The Failure of the Family and Medical Leave Act: Alternative Proposals for Contemporary American Families

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THE FAILURE OF THE FAMILY AND MEDICAL LEAVE ACT: ALTERNATIVE PROPOSALS FOR CONTEMPORARY AMERICAN FAMILIES

I. INTRODUCTION

The Family and Medical Leave Act ("FMLA") was enacted February 5, 1993, but still falls short of meeting the needs of the women it was intended to protect. "On the eighth anniversary of the federal law requiring some employers to provide family and medical leave, Congress and many states are [still] considering whether to cover more people and grant partial pay for such leaves." As of 1998, more than seventy-five percent of working mothers who were eligible to take advantage of rights afforded under the FMLA were unable to do so.2 "In fact, a recent study by the U.S. Department of Labor found that 88 percent of eligible employees who need time off do not take it because they cannot afford to go without a paycheck."3 While women are afforded minimum statutory protection against pregnancy discrimination, "[t]he absence of even minimally adequate support for maternity and parenting is particularly distressing in a country that has long had the highest divorce rate in the world as well as a substantial proportion of mothers in the paid workforce."4 In the early 1990s, "57 percent of women with children under six [were] in the workforce—up from 19 percent in 1960. While the number of working women . . . doubled since 1940, the number of working mothers . . . increased tenfold."5 Women have been entering the workforce at a phenomenal rate; in January 1997, there were 62.7 million women working or

looking for work. Moreover, the United States Department of Labor predicts that by 2005, female participation in the labor force will increase almost fifty percent; nearly double the growth rate for men. The Family and Medical Leave Act has helped millions of families. But what we are finding out is there are millions more who are being left behind. As the number of women in the workforce continues to increase, the FMLA needs to change to meet their needs and effectively help them.

This Note explores issues surrounding the implementation and impact of the FMLA. Part II analyzes the historical debates resulting in both the Pregnancy Discrimination Act (“PDA”) and the FMLA. Part III critiques several proposals, made by both Congress and former President Clinton, and further analyzes alternative structures from the states and domestic companies. To help gain further insight, Part IV investigates foreign family leave models. Looking abroad to countries such as Mexico, Japan, Australia, and England, illustrates how other countries are grappling with maternity leave and discrimination while attempting to create government mandated family leave legislation. Finally, Part V establishes guidelines aimed at implementing a better parental leave program.

II. HISTORY

In response to the societal changes brought about by the excesses of the Industrial Revolution, the United States enacted protective legislation, such as minimum wage standards, unemployment compensation, and social security legislation. However, at that time, there were few mothers in the workforce; and thus, the need to legislate for their protection was not a priority. Due to the evolution of the American family and a shift in the workforce structure, protective legislation for working women needed to be enacted.

Without such legislation, women inevitably became targets of

7. See id.
9. See infra notes 13-83 and accompanying text.
10. See infra notes 84-154 and accompanying text.
11. See infra notes 155-238 and accompanying text.
12. See infra notes 239-49 and accompanying text.
13. See Bravo, supra note 5, at 165.
14. See id. "Ward and June Cleaver may be recycled on television, but they were disappearing from the neighborhood." Id.
employment discrimination. Consequently, throughout the 1950s, for fear of losing their jobs, women delayed informing their employers of their pregnancies. Today, however, women are protected against pregnancy discrimination.

A. The Pregnancy Discrimination Act

Enacted by Congress in response to a controversial Supreme Court decision, the Pregnancy Discrimination Act ("PDA") was the first substantive legislation affording protection for mothers in the workforce. In General Electric Co. v. Gilbert, the Court held that discrimination on the basis of pregnancy did not violate Title VII of the Civil Rights Act of 1964. The majority reasoned that since pregnancy is a condition that did not affect all women, its exclusion from a comprehensive disability insurance program was not discrimination. Congress disagreed with the Supreme Court's interpretation of Title VII and, in 1978, enacted the PDA. Drawing on the 1972 Equal

15. See Delia M. Rios, Pregnant Workers Protected, But Bias Lingers, NEW ORLEANS TIMES-PICAYUNE, Sept. 6, 1998, at A18 (contrasting the experiences of a woman and her mother-in-law). This cultural stigmatism was reflected in the media, as even a prominent actress such as Lucille Ball, the first pregnant woman on television, was originally advised she could neither be pregnant nor mention the term pregnancy on television. See Beverly Wettenstein, HERSTORY, DALLAS MORNING NEWS, Aug. 25, 1999, at 5C.

16. See 42 U.S.C. § 2000(e) (1994) (adding subsection (k) to section 701 of Title VII). For example, in February 1998, actress Hunter Tylo was awarded almost $5 million after she was wrongfully terminated from the television show Melrose Place when she disclosed her pregnancy to her employer. See Tylo v. Super. Ct. of L.A., 64 Cal. Rptr. 2d 731, 733 (Cal. Ct. App. 1997); see also Julia Lawlor, Pregnant Pause, SALES & MARKETING MGMT., Feb. 1998, at 44, 46 (discussing the Tylo case).


19. See id. at 125.

20. See id.; see also Issacharoff, supra note 17, at 2180.

The majority explained that: "As there is no proof that the package is in fact worth more to men than to women, it is impossible to find any gender-based discriminatory effect in this scheme simply because women disabled as a result of pregnancy do not receive benefits; that is to say, gender-based discrimination does not result simply because an employer's disability-benefits plan is less than all-inclusive."

Id.

21. See Vogel, supra note 4, at 100 (outlining how the PDA was a step in a several decade long process that extended the law to protect the special needs of pregnant workers); see also Rios, supra note 15, at A18. Congress agreed with the dissent of Justice Stevens stating that "[the PDA] was made necessary by an unfortunate decision rendered by the Supreme Court in the case of Gilbert v. General Electric." 123 CONG. REC. 29,641 (1977) (statement of Sen. Bayh) (emphasis in original).
Employment Opportunity Commission Guidelines, Congress, through the PDA, "affirm[ed] the right of pregnant women to be treated the same as other workers." As a technical matter, the PDA accomplished this through two changes. First, the definitions of the phrases 'because of sex' and 'on the basis of sex' were expanded to encompass "pregnancy, childbirth, or related medical conditions," thus establishing that pregnancy discrimination was actionable under Title VII. Second, the PDA shaped the contours of pregnancy discrimination, requiring employers to treat pregnant women at least as well as comparably disabled workers. The PDA established the rights of pregnant women "to be hired, to enter training programs, and to continue working while pregnant."

