased by an average of three to four weeks.¹³¹ Furthermore, 83% of California workers in "lower quality" jobs who used paid parental leave returned to their previous employer, a nine percent improvement compared to the percentage of California workers who returned to their previous employer and did not take paid leave.¹³² Other analyses of California firms before and after they enacted the paid leave reported that wage costs had not increased and turnover rates had decreased.¹³³ Better still, companies have, on average, seen a 4.6% increase in revenue and a 6.8% increase in profit per full-time employee since implementing paid parental leave programs.¹³⁴ This suggests that paid

¹²⁷ DELOITTE, *supra* note 126.

¹²⁸ See INST. LAB. ECON., <https://www.iza.org/>.

¹²⁹ Barbara Broadway, et al., *The Impact of Paid Parental Leave on Labour Supply and Employment Outcomes*, INST. LAB. ECON. 1, 26 (Mar. 2016), <https://docs.iza.org/dp9801.pdf>.

¹³⁰ *Celebrating 20 Years of Paid Family Leave*, EMP. DEV. DEP'T – ST. OF CAL., <https://edd.ca.gov/en/disability/paid-family-leave/> (last visited Apr. 27, 2024).

¹³¹ Bureau of Labor Statistics, *How paid family leave affects mothers in the labor force*, MONTHLY LAB. REV. 1, 66 (Mar. 2012), <https://www.bls.gov/opub/mlr/2012/03/precis.pdf>.

¹³² Eileen Appelbaum & Ruth Milkman, *Leaves That Pay: Employer and Worker Experiences with Paid Family Leave in California*, CTR. FOR ECON. & POL'Y RSCH. PUB. 1, 4-5 (2011), <https://www.cepr.net/documents/publications/paid-family-leave-1-2011.pdf>.

¹³³ Bedard, *supra* note 126, at 7.

¹³⁴ *The Business Impacts of Paid Leave: Insights from a financial analysis of companies offering paid family and medical leave*, PANORAMA & AM. SUSTAINABLE BUS. COUNCIL 1, 14 (Sept. 2019),

leave programs not only increase the worker retention rate, but also have positive impacts on worker productivity.

Therefore, European and American studies have shown that paid parental leave programs implemented in both nations increase worker retention and productivity.¹³⁵ This increase could be because workers who are given access to more of a work-life balance than workers who do not have this opportunity are more likely to remain productive and want to return to work after caring for their children.¹³⁶

B. Labor Force Participation

If parents, particularly mothers, have access to paid parental leave, they are more likely to return to the labor force after the birth or adoption of a child.¹³⁷ This increase in likelihood could be because mothers who are given the ability to take a brief hiatus to care for a child while being paid do not have to completely readjust to life without salary, unlike mothers who are not able to take paid parental leave.¹³⁸ Yet, regardless of the reason, paid parental leave is seen to have increased participation in the female labor force.¹³⁹

In the EU, a study of sixteen European countries' paid parental leave policies found increases on women's labor force participation rates and mothers' weekly working hours.¹⁴⁰ Another study conducted by economist Christopher J. Ruhm also asserts that paid parental leave

https://www.asbcouncil.org/sites/main/files/file-attachments/panorama_report_-_business_impacts_of_paid_leave.pdf.

¹³⁵ See Broadway, *supra* note 129, at 26; EMP. DEV. DEP'T – ST. OF CAL., *supra* note 130.

¹³⁶ See Broadway, *supra* note 129, at 26; EMP. DEV. DEP'T – ST. OF CAL., *supra* note 130.

¹³⁷ Barbara Gault, et al., *Paid Parental Leave in the United States: What the data tell us about access, usage, and economic and health benefits*, INST. FOR WOMEN'S POL'Y RSCH. 1, 8 (Mar. 2014), <https://iwpr.org/wp-content/uploads/2020/09/B334-Paid-Parental-Leave-in-the-United-States.pdf>.

¹³⁸ Julia Isaacs, et al., *Paid Family Leave in the United States: Time for a New National Policy*, URB. INST. 1, 5-6 (May 2017), https://www.urban.org/sites/default/files/publication/90201/paid_family_leave.pdf.

¹³⁹ Yusuf Emre Akgunduz & J. Plantenga, *Labour market effects of parental leave: a European perspective*, TJALLING C. KOOPMANS RSCH. INST. 1 (Jan. 2011).