The first challenge to the PDA, which questioned whether there should be special treatment for pregnancy in the workplace, arose in California Federal Savings & Loan Association v. Guerra. At that time, an existing California statute required employers to provide at least four months of leave for female employees disabled by pregnancy, even though such leave was not available for men with comparably debilitating conditions. The petitioner, California Federal Savings & Loan Association, claimed that this statute was invalid because it was pre-empted by Title VII. On appeal, the Supreme Court upheld the California statute.

By reading the PDA to encompass equality in the sense of equal opportunity, as opposed to equal treatment, [the Supreme Court] was able to adopt the court of appeals' finding that the PDA was "a floor beneath which pregnancy disability benefits may not drop-not a ceiling above which they may not rise."

22. Vogel, supra note 4, at 100.
23. 42 U.S.C. § 2000(e) (adding subsection (k) to section 701 of Title VII).
24. See id.
25. Vogel, supra note 4, at 106.
28. See Guerra, 479 U.S. at 279. The district court, which found in favor of California Federal Savings & Loan Association, stated that "California employers who comply with state law are subject to reverse discrimination suits under Title VII brought by temporarily disabled males who do not receive the same treatment as female employees disabled by pregnancy ..." Id. (internal citation omitted).
29. See id. at 280.
30. Issacharoff, supra note 17, at 2183 (quoting Guerra, 479 U.S. at 285). "Under the majority's view, the California preferential treatment law enabled women to have children and return to work, thus putting them on equal footing with men who routinely have children and remain..."
The ruling in Guerra opened the door for employers to provide expansive protection for pregnant employees regarding leave benefits. Unfortunately, however, the impact of the PDA was never realized, as it failed to adequately meet the needs of the women it purported to cover. Title VII is only applicable to employers with greater than fifteen employees. Thus, the PDA “bypass[ed] the many poor and working-class women employed by firms so small they [were] exempt.” Nevertheless, the PDA laid the groundwork for future legislation concerning pregnancy and parenting in the workforce.

B. The Parental Leave Debates

In the 1980s, legislation was proposed which addressed the needs of working women. Introduced in Congress as early as 1985, various versions of the FMLA provided different types of work leave programs. Proposals such as the Parental and Disability Leave Act of 1985 and the Parental and Medical Leave Act tried to establish, among other things, guaranteed job security and unpaid leave. Despite the fact that the leave was unpaid, the proposals tried to alleviate the high costs of childbirth by preserving access to health care while an employee is on leave. The bills reflected the fundamental American principle that “[n]o worker should have to choose between the job they need and the family they love.” However, this principle is in direct conflict with the economic needs of employers. Consequently, these bills were introduced into a hostile political environment and encountered strong opposition from various groups with political clout. Issues such as the right to contract between employees and their employers, infringement in the workplace.” Id.

33. Vogel, supra note 4, at 101.
34. See id. at 106.
35. See id. at 107.
36. See id.
37. See id.
38. Teresa Burney, Celebrating the Family and Medical Leave Act, ST. PETERSBURG TIMES, Aug. 16, 1998, at 1G.
39. See Lawlor, supra note 16, at 46 (noting, for example, that “[m]anaging pregnant employees is particularly daunting in sales, where long hours are a given and a seller’s success depends on always being available for the customer”).
40. See generally Bravo, supra note 5, at 166-74 (commenting on the various themes that emerged throughout the debates).
upon the powers and duties of unions, collective bargaining, and the adverse impact upon small businesses were all vigorously debated.\footnote{See id.}

Opponents of the bill argued that "'[g]overnment mandates for family leave [would] interfere with the protected negotiations between employer and employees.'"\footnote{Id. at 166.} Many believed that such a bill would have a discriminatory impact on a majority of employees, who may not want the aforementioned provisions, but would still have to pay for them.\footnote{See 137 CONG. REC. S14154 (daily ed. Oct. 2, 1991) (statement of Sen. Hatch).} The leave proposal was further viewed as "a direct intrusion by the Federal Government into the free market ... mandating certain fringe benefits whether or not ... desired or in the best interest of [the] employer or employee."\footnote{137 CONG. REC. S14156 (daily ed. Oct. 2, 1991) (letter from a constituent).} According to critics, the proposed legislation called for a "mandated one-size-fits-all benefit"\footnote{137 CONG. REC. S14154 (daily ed. Oct. 2, 1991) (statement of Sen. Hatch).} and failed to take into account the needs of half of the American workforce.\footnote{See id.} Critics feared that the benefits offered under the proposed legislation were too narrow in their scope, allowing only the upperclasses to utilize them.\footnote{See 137 CONG. REC. S14154 (daily ed. Oct. 2, 1991) (statement of Sen. Hatch).}

In addition to failing to meet the individual needs of employees, it was claimed that the proposals failed to consider the potential backlash. For instance, when budgeting to incorporate the federally mandated package, many employers would be forced to cut other benefits such as paid vacation and subsidized health care.\footnote{See id.} Consequently, "workers [would] not get the compensation packages they actually prefer because the Government has not only required a family leave benefit, but a family leave benefit that measures up to a Federal standard."\footnote{See id.}

Employees, as well as employers, are better able to determine their individual needs and negotiate for customized benefits satisfying their particular situations. Moreover, if an employee does not want to negotiate on her own behalf, the option to negotiate through collective bargaining agreements is available. "Workers who are covered by collective bargaining can negotiate benefits far more substantial than those mandated by a minimum government standard."\footnote{Id.} In support of this claim, a survey found that eighty-nine percent of workers preferred

\begin{footnotes}
\item[41.] See id.
\item[42.] Id. at 166.
\item[46.] See id.
\item[49.] Id.
\item[50.] Bravo, \textit{supra} note 5, at 166 (support omitted).
\end{footnotes}
to negotiate directly with their employer.\textsuperscript{51} However, proponents of the bill have noted that these groups do not negotiate on their own and fewer than one in five workers is a member of a union.\textsuperscript{52} While these supporters argue that a federal standard is necessary to establish a minimum national standard of protection,\textsuperscript{53} this is not true. The influx of women into both the labor force and unions, as well as the impact of the Women's Movement, has caused unions to increase their support for working women's issues.\textsuperscript{54} This response was exemplified by the unions' vigorous bargaining for working parent leave programs, with an emphasis on mothers.\textsuperscript{55}