¹⁴⁰ *Id.*

increase's women's participation in the labor force.¹⁴¹ Ruhm's study found that nine European countries that had paid parental leave legislation raised the female employment rate between 1969 to 1993.¹⁴² During this time, these countries increased the amount of time of paid parental leave, and these increases were associated with a three to four percent increase in the "employment-to-population ratios" of women.¹⁴³ Furthermore, an Organization for Economic Co-Operation and Development ("OECD") report suggests that Nordic countries, which were among the first countries in the world to introduce paid parental leave policies, have very high levels of female participation in the labor force.¹⁴⁴ These European studies all suggest that paid parental leave has a positive effect on women's labor force participation.

In the US, paid parental leave laws in California and New Jersey have increased labor force participation among women who would otherwise have exited the labor market to give birth.¹⁴⁵ Paid family leave policies have been shown to increase mothers' labor force participation by six percent in the year of their child's birth.¹⁴⁶ Furthermore, up to five years after the birth of a child, women who had access to paid parental leave are three to six percent more likely to be actively participating in the labor force.¹⁴⁷ And there is evidence of an even a stronger increase in mothers' working hours and wage income – working mothers who took paid leave in California

¹⁴¹ Christine Jolls, *Accommodation Mandates*, 53 STAN. L. REV. 223, 297 (citing Christopher J. Ruhm, *The Economic Consequences of Parental Leave Mandates: Lessons from Europe*, 113 QJ ECON. (1998)).

¹⁴² Christopher J. Ruhm, *The Economic Consequences of Parental Leave Mandates: Lessons from Europe*, 113 QJ ECON. 285, 292 (1998). The study observed Denmark, Finland, France, Germany, Greece, Ireland, Italy, Norway, and Sweden. *Id.*

¹⁴³ *Id.* at 311. These nine countries all experienced significant changes in their paid parental leave policies, which is why they were excellent countries to observe to see the effects of paid parental leave policies. *Id.*

¹⁴⁴ Florence Jaumotte, *Labour Force Participation of Women: Empirical Evidence on the Role of Policy and Other Determinants in OECD Countries*, OECD ECON. STUD. 1, 65 (2004), <https://www.oecd.org/economy/growth/34562935.pdf>.

¹⁴⁵ Tanya S. Byker, *Paid Parental Leave Laws in the United States: Does Short-Duration Leave Affect Women's Labor-Force Attachment?*, 106 AM. ECON. REV. 242 (May 2016).

¹⁴⁶ *Paid Leave Increases Mothers' Labor Market Attachment*, INST. FOR WOMEN'S POL'Y RSCH. 1 (Jan. 2020), <https://iwpr.org/wp-content/uploads/2020/01/B383-Paid-Leave-Fact-Sheet.pdf>.

¹⁴⁷ *Id.*

had a six to nine percent increase in work hours and a similar growth in wage income one to three years after the birth of their child.¹⁴⁸ Therefore, American statistics suggest that paid leave increases women's participation in the labor force, their weekly working hours, and their wage income.

In sum, paid parental leave policies have displayed a positive impact on increasing women's participation in the labor force in both the EU and the US.¹⁴⁹

C. Caring for Children for the Future Economy

Caring for children is an investment in the future of society – healthy children will become good workers.¹⁵⁰ Without healthy children, there will be no one in the next generation to carry on the economy, and businesses would crumble since the labor market requires the participation of good workers.¹⁵¹ Studies have shown that there is a strong connection between early parent-child relationships and the likelihood that their children will grow up to display socially profitable characteristics such as kindness and empathy¹⁵² – attributes that will, in turn, create the next generation of business owners and employees.

In an IZA discussion paper, the German institute examined the implementation of a Denmark increase in paid parental leave from twenty four to forty six weeks.¹⁵³ The study's authors observed the effects of parental leave on children's socio-emotional skills, which are most crucial for a healthy and wealthy life.¹⁵⁴ The study found that children whose mothers took longer leave

¹⁴⁸ Bureau of Labor Statistics, *supra* note 131, at 62.

¹⁴⁹ See Akgunduz, *supra* note 139, at 1; Byker, *supra* note 145, at 242.

¹⁵⁰ Gillian Lester, *A Defense of Paid Family Leave*, 28 HAR. J.L. & GENDER 1, 19 (2005).