Perhaps the most persuasive argument put forth by those opposed to the implementation of a 'one-size fits-all' federal mandate is the negative impact upon small businesses.\textsuperscript{56} It was feared that "[m]andated family leave [would] be too expensive and [would] destroy small businesses."\textsuperscript{57} In 1989, the National Foundation of Independent Businesses conducted a poll of 550,000 small business owners nationwide, the results of which revealed that eighty-four percent of small business owners opposed a federally mandated parental leave program.\textsuperscript{58} In fact, ninety-four percent of small businesses already provided a family leave program which fit within their budgets and believed that there was no need for the federal government to intervene.\textsuperscript{59}

Although unpaid, it was feared that this federally mandated leave program would have an adverse effect on small businesses. As one small business owner pleaded:

\begin{quote}
If key people are to be absent from our business for 10 to 13 weeks, how are we expected to keep our business operating. By the time a replacement is trained he or she [is] no longer needed and all the cost and disruption of the interim period is wasted. Even though the
\end{quote}

\begin{itemize}
\item \textsuperscript{51} See 137 CONG. REC. S14155 (daily ed. Oct. 2, 1991) (letter from John J. Motley III, Vice President of Federal Governmental Relations).
\item \textsuperscript{52} See Bravo, supra note 5, at 166. Moreover, eighty-seven percent of all working women were not protected by any type of collective bargaining agreement. See id.
\item \textsuperscript{53} See id.
\item \textsuperscript{54} See Carolyn York, \textit{The Labor Movement's Role in Parental Leave and Child Care, in PARENTAL LEAVE AND CHILD CARE} 176, 176 (Janet Shibley Hyde & Marilyn J. Essex eds., 1991).
\item \textsuperscript{55} See id. at 177.
\item \textsuperscript{56} See generally 137 CONG. REC. S14154-58 (daily ed. Oct. 2, 1991) (discussing the negative response communicated by small business owners to the government).
\item \textsuperscript{57} Bravo, supra note 5, at 169.
\item \textsuperscript{59} See 137 CONG. REC. S14155 (daily ed. Oct. 2, 1991) (letter from John J. Motley III, Vice President of Federal Governmental Relations).
\end{itemize}
parental leave is proposed as unpaid leave, the cost to business will be horrendous. Moreover, it was claimed that the ability to choose and select the specific employee benefits to be offered is one of the few ways a small business can compete against neighboring businesses. Furthermore, there was an overwhelming fear that the bill would inhibit recruitment efforts. New employees "would be afraid of being fired after 10 weeks when [an employee] comes back from parental leave." Small business owners argued that they did not have the resources or funding to maintain a profitable level of productivity with an employee on leave. As stated by the owner of a supply company:

> When we hire an individual we have a specific need for that person in the organization. We expect him to be in attendance during every regular work shift. If we hadn't needed him we wouldn't have hired him. It is not that we are against employees having time off, but we feel that we should have the final say as to the justification of the time off.

Although there was enormous support in both the House of Representatives and the Senate, President Bush, perhaps swayed by small business owners, vetoed the bill in 1990.

C. The Family and Medical Leave Act

The Family and Medical Leave Act was finally passed by Congress and signed into law by President Clinton in 1993. The FMLA established, among other things, unpaid maternity leave for up to twelve weeks, to be taken any time within a twelve month period, to care for a newborn child. It further requires the continuation of health insurance during the leave and guarantees that the employee's position, or one that

60. Id. (letter from Kenneth W. Jones, A.I.A., President of Jones/Richards & Assoc.).
61. See id.
63. Id.
64. See id.
65. 137 CONG. REC. S14156-57 (letter from Kent Larson, Manager, Maca Supply Co.).
66. See VOGEL, supra note 4, at 108.
68. See id. § 2612(a)(1)(A). The FMLA provides leave for employees with serious health conditions; to care for a parent, spouse or child with a serious health condition; and for the birth of a child or placement of child for adoption. See id. § 2612(a)(1)(B)-(D).
is equivalent, will remain open until she returns. In recognition of the pleas from the small business community, employers with less than fifty employees are exempt from coverage under the Act. Furthermore, the FMLA "provides maternity benefits within a gender-neutral package." Unlike the PDA, which is gender-specific in that it allows employers to give special treatment to pregnant women during the period of their disability, the FMLA grants leaves without gender consideration.

1. Five Years Later

Five years after its implementation some have declared the FMLA to be a success. From 1993 to 1995, approximately 20 million workers took advantage of the leave programs prescribed by the FMLA. Furthermore,

[a] 1996 report to Congress, issued by a bipartisan commission, found that more than 90 percent of employers said most aspects of the law were "very easy" or "somewhat easy" to administer, more than 89 percent found they incurred "no cost" or "small costs," and more than 86 percent reported "no noticeable effect" on productivity, profitability, and growth.

Although it may be claimed that the FMLA has been successful

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69. See id. § 2612(b)(2), § 2614(c)(1).
70. See id. § 2611(4)(A)(i). Furthermore, employees are only covered if they have worked for a covered employer for twelve months and worked at least 1,250 hours in the twelve months before their leave. See id. § 2611(2)(A); see also Harvell v. N.C. Ass’n of Educators, 510 S.E.2d 403, 405 (N.C. Ct. App. 1999) (noting that the exemption covers an employer with less than fifty employees within seventy-five miles of its headquarters). However, it appears that employers, in order to avoid falling under its coverage, can manipulate the requirements of the FMLA. See Harvell, 510 S.E.2d at 405 (describing how an employer evaded coverage by having thirty-nine employees at its headquarters, seven employees at branch offices within seventy-five miles, and eighteen to nineteen employees located at offices just outside of seventy-five miles from the headquarters who may report to the headquarters on a daily basis even though their fixed worksites of origin are their offices). Government agencies are covered regardless of the number of employees. See 29 U.S.C. § 2611(4)(A)(iii); cf. McGregor v. Goord, 691 N.Y.S.2d 875, 877 (1999) (holding that the 11th Amendment is not a bar against a corrections officer bringing a FMLA cause of action against a state in state court, and that such an action against the state under the FMLA did not violate the 10th Amendment).
71. VOGEL, supra note 4, at 106.
72. See id.
73. See, e.g., Woller, supra note 2.
74. See id.
because it meets the needs of some women in the workforce, it is sufficiently short of substantive progress. It is true that approximately 20 million people took advantage of the benefits offered, but that is only a small portion of the 88 million people eligible to do so. In fact, "the FMLA was primarily a symbolic act, which afforded no significant assistance to working women, or men, and has perhaps retarded progress on the family leave front more than it has plausibly helped."