¹⁵¹ *Id.*

¹⁵² University of Cambridge, *Young children who are close to their parents are more likely to grow up kind, helpful and 'prosocial'*, SCI. DAILY (Oct. 9, 2023), <https://www.sciencedaily.com/releases/2023/10/231009191705.htm#:~:text=Summary%3A,characteristics%20like%20kindness%20and%20empathy>.

¹⁵³ Miriam Gensowski, et al., *Effects of Extending Paid Parental Leave on Children's Socio-Emotional Skills and Well-Being in Adolescence*, INST. LAB. ECON. 1 (July 2022), <https://docs.iza.org/dp15421.pdf>.

¹⁵⁴ *Id.*

had better socio-emotional skills than children whose mothers did not take the leave.¹⁵⁵ For each additional month of leave, the children had a 4.7% higher well-being and a 2.8% higher emotional stability.¹⁵⁶ Furthermore, a study conducted by Marianne A. Ferber, an American economist and author, observed the effects of parental leave on children's development.¹⁵⁷ Ferber argued that parental leaves are useful because children tend to thrive when cared for in their homes by their parents, and these children will then grow up to be productive members of society and workers.¹⁵⁸ Therefore, implementing parental leave laws that will allow parents to actually take time off of work to care for their children will benefit the next generation.

In sum, because of the studied effects of paid parental leave on children, in both the EU and the US, there is a positive correlation between mothers taking leave and the socio-emotional skills displayed by their children.¹⁵⁹ Because children make up the future generation of society, it is essential to ensure the best childcare to produce the next generation of productive workers and members of society.¹⁶⁰

Part V: The Effects of Unpaid Parental Leave on Businesses

A. Deep Cultural Biases

Cultural biases surrounding parental leave still exist among both men and women.¹⁶¹ There are societal pressures that only women should look after a child, and these pressures are reflected in the form of guilt among women to return to work and an unwillingness among men to apply for

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 2.

¹⁵⁷ Lester, *supra* note 150, (citing MARIANNE A. FERBER, COMMENTARY ON CHAPTER 5 – GENDER AND FAMILY ISSUES IN THE WORKPLACE 162 (1997)).

¹⁵⁸ MARIANNE A. FERBER, COMMENTARY ON CHAPTER 5 – GENDER AND FAMILY ISSUES IN THE WORKPLACE 162 (1997).

¹⁵⁹ *Id.*; Gensowski, *supra* note 153, at 1.

¹⁶⁰ Ferber, *supra* note 158, at 162.

¹⁶¹ Chen Chen, et al., *Gender bias in cultural tightness across the 50 US states, its correlates, and links to gender inequality in leadership and innovation*, 2 PNAS NEXUS 1 (July 20, 2023), <https://doi.org/10.1093/pnasnexus/pgad238>.

parental leave.¹⁶² Implementing mandatory parental leave laws will normalize the concept of parental leave and encourage both men and women to take it, diminishing the cultural biases that currently surround it.¹⁶³

Deeply-rooted cultural biases about which parents should take leave still exist in the US – 82% of Americans believe mothers should receive paid leave following the birth or adoption of a child, but only 69% think fathers should receive the same benefit.¹⁶⁴ Furthermore, those who favor paid parental leave for both mothers and fathers believe that mothers should receive significantly more time off than fathers (a median of 8.6 weeks off for mothers vs. 4.3 weeks for fathers).¹⁶⁵ These statistics highlight the stigma that still plagues the US – that mothers are automatically more likely to or should use parental leave after the birth or adoption of a child and, therefore, should be the primary beneficiary of parental leave as opposed to fathers.¹⁶⁶

The same cultural biases still exist in the EU, yet hopefully, these will soon change as the Work-Life Balance Directive's effects prevail across the nation. Currently, cultural beliefs and attitudes about gender roles affect European parents' behavior concerning parental leave.¹⁶⁷ Research done in Norway found that fathers were 11% more likely to take parental leave if their male coworkers also used it.¹⁶⁸ This statistic suggests that fathers are still uncomfortable taking

¹⁶² Neeti Jain, *How can organisations tackle parental leave bias?*, IN DIVERSE CO. (May 4, 2021), <https://www.indiversecompany.com/how-can-organisations-tackle-parental-leave-bias/>.