The employees that were most in need of the FMLA were "those between the ages of 25 and 34, those with children, those paid by the hour and those with family incomes between $20,000 and $30,000 a year." Yet, many of these people could not take leave since, during pregnancy and childbirth, they need all the monetary resources they can obtain, especially the weekly paycheck. Consequently, many families are forced into debt to compensate for lost wages. One of the main reasons people do not take advantage of leave programs is that they cannot afford to do so. To these individuals, the provisions of the

76. See id.
77. See Woller, supra note 2.
78. Michael Selmi, The Limited Vision of the Family and Medical Leave Act, 44 VILL. L. REV. 395, 396 (1999). When the FMLA was enacted, thirty-four states, as well as Puerto Rico and Washington D.C., had a leave program in place. See id. at 407. Moreover, "[t]he fact that the FMLA largely replicates what employers were already providing raises the question why the legislation was seen as so important and why its advocates were willing to settle for such a weak form of parental leave." Id. at 410.
79. Woller, supra note 2.
If an individual earns $20,000 a year, the opportunity cost of foregoing income for a period of time is less than if the individual earns say, $100,000 a year. This is because the loss of income is, for lower incomes, offset at least in part by savings in work-related expenses: childcare, . . . commuting, et cetera, and in lower taxes. So the cost of staying out of the work force for a period of time is less than the income that would have been earned. If the leave period is limited to 12 weeks, the individual cannot reap significant cost savings. The family still has to have childcare after 12 weeks, get to work, buy lunches, so forth. It is much more likely that 12 weeks' leave will equate to a 12 weeks' loss of income.

Id.
81. See 143 CONG. REC. S5159 (daily ed. May 27, 1997) (statement of Sen. Ashcroft). "[T]he family and medical leave Commission stated that the method that hourly employees used to recover lost wages when taking family and medical leave is that 28.1 percent borrowed money. So, families had to go in debt to meet their needs. And 10.4 percent, 1 out of every 10 hourly workers who took time off under family and medical leave had to go on welfare because of the money they lost. 41.9 percent . . . 4 out of every 10 people, deferred paying their bills.

Id.
82. See id. ("People would rather have the flexibility of keeping their [bill] payments on time
FMLA are meaningless. Furthermore, within the last three years, employers have complained that the FMLA is too difficult to administer and poorly worded, rendering it virtually ineffective.\textsuperscript{83}

There are some beneficial aspects of both the PDA and FMLA, however, neither statute goes far enough. An act cannot be deemed successful if the people most in need of its benefits cannot take advantage of them. The federal government has recognized the shortcomings inherent in these Acts and is attempting to rectify the situation. However, the proposed solutions, discussed \textit{infra}, are also insufficient. Developing a proper solution requires a broader examination of the problem.

\section*{III. The Current American Situation}

\textbf{A. Alternatives Debated in Congress}

The issues raised throughout this Note have not gone unnoticed in the political arena, as Congress is continuously evaluating more substantive family and medical leave packages. Although several different plans have been introduced in Congress, in an attempt to alleviate the stress of implementing the FMLA, each solution merely addresses part of the problem. This is because Congress has neglected to 'take a step back' and improve the overall effect of the FMLA itself.

As mentioned above, the FMLA legislation was introduced into a politically hostile environment. At that time, owners of small businesses possessed strong lobby power and were able to obtain political compromise. "Among the most important of those compromises was one that limited the applicability of the law to employers of 50 or more employees.\textsuperscript{84}" This compromise was reached because the impact the law would have on employers was unclear.\textsuperscript{85} Employers with small numbers of employees feared that attempting to adhere to the standards of a federally mandated one-size-fits-all benefit package would diminish their ability to compete efficiently with larger companies possessing greater resources.\textsuperscript{86} The fact that an employer had fifty instead of forty-

\begin{itemize}
  \item See Ilana DeBare, \textit{A Time For Caring}, S.F. \textsc{Chron.}, Aug. 3, 1998, at B1 (proclaiming that "[e]mployers complain that the FMLA is . . . so broadly worded that relatively minor ailments like ingrown toenails can prompt a leave").
  \item See id.
  \item See 137 \textsc{Cong. Rec.} S14155 (daily ed. Oct. 2, 1991) (letter from John J. Motley III, Vice President of Federal Governmental Relations).
\end{itemize}
nine employees does not alleviate the financial difficulty of meeting the federal requirement. However, as Rep. William Clay of Missouri notes, "[t]he fact that an employee may work for an employer of 40 rather than 50 people does not immunize that employee from the vicissitudes of life nor diminish that employee's need for protections afforded by the FMLA."8

On January 16, 1999, Clay introduced a plan to the United States House of Representatives proposing to lower the small business threshold from fifty employees to twenty-five.8 It was his opinion that "the costs to employers of complying with the law [were] negligible, [and] in many instances [the] FMLA ... led to improvements in employer operations by improving employee morale and productivity and reducing employee turnover."89 Based on these findings, Clay justified his plan to expand the law to employers of twenty-five or more employees, and increase coverage to seventy-three percent of the workforce, or fifteen million workers and their families.90 In addition, Clay asked that the rights currently afforded to parents under the FMLA be extended to permit parental leave to participate in or attend their children's educational and extracurricular activities.91 Unfortunately, Clay's plan fails to take into account the "evidence of [a] myriad [of] problems in the workplace caused by the FMLA's intermittent leave provisions ...."92

The original FMLA legislation, in addition to providing for terms of leave, created a Commission on Leave charged with reporting the FMLA's impact.93 The Commission released a report in April 1996, which indicated that the legislation was operating at a minimum cost to employers.94 However, as Rep. Harris W. Fawell acknowledges, the Commission's report failed to give a complete picture.95 "Simply put, [it] was based on old and incomplete data, looked at long before employers or employees could have been fully aware of the FMLA's many requirements and responsibilities."96
Furthermore, setting the threshold number at twenty-five, as Clay suggests, is just as arbitrary as setting it at fifty; the same problem will still exist for those people on or near that number. "The ones for whom it's a burden are smaller employers who are just big enough to qualify for FMLA coverage but don't have the staffing to [effectively administer the FMLA in conjunction with the relevant state laws]."97 "[S]etting thresholds for regulatory guidelines at artificial levels-e.g., 50 employees or more, $500,000 in sales-take no account of other realities, such as profit margins, labor intensive versus capital intensive businesses, and local market economics."98

Perhaps a more equitable solution to this issue can be found in Senator Pressler's proposed amendment to the FMLA.99 As mentioned above, the FMLA, as currently written, establishes a Commission on Leave to study, among other things, the Act's impact on employer productivity.100 Senator Pressler's amendment would provide for a more specific reporting requirement to make the Commission's efforts more effective.101 For example, the Commission would be required to include an analysis of an employer's ability to collect premium payments from employees who do not return from leave.102 This would limit the cost incurred by businesses, while at the same time preserve the ability to choose whether to return to work after the birth of a child. This option could further operate to minimize the negative impact that maintaining such a right to choose has had on the desirability of hiring women of childbearing age. The employer would no longer be required to carry the financial burden. Instead, the cost would be shared with the employees.

To minimize small businesses' fear that the FMLA will cause financial ruin, Senator Pressler's amendment would also require the

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97. DeBare, supra note 83, at B1. An example of where a covered employer should not be covered can be seen in the Business Network Group division of Sprint North Supply. According to Susan Swope, inside sales and service manager in 1996, there were eleven inside sales representatives out on maternity leave out of a total staff of sixty-six. See Lawlor, supra note 16, at 49. With such a small workforce, the company could not hire temporary employees, employees were forced to work excessive amounts of overtime, vacation time was limited, and the overall level of customer service plummeted. See id. Ms. Swope claimed: "We lost a lot of customers... [i]t was hot work. People were not happy. It was bad for morale." Id.


100. See id. (statement of Sen. Pressler).

101. See id.

102. See id.
Commission to analyze the differences in costs and benefits of leave policies on businesses based on size.\textsuperscript{103} He further suggests that the Secretary of Commerce and the Administrator of the Small Business Administration be added as \textit{ex officio} members of the Commission on Leave to ensure that leaders from both large and small businesses are represented.\textsuperscript{104} This would ensure that concerns of small businesses are heard and considered if Congress decides to extend application of the Act to cover them or impose more restrictive mandates.\textsuperscript{105}

A proposal initiated by Senator Kassebaum aimed at mitigating some of the excess costs to businesses and detrimental effects on employees.\textsuperscript{106} The key to Kassebaum’s proposal “is that it is the employees who decide what is best for them—not a distant and inflexible Government decree.”\textsuperscript{107} Taking into account the fact that the “one-size-fits-all” rules for businesses ignore the reality of the marketplace[,]\textsuperscript{108} Kassebaum suggested that a company which offers a “cafeteria of benefit options,” one of which is family and medical leave at least as generous as the rights afforded under the FMLA, should be deemed to have fulfilled the requirements of the FMLA.\textsuperscript{109} Unfortunately, although Kassebaum’s proposal allows employees to choose which benefits are most valuable to them, Congress rejected it.\textsuperscript{110}

Not all the proposals before Congress, however, are concerned with the economic impact on business. In fact, other proposals are concerned with the opposite - the economic impact unpaid leave has on families. “[I]t is just too hard, if not impossible, for new parents to take time off from work without pay for very long after the birth of a new baby.”\textsuperscript{111} A recent study found that nearly two-thirds of employees who need to take family leave do not, because they simply cannot afford to give up that

\begin{itemize}
\item \textsuperscript{103} See id. “It is essential to determine if small businesses are adversely impacted by this legislation or if in fact, there is a net benefit for job creation and economic growth.” Id.
\item \textsuperscript{104} See 139 CONG. REC. S1339 (daily ed. Feb. 4, 1993) (statement of Sen. Pressler).
\item \textsuperscript{105} See id. Unfortunately, Senator Pressler’s amendment was met with strong opposition because it would substantially strengthen employer protection. See 139 CONG. REC. S1343 (daily ed. Feb. 4, 1993) (statement of Sen. Gorton).
\item \textsuperscript{107} Id.
\item \textsuperscript{110} See id. Under Kassebaum’s proposal, “[a] single woman with no dependents may choose educational assistance or greater health benefits. A working father may choose the family leave option.” Id.
\end{itemize}
The Failure of the FMLA

income. In fact, a bill submitted to the Senate on January 22, 2001, considers providing such funding. One of its purposes is to establish partial or full wage replacement to new parents to enable them to take time off. The funding will be made available to individuals taking leave under the FMLA. While it is not clear how the federal funding will be provided, at a minimum, the bill reflects the Senate’s acknowledgement of a serious deficiency in the FMLA.

B. A Presidential Proposal

Of all of the proposals that attempted to fix the economic troubles of the FMLA, none have been met with as much debate as President Clinton’s unemployment insurance proposal of November 1999. Clinton’s proposal consisted of a new rule allowing the use of a state’s unemployment insurance fund to pay for parental leave when caring for newborn or newly adopted children. The workers on family leave would be paid by employers out of employment insurance funded by federal and state payroll taxes.

Established in the 1930s, the unemployment insurance system allows states flexibility when determining eligibility for benefits. According to Clinton, “[g]iving states the flexibility to experiment with paid employment leave is one of the best things we can do to strengthen our families and help new mothers and fathers meet their responsibilities both at home and at work[.]” Clinton’s proposal had some support.

114. See id.
115. See id.
116. See generally Bill Sammon, Clinton Diverts Funds From Jobless Set-Aside for Workers on Maternity Leave Draws GOP Fire, WASH. TIMES, Dec. 1, 1999, at A1 (discussing several of the arguments both for and against Clinton’s proposal).
117. See Plan Would Pay Parents on Leave, NEWSDAY, Dec. 1, 1999, at A22 [hereinafter Plan Would Pay]; see also Ellen Goodman, A Baby Step Toward Paid Maternity Leave, CINCINNATI POST, Nov. 16, 1999, at 15A (noting that “[w]hat the Clinton plan would do is allow states to treat [workers on maternity leave] as if they were laid off from the very jobs they will go back to”).
120. Lewis, Clinton, supra note 118, at A1.
121. See Editorial,Paid Family Leave, WASH. POST, Dec. 6, 1999, at A26 [hereinafter Paid Family Leave] (noting that Clinton’s proposal would benefit the lower-income women who were
Prior to Clinton’s proposal, four states (Washington, Vermont, Massachusetts and Maryland) sought federal approval for precisely the same purpose. These states aside, the vast majority of comments concerning Clinton’s unemployment insurance proposal were not positive. “His action was angrily denounced by the U.S. Chamber of Commerce and other groups as a reckless ‘raid’ on unemployment funds that will create a huge new welfare entitlement.”