¹⁶³ *Id.*

¹⁶⁴ Kate Miceli, *Life, Liberty, and the Pursuit of Paid Parental Leave: How the United States has Disadvantaged Working Families*, 53 U. RICH. L. REV. 33, 47 (May 2019) (citing Juliana Menasce Horowitz, et al., *Americans Widely Support Paid Family and Medical Leave, but Differ Over Specific Policies*, PEW RSCH. CTR. (Mar. 23, 2017), <http://www.pewsocialtrends.org/2017/03/23/americans-widely-support-paid-family-and-medical-leave-but-differ-over-specific-policies/>).

¹⁶⁵ Juliana Menasce Horowitz, et al., *Americans Widely Support Paid Family and Medical Leave, but Differ Over Specific Policies*, PEW RSCH. CTR. (Mar. 23, 2017), <https://www.pewresearch.org/social-trends/2017/03/23/americans-widely-support-paid-family-and-medical-leave-but-differ-over-specific-policies/>.

¹⁶⁶ *Id.*

¹⁶⁷ Janna van Belle, *Paternity and parental leave policies across the European Union*, RAND EUR. 1, 15 (2016), https://www.rand.org/content/dam/rand/pubs/research_reports/RR1600/RR1666/RAND_RR1666.pdf.

¹⁶⁸ Gorden Dahl, et al., *Peer Effects in Program Participation*, 104 AM. ECON. REV. 2049 (July 2014), <https://pubs.aeaweb.org/doi/pdfplus/10.1257/aer.104.7.2049>.

parental leave unless they observe other men normalizing it. However, the effects of paid parental leave policies are already surfacing, as countries that have already reserved parental leave for fathers years before the Work-Life Directive came into effect have seen. In Germany, uptake in fathers taking parental leave rose from 3.3% in 2006 to 29.3% in 2012 after the country introduced a two-month individual entitlement of parental leave for fathers.¹⁶⁹ Because of these statistics, it is evident that paid, nontransferable parental leave is breaking cultural biases surrounding parental roles and parental leave one step at a time.¹⁷⁰

Therefore, as is seen in both the US and the EU, deeply rooted cultural biases are one of the persistent effects of unpaid parental leave.¹⁷¹ More men are likely to take parental leave when it is paid, and as more men take parental leave it will become more normalized among fathers, which will in turn break these cultural biases surrounding which parents should take parental leave.¹⁷²

B. The Gender Wage Penalty

The gender pay gap, also known as the gender wage penalty, is the difference between men's and women's earnings.¹⁷³ In 2022, American women typically earned eighty-two cents for every dollar earned by an American man.¹⁷⁴ In the EU in 2022, the year the Member States implemented the Work-Life Balance Directive, women's gross hourly earnings were, on average, 12.7% below those of men.¹⁷⁵

¹⁶⁹ van Belle, *supra* note 167, at 15.

¹⁷⁰ *Id.*

¹⁷¹ See Horowitz, *supra* note 165; van Belle, *supra* note 167, at 15.

¹⁷² See Horowitz, *supra* note 165; van Belle, *supra* note 167, at 15.

¹⁷³ Rakesh Kochhar, *The Enduring Grip of the Gender Pay Gap*, PEW RSCH. CTR. (Mar. 1, 2023), <https://www.pewresearch.org/social-trends/2023/03/01/the-enduring-grip-of-the-gender-pay-gap/#:~:text=The%20gender%20pay%20gap%20%E2%80%93%20the,every%20dollar%20earned%20by%20men.>

¹⁷⁴ *Id.*

¹⁷⁵ *Gender pay gap statistics*, EUROSTAT STAT. EXPLAINED (Mar. 2024), [https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Gender_pay_gap_statistics#:~:text=For%20the%20economy%20as%20a,in%20Estonia%20\(Figure%201\).](https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Gender_pay_gap_statistics#:~:text=For%20the%20economy%20as%20a,in%20Estonia%20(Figure%201).)