While there are some states that do not consider this new welfare entitlement to be a problem, several states fear that if there was a recession, workers on maternity leave would deplete their unemployment funds and the consequences would be disastrous. Massachusetts, a state that supported Clinton’s proposal, should heed these warnings since, “in the last recession, the combination of high benefits and massive layoffs threw the Massachusetts fund deeply into the red and forced the state to borrow several hundred million dollars from the federal government.” Furthermore, Clinton’s proposal would be “an ill-advised exception to Labor Department rules that generally

122. See Melissa Healy, Clinton Seeks to Expand Family-Leave Benefits, L.A. TIMES, Dec. 1, 1999, at A16. Clinton modeled his proposal after two Massachusetts bills, one in the House and one in the Senate, which “would offer workers on leave 50 percent of their weekly wage, capping compensation at about 57.5 percent of the average weekly wage in the state.” Lewis, Clinton, supra note 118, at A1. The cap would have been around $400 per week, according to figures taken in 1998. See id.


124. Sammon, supra note 116, at A1. According to Deanna Gelak, executive director of Family Medical Leave Act Corrections Coalition, “[Clinton has] overstepped his bounds. He’s legislating through the executive branch, and Congress does have the power to stop that.” Id.

125. See Paid Family Leave, supra note 121, at A26 (discussing how the unemployment fund cannot support Clinton’s proposal). “In the last recession, fewer than a third of unemployed workers were covered. To graft new obligations onto a system that can’t—or doesn’t—fulfill the obligations it already has may not make much sense.” Id. “Some states, especially those with the potential for high unemployment, may be reticent to adopt such a proposal since it could stress limited funds and face opposition from the business sector[.]” Healy, supra note 122, at A16; see also Sanah Kellogg, Engler Opposes Parental Leave, GRAND RAPIDS PRESS, Dec. 30, 1999, at A1 (noting that “[m]ost states are balking at the proposal, fearing it will bankrupt businesses”).

126. Editorial, Keep Jobless Fund for the Jobless, BOSTON HERALD, Dec. 5, 1999, at 24, available at 1999 WL 3415471. “Thanks to heavy taxes on payrolls, that debt has been repaid and the fund restored to a healthy $1.8 billion.” Id.
require workers to be available to work during the period they are receiving unemployment benefits.\footnote{127} This would not be the case with the workers that would be on parental leave.

Regardless, Clinton’s proposal did not pass. However, if Clinton’s proposal had been implemented, “states would have [had] the option but would not [have been] required, to use the new rules.”\footnote{128} As discussed below, some states, on their own, are considering using unemployment funds to pay for parental leaves, while other states have gone one step further, passing legislation extending far beyond the reach of the FMLA.\footnote{129}

\textbf{C. Options From the States and Domestic Companies}

Many states are currently considering whether family and medical leave should cover a greater number of people or grant partial pay.\footnote{130} For instance, Texas, Arizona, Massachusetts, Nebraska, and New Jersey have introduced legislation that would allow for an average of $214 per week for up to twelve weeks of parental leave, using state unemployment funds.\footnote{131} Alternatively, Washington State legislators are considering proposals to provide $250 a week, with a cap at five weeks for individuals taking FMLA leave.\footnote{132} The funding would be provided by a two-cent per hour payroll tax shared by employers and employees.\footnote{133}

However, in some states, such as California, “where some form of paid disability leave already exists, there is far less likelihood that lawmakers would embrace the unusual use of the unemployment insurance fund.”\footnote{134} California is one of the most progressive states when

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\item \footnote{127} Bad Answer, supra note 123, at 24.
\item \footnote{128} Plan Would Pay, supra note 117, at A22.
\item \footnote{129} See Dr. Wade F. Horn, Dad May be Eligible for Leave at Baby’s Birth, WASH. TIMES, Sept. 21, 1999, at E2 ("Fifteen states have laws that apply to employers with fewer than 50 employees, and eight states provide for longer leave periods.").
\item \footnote{130} See Holland, supra note 1, at F1.
\item \footnote{131} See American Health Line, Family Leave: Congress May Expand To Business’ Chagrin (Feb. 6, 2001), available at http://www.americanhealthline.com (on file with the Hofstra Labor & Employment Law Journal). Pennsylvania and Maryland are considering similar measures. See id.
\item \footnote{132} See id.
\item \footnote{133} See id.
\item \footnote{134} Healy, Clinton, supra note 122, at A16. “In California, a disability fund paid for with a tax levied on employers last year paid 625,000 new mothers up to $336 per week for medical leave following the birth of a child, some for as long as a year.” Id. Furthermore, in San Francisco, there was an attempt to establish a proposal to grant women one year of paid maternity leave to care for their children. See Jason B. Johnson, Ammiano Has Idea for New Mothers, S.F. CHRON., Mar. 3, 1999, at A14, available at 1999 WL 2681330. The proposal “drew praise . . . from several women’s advocacy groups. But the Chamber of Commerce threw cold water on the idea[.]” Id.
\end{itemize}
it comes to leave legislation. There are three separate laws governing family or pregnancy leave with which California employers must comply. Furthermore, other states, such as Hawaii, use a system based upon the Temporary Disability Insurance Law, a mandatory law that applies to pregnant workers. This type of coverage is employee-based and allows for the employee to receive approximately fifty-eight percent of their average weekly salary. Conversely, Oregon's House of Representatives passed a bill that gives more flexibility to employers by allowing them to shift returning workers into jobs with "substantially similar" duties, pay and other conditions. However, this bill has met with extensive criticism rather than the expected support. California, Hawaii, and Oregon are some of the most legislatively advanced states when it comes to family and medical leave; other states do not necessarily have the financial stability to implement some of these expensive policies.