The wage penalty is even more prevalent when looking at its effects on parents. For example, in the US, the estimated wage penalty for having children and leaving work to care for them is between 10% and 15% of a worker's salary.¹⁷⁶ This wage penalty is attributable to more mothers than fathers feeling that they need to reduce their working hours (34% v. 26%) or turn down a promotion (9% v. 3%) to balance work and parental responsibilities, as seen during the pandemic.¹⁷⁷ Suppose more women than men feel they must sacrifice their careers for their families.¹⁷⁸ In that case, the gender wage penalty will persist because more women will take more time off work or turn down promotions than men because of the cultural bias that women belong at home more than men.¹⁷⁹

In the EU, because Member States only needed to implement the Work-Life Balance Directive by 2022,¹⁸⁰ this explains why the gender wage penalty still exists in the EU.¹⁸¹ The European Commission has officially stated that one of the prevalent reasons why the gender wage penalty still exists in the EU is because of the unequal share of paid and unpaid work between men and women.¹⁸² Women have more work hours per week than men, but they spend more hours on unpaid work like caring for children or housework, which also affects their career choices.¹⁸³ Furthermore, according to 2020 figures, 28% of women in the EU work part-time, while only

¹⁷⁶ Lester, *supra* note 150, at 22 (citing Jane Waldfogel, *Understanding the "Family Gap" in Pay for Women with Children*, 12 J. ECON. PERSP. 137, 143 (1998)).

¹⁷⁷ Ruth Igielnik, *A rising share of working parents in the U.S. say it's been difficult to handle child care during the pandemic*, PEW RSCH. CTR. (Jan. 26, 2021), <https://www.pewresearch.org/short-reads/2021/01/26/a-rising-share-of-working-parents-in-the-u-s-say-its-been-difficult-to-handle-child-care-during-the-pandemic/>.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ Work-Life Balance Directive, *supra* note 5.

¹⁸¹ EUROSTAT STAT. EXPLAINED, *supra* note 175.

¹⁸² *The gender pay gap situation in the EU*, EUR. COMM'N, https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/gender-equality/equal-pay/gender-pay-gap-situation-eu_en (last visited Apr. 27, 2024).

¹⁸³ *Id.*

8% of men do.¹⁸⁴ Considering both unpaid and paid work, women work more hours per week than men, yet receive far less salary.¹⁸⁵ This steadfast gender wage penalty is why the EU promotes equal sharing of parental leaves.¹⁸⁶

Therefore, the cultural biases combined with the unavailability of paid parental leave directly contribute to the gender wage penalty. It will be interesting to observe how cultural biases and the gender wage penalty change as the effects of the EU's Work-Life Directive begin to come to light. Since cultural biases, the gender wage penalty, and unpaid parental leave are all interrelated, it is reasonable to hypothesize that as the years pass, the EU will observe a diminishment in both cultural biases and the gender wage penalty as the Work-Life Balance Directive is enforced.

Part VI: The Solution – Taking the Best Qualities of Both the Work-Life Balance Directive and the FMLA

What is the ideal solution regarding parental leave laws? It would resemble a hybrid between the Work-Life Balance Directive and the FMLA. By combining the best provisions of both the Work-Life Balance Directive and the FMLA, such as making the parental leave law gender-neutral and LGBTQ+ inclusive, making the parental leave paid (and the pay should be equal among all workers, and equal to at least sick leave pay), and having exceptions for small companies to protect both employers and employees alike, an ideal parental leave law could very well exist one day.

¹⁸⁴ *Share of women working part-time higher than men*, EUROSTAT (Mar. 3, 2023), <https://ec.europa.eu/eurostat/web/products-eurostat-news/w/EDN-20230303-1>.

¹⁸⁵ *Id.*

¹⁸⁶ EUR. COMM'N, *supra* note 182.

A. Gender-Neutral and LGBTQ+ Inclusive

Parental leave laws must be gender-neutral for many reasons. One reason is that if parental leave laws are gender-neutral, they prevent discrimination from LGBTQ+ couples who would otherwise be excluded if each state received discretion on whether to protect same-sex parents.¹⁸⁷ This choice is a flaw of the Work-Life Balance Directive, which gives Member States the discretion on whether to give same-sex parents the same parental leave privileges as heterosexual parents.¹⁸⁸ Data from a 2020 survey of LGBTQ+ employees indicated that 37% of LGBTQ+ workers do not have access to paid family leave at their current employer.¹⁸⁹ This statistic is a meager percentage, especially given that there are 1.2 million same-sex households in the US,¹⁹⁰ and a significant percentage of same-sex couples in certain Member States.¹⁹¹ The FMLA's policy, which updated the regulatory definition of "spouse" to clarify that employees in legal same-sex marriages can take FMLA leave,¹⁹² is more progressive than the Work-Life Balance Directive, which does not explicitly protect same-sex parents' rights to parental leave.¹⁹³ Therefore, if a nation were to adopt an ideal parental leave law, it would be wise to follow the FMLA's footsteps in

¹⁸⁷ Mary Beth Maxwell, et al., *U.S. LGBTQ Paid Leave Survey*, HUM. RTS. CAMPAIGN FOUND. 1, 2 (2018), <https://assets2.hrc.org/files/assets/resources/2018-HRC-LGBTQ-Paid-Leave-Survey.pdf>.

¹⁸⁸ Work-Life Balance Directive, *supra* note 5.

¹⁸⁹ Diana Boesch & Lindsay Mahowald, *Making the Case for Chosen Family in Paid Family and Medical Leave Policies*, CTR. FOR AM. PROGRESS (Feb. 16, 2021), <https://www.americanprogress.org/article/making-case-chosen-family-paid-family-medical-leave-policies/>.

¹⁹⁰ Zachary Scherer, *Key Demographic and Economic Characteristics of Same-Sex and Opposite-Sex Couples Differed*, U.S. CENSUS BUREAU (Nov. 22, 2022), <https://www.census.gov/library/stories/2022/11/same-sex-couple-households-exceeded-one-million.html#:~:text=There%20were%20about%201.2%20million,and%20about%20500%2C000%20were%20unmarried.>

¹⁹¹ *Archive: People in the EU – statistics on household and family structures*, EUROSTAT STAT. EXPLAINED (Jan. 2, 2018), https://ec.europa.eu/eurostat/statistics-explained/index.php?title=People_in_the_EU_%E2%80%93_statistics_on_household_and_family_structures&oldid=368461.

¹⁹² U.S. DEP'T LAB., *supra* note 94.

¹⁹³ Work-Life Balance Directive, *supra* note 5.

explicitly protecting same-sex parents' rights to parental leave as opposed to the EU's choice giving the Member States discretion.

B. Paid Parental Leave

High-wage employees tend to benefit the most from current paid leave structures, while low-wage employees tend not to enjoy any paid parental leave.¹⁹⁴ Because of this, there should be a federal law mandating paid parental leave for workers, and the pay should be equal among all workers so that everyone can enjoy time off with their family. This idea is heard from the Work-Life Balance Directive, which gives all workers paid parental leave, which is equal among all workers and equivalent to sick leave pay.¹⁹⁵

When the FMLA was enacted, President Bill Clinton said that American workers would apparently no longer have to choose between “the job they need and the family they love.”¹⁹⁶ Yet, statistics have shown that 74% of American women would have to deplete their savings to take unpaid parental leave.¹⁹⁷ Further, only about 27% of American workers are covered by a defined paid parental leave program,¹⁹⁸ yet 89% of women answered "yes" when surveyed about whether they believed the federal government should offer a paid parental leave program.¹⁹⁹ With inflation steadily increasing at the rate of 3.1% just this past year,²⁰⁰ paid parental leave is more crucial now than ever to ensure that all workers can take time to care for their families.

¹⁹⁴ *Employee Benefits*, U.S. BUREAU LAB. STAT. (Mar. 2023), <https://www.bls.gov/ebs/home.htm>.

¹⁹⁵ Work-Life Balance Directive, *supra* note 5, art. 5, at 9.

¹⁹⁶ Clinton, *supra* note 85.

¹⁹⁷ Mike Brown, *Unpaid Maternity Leave Would Empty Cash Savings for 3-in-4 Women*, BREEZE. (July 26, 2022), <https://www.meetbreeze.com/disability-insurance/unpaid-maternity-leave-financial-impact-study/>.

¹⁹⁸ U.S. BUREAU LAB. STAT., *supra* note 194.

¹⁹⁹ Wyndi Kappes, *74% of Women Would Have to Drain Their Savings to Take Unpaid Maternity Leave*, THE BUMP (Aug. 4, 2022), <https://www.thebump.com/news/unpaid-maternity-leave-crisis>.

²⁰⁰ Tiffany Lam-Balfour & Alieza Durana, *The Current Inflation Rate is 3.2%. Here's Why It Matters*, NERDWALLET (Mar. 12, 2024), <https://www.nerdwallet.com/article/investing/inflation>.