Due to the high costs that could result when an employee takes maternity leave, employers have looked toward plans that could shorten the length of such leaves, bringing the employee back to work more quickly. Some states have considered implementing a system that will allow employees to take advantage of job-sharing and flex-time to help alleviate the rigors of a maternity leave. Flex-time and job-sharing can lower childcare costs for two income families by allowing parents to balance their work schedules, permitting one of them to always remain home with the child. In Idaho, employers have begun, although slowly,

136. See DeBare, supra note 83, at B1. California employers must comply with the FMLA, the California Family Rights Act ("CFRA") and the Pregnancy Disability Leave ("PDL"). See id. (comparing the three acts that require compliance, distinguishing which employees and employers are covered under each, how much time off each Act provides, as well as other aspects).
137. See Jason S. Feinberg, M.D., Pregnant Workers: A Physician's Guide to Assessing Safe Employment, 168 W. J. OF MED. 86, 87 (1998). In Hawaii, $0.80 per every $100.00 of wages is set aside for reimbursement benefits. See id. The cost of $0.80 is usually shared between the employer and employee. See id.
138. See id. The leave payment cannot exceed the maximum weekly benefit, which is determined each year by the Disability Compensation Division. See id.
140. See id. (noting that since it is feared that people would be more easily removed from a job they liked to a job they did not, the bill has been described as "a new club to wield over workers . . . to discourage them from taking a leave [and as] 'a wolf in sheep's clothing'.").
142. See id.
to accept these types of programs that enable working couples to juggle childcare.143

Another solution to help working parents deal with their needs is the creation of on-site childcare centers to aid in the raising of young children.144 In New Jersey, Johnson & Johnson has four on-site childcare centers and plans to educate new mothers about breast-feeding and offer breast-feeding rooms.145 The success of these childcare centers is exemplified by Lancaster Labs, a Pennsylvania based business, which, since the creation of its childcare center, has had a forty-four percent increase in the number of mothers returning to work.146 UNUM, a nationwide insurance company, offers one of the most comprehensive systems, combining an on-site childcare center with flex-time and job-sharing.147 "Since most of this insurance company's sales force is located in field offices around the country, most salespeople cannot take advantage of UNUM's on-site child care center. But managers are encouraged to help employees create flexible schedules suited to their needs."148 Although these types of systems may be too costly for some businesses, they prove that success in these situations can only be attained through the common efforts of both employees and employers.

States have further tried to alleviate some of the pressures of maternity leave by permitting the combination of maternity leave with other forms of leave to lengthen the leave or, in some cases, make it paid. However, under the FMLA, combining leave programs to exceed twelve weeks is not permitted.149 In California, time off under the California Family Rights Act ("CFRA") or the Pregnancy Disability Leave ("PDL") is counted toward an employee's twelve-week FMLA limit.150 Therefore, if an employee has been on pregnancy disability leave for four months, she is not entitled to twelve more weeks under the FMLA.151 Conversely, leave time under both the CFRA and the PDL can

143. See id.
144. See Lawlor, supra note 16, at 51.
145. See id.
146. See id. ("Before the center was built, 50 percent of women who got pregnant didn't return to work after they gave birth. Currently, 94 percent of women who give birth return to their job.").
147. See id.
148. Id. UNUM's employees are accounted for on an electronic bulletin board that allows the managers to access information on the different flexible schedules that have been instituted in other departments. See id. The employees are also given one paid day a year to attend a parent-teacher conference. See id.
149. See 29 U.S.C. § 2612(a)(1); see also DeBare, supra note 83, at B1.
150. See DeBare, supra note 83, at B1.
151. See id.
be combined to extend the total leave period.\textsuperscript{152}

In Wisconsin, the Wisconsin Family and Medical Leave Act ("WFMLA") allows employees to "substitute, for portions of family leave or medical leave, paid or unpaid leave of any other type provided by the employer."\textsuperscript{153} Although under federal law such substitutions are not allowed, Wisconsin, along with several other states, has recognized that, "Congress clearly indicated that [the FMLA's] passage was intended to insulate State family and medical leave provisions from all federal preemption."\textsuperscript{154} Allowing for certain substitutions permits employees to take advantage of the opportunity to pay for childcare costs while on maternity leave. However, since many states and domestic employers cannot afford to implement some of these maternity programs, it is useful to analyze foreign models of leave legislation.

III. LOOKING ABROAD

A. Learning From a Worldwide Model

Since "[a]n accurate method for predicting the likely consequences of laws has not been developed . . . it is convenient . . . to look to the experiences of foreign models."\textsuperscript{155} In over one hundred countries, some form of parental leave policy has been enacted, with most assuring at least two to three months of paid job absences.\textsuperscript{156} Legislated maternity leave packages have a long history throughout Europe. Unlike the United States, which first enacted legislation mandating unpaid leave in 1993, government mandated maternity benefits in Europe can be traced to 1891 when the German Imperial Industrial Code set maximum work hours and prohibited women within four weeks of childbirth from employment.\textsuperscript{157} The policy behind such leave provisions is to allow

\footnotesize{152. See id.
157. See id. at 290. European models provide a useful tool to discern possible solutions for the issues faced when legislating maternity benefits. However, they also demonstrate the difficulty in implementing such complex social legislation. "Europe has been grappling with the question of whether extensive social protections inhibit economic flexibility and are a cause of low rates of}
workers to balance their work and family responsibilities without being penalized in the workplace.\textsuperscript{158}

In the United States, those who support mandatory benefits, such as maternity leave, often note that this country is the only industrialized nation that does not guarantee a type of parental leave for all workers.\textsuperscript{159} These supporters look to other countries, such as Sweden and Finland, which are among the most benevolent, allowing as much as thirty-eight weeks and thirty-five weeks paid leave, respectively.\textsuperscript{160} Moreover, according to the International Labour Organization in Geneva, of the countries that guarantee paid maternity leave for working women "many pay new mothers from a social security fund rather than have women assume the cost of leaving the workplace temporarily[.]"\textsuperscript{161} For instance, utilizing its social security fund, Hungary provides a minimum of six months paid leave.\textsuperscript{162} Similarly, Brazil offers up to four months maternity leave completely covered by social security.\textsuperscript{163} Even third world nations, such as Ghana and Haiti, have implemented paid leave programs.\textsuperscript{164}

Around the world, proponents argue that parental leave operates to improve the position of women in the workplace and results in healthier children.\textsuperscript{165} The parental leave statutes of some countries demonstrate that maternity leave is justified, in part, by the needs of children. For example, Austria, Germany, Norway, Poland, and Luxembourg all lengthen maternity leave if the baby is born prematurely or if the mother has a multiple birth.\textsuperscript{166} Moreover, Poland has implemented additional measures lengthening maternity leave when another child exists in the recent employment growth" leaving the effect of parental mandates unclear. Id. at 287 (citation omitted).