In practice, paid parental leave could be achieved by following the examples displayed by the countries and states that have already implemented paid leave. For example, most OECD countries fund their paid parental leave programs by using social insurance funds that are supported by the employer, the worker, and government contributions.²⁰¹ Further, Poland presents an alternative solution by relying only on the employee's contributions.²⁰² Another example of a successful paid parental leave program is New Jersey. New Jersey implemented the Family Leave Insurance so New Jersey workers who take family leave are covered under the State's program.²⁰³ However, New Jersey employers are also given the option to provide Family Leave Insurance through a plan with a private insurance carrier.²⁰⁴ The State's program is completely financed by worker payroll deductions, like Poland's paid parental leave system.²⁰⁵

Another strategy to implement a paid leave program is to follow New York's example, who implemented a mandatory private insurance system.²⁰⁶ This system requires New York employers to purchase paid family leave programs through private insurers, yet the insurance is also fully funded by the employees through payroll deductions.²⁰⁷ From these examples, it is evident that there are multiple pathways to financing paid parental leave. A nation could fund its

²⁰¹ *Paid Family Leave Across OECD Countries*, BIPARTISAN POL'Y CTR. (Sept. 2022), <https://bipartisanpolicy.org/explainer/paid-family-leave-across-oecd-countries/>.

²⁰² *Id.*

²⁰³ Division of Temporary Disability and Family Leave Insurance, *Family Leave Insurance*, DEP'T LAB. & WORKFORCE DEV., <https://www.nj.gov/labor/myleavebenefits/worker/fli/#:~:text=Family%20Leave%20Insurance%20provides%20New%20Jersey%20workers%20cash%20benefits%20for,a%20private%20insurance%20carrier%20instead> (last visited Apr. 27, 2024).

²⁰⁴ *Id.*

²⁰⁵ *Id.*; BIPARTISAN POL'Y CTR., *supra* note 201.

²⁰⁶ *State Paid Family Leave Laws Across the U.S.*, BIPARTISAN POL'Y CTR., <https://bipartisanpolicy.org/explainer/state-paid-family-leave-laws-across-the-u-s/> (last updated Jan. 16, 2024).

²⁰⁷ *New York Paid Family Leave Updates for 2024*, N.Y. ST., <https://paidfamilyleave.ny.gov/2024#:~:text=Employees%20taking%20Paid%20Family%20Leave,maximum%20weekly%20benefit%20is%20%241%2C151.16> (last visited Apr. 27, 2024).

parental leave program through public programs or mandated private insurance carriers, depending on how much flexibility it wishes to afford its employers.

In this aspect, the Work-Life Balance Directive far exceeds the FMLA by providing paid leave equal to all workers, so if a nation creates an ideal parental leave policy, it should follow the EU by implementing paid parental leave.²⁰⁸

C. Required Notice Period and Length of Employment to Protect Small Employers

Lastly, provisions need to be enacted to protect smaller employers because they will understandably have more of a challenge providing paid parental leave to their employees. Small companies typically attribute two challenges to providing their employees with paid parental leave – cost and business disruption.²⁰⁹ Because of this, the Work-Life Balance Directive’s provision allowing Member States to require a length of service qualification and a notice period that a worker must satisfy before exercising their right to parental leave are feasible ways to protect the interests of the employer.²¹⁰ The issue with the FMLA’s requirement that an employee must work for a company of fifty or more workers to receive parental leave benefits is that it penalizes employees of small companies.²¹¹ Employees of any company should not have to forfeit their ability to take parental leave based on the size of the company that they work for. Therefore, the Work-Life Balance Directive is a better option for considering both the interests of the employer and the employee because it provides certain safeguards for smaller companies without requiring their employees to completely forfeit the right to parental leave.

²⁰⁸ Work-Life Balance Directive, *supra* note 5.

²⁰⁹ *How small companies can offer paid parental leave*, PARENTALY (Mar. 19, 2022), <https://www.parentaly.com/blog/small-companies-paid-parental-leave>.

²¹⁰ Work-Life Balance Directive, *supra* note 5, art. 5, at 9.

²¹¹ 29 U.S.C. §§ 2601-2654 (1994).

Conclusion

The ideal parental leave policy has not yet been adopted by any nation. However, a combination of aspects from both the EU's Work-Life Balance Directive and the US's FMLA would best protect working parents. A paid, gender-neutral, and LGBTQA+ inclusive parental leave policy that also protects small businesses by requiring a notice period and a length of service qualification to enjoy parental leave would be ideal. This would balance the interests of both the employer and the employee.

Hopefully, in the future, nations will adopt some combination of the Work-Life Balance Directive and the FMLA to best protect both employees' right to parental leave and the businesses that keep the economy thriving.