158. Schuchmann, supra note 155, at 332.
160. See id. at 604. Furthermore, "[i]n Finland . . . pregnant female workers are entitled to a special, paid maternity leave if the employer cannot ensure that the workplace meets a minimum level of safety for the fetus." Ruth Colker, Pregnancy, Parenting, and Capitalism, 58 OHIO ST. L.J. 61, 76-77 (1997).
162. See id.
163. See id.
165. See Ruhm, supra note 156, at 285.
These countries recognize the importance of the first two years of a child's life, and that it is imperative for a parent to be there to nurture the child's intellectual and emotional development.168

"Opponents counter that the mandates, by restricting voluntary exchange between workers and employers, reduce economic efficiency and may have a particularly adverse effect on women.”169 Economists maintain that mandating parental leave in a competitive labor market will result in lower wages being paid to the groups most likely to take the leave,170 thus supporting the implication that “females of childbearing age will continue to obtain lower and possibly reduced compensation.”171

As mentioned above, critics of the FMLA argue that one of the main causes for discontent is the fact that the FMLA provides for unpaid leave. However, whether the mandated leave is paid or unpaid is just part of the problem. Trying to legislate government mandated leave laws can cause political backlash and, as demonstrated below with a random sampling of four countries, lead to an increase in discrimination against women in the workforce.172

Although generous leave policies have economic and social benefits for families with very young children, they can create new forms of gender inequality. The total percentage of paid parental leave days taken by fathers amounts to less than 10 percent across the European welfare states.... Because leaves are taken overwhelmingly by mothers, many women pay a price for their long absences from the labor market in the form of lost human capital and career advancement.173

167. See id. at 128.
168. See Lewis, U.S., supra note 161, at 4F; see also Carpenter, supra note 164, at A-9 (noting that experts have found that the best thing for children would be for parents to remain at home for at least the first four to six months, if not the entire first year).
169. Ruhm, supra note 156, at 285. "In a competitive spot labor market with perfect information and no externalities, mandated benefits such as parental leave reduce economic efficiency by limiting the ability of employers and workers to voluntarily select the optimal compensation package." Id. at 288.
170. See id.
171. Id. ("Entitlements that allow substantial time off work may cause employers to limit women to jobs where absences are least costly, thereby increasing occupational segregation, as Stoiber[1990] suggests has occurred in Sweden.").
172. See generally Ken Guggengheim, Pregnant Job Seekers Need Not Apply, SALT LAKE TRIB., Aug. 17, 1999, at A3 (discussing the political backlash and discrimination against women in Mexico).

http://scholarlycommons.law.hofstra.edu/hlelj/vol18/iss2/12
B. A Sampling of Countries

1. Mexico

Mexico is a prime example of a country that legislates maternity benefits and yet, women are still given very little, if any, actual protection. Pregnant workers in Mexico are given much less protection from discrimination than their counterparts in other countries. Mexico’s maternity leave policy allows female employees to take twelve weeks paid leave around the birth of their child, but is “deceptively over-inclusive.” "The Mexican system provides for greater maternity benefits, but because a great burden is placed on the employer, the Mexican government often defers to the employer and does not enforce its laws.” Since they may be accountable for the cost of maternity leave, Mexican employers believe that if they are going to hire a female employee, they have the right to test her for pregnancy. This is done to determine if she is going to take maternity leave immediately upon employment. If the female employee is planning to take such leave, employers maintain they also have the right to deny employment.

Although technically illegal, pregnancy testing by employers is an all too common practice with violators fearing no repercussions. The United States and Canada have tried to curtail Mexico’s behavior in accord with the North American Agreement on Labor Cooperation, but have been unsuccessful thus far. It is distressing, but most Mexican workers are not in the habit of protecting their privacy rights and are even less likely to seek any remedy through legal methods.

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175. Laurie J. Bremer, Pregnancy Discrimination in Mexico’s Maquiladora System: Mexico’s Violation of its Obligations Under NAFTA and the NAALC, 5 NAFTA: L & BUS. REV. OF THE AMERICAS 567, 579, 582 (1999). If a woman has not worked for the mandated thirty week time period, the burden of bearing the cost of maternity leave shifts from the government to the employer. See id. at 579.
176. Id. at 582.
177. See Guggengheim, supra note 172, at A3.
178. See id.
179. See id.
180. See id. Pregnancy testing is a hiring method used by a majority of Mexican employers for both factory and executive positions. See id. In Mexico, pregnancy testing is so prevalent that, “[w]hen Aida Flores Rosales applied for a job as an economist at a Mexico City bank, she had to do more than show she was qualified: She had to prove she wasn’t pregnant.” Id.
181. See generally Bremer, supra note 175 (discussing the steps taken by the United States and Canada to prevent Mexican employers from testing for pregnancy).
182. See Guggengheim, supra 172, at A3.
Tapia, president of Gender Equity, stated that: "'There is a feeling of, "I have work, therefore I am fortunate. They are doing me a favor by giving me a job.'" Consequently, as long as apathy on the part of the Mexican government continues, Mexican employers will continue to test for pregnancy. Thus, while the United States is not the only country that does not offer sufficient parental leave to all workers, there are other countries with standards that are far worse.

2. Japan

Japan is also struggling with how to improve conditions for working mothers. "The continuing precipitous decline in Japan's birthrate... has long troubled planners in both the government and the private sector." In response, Prime Minister Yoshiro Mori proposed the creation of a government panel to develop a plan to assist working women throughout birth and childcare. To achieve this goal, the panel would consider proposals to provide government funded childbirth allowances, interest free loans to help meet childbirth costs, and encourage employers to grant longer maternity leaves. While this panel is innovative on its face, critics have concerns. "What the [P]rime [M]inister seems to be overlooking is that one of the major problems facing working women in [Japan] is the pressure they are under to quit their jobs after they marry or give birth."

Since the mid-1980s, the Japanese government has been attempting to curtail discrimination against women. Historically, however, many obstacles, primarily cultural, have impeded the process of integrating women into the workplace. For instance, Japan's Equal Employment Opportunity Law, effective April 1986, mandated equal opportunity and

183. Id.
184. See generally Loane, supra note 174, at 11 (acknowledging that the United States, Australia, and New Zealand are three of several countries with no law making paid maternity leave mandatory).
186. See id.
187. See id.
188. Id.
190. See id. These obstacles stem from the misperception of Japanese women, who are typically stereotyped as quiet, obedient, and preoccupied with their family. See id.
treatment in the job market for both men and women. Unfortunately, the provisions of the law were not mandatory and no enforcement provisions were provided, resulting in minimal effectiveness.

However, necessary changes to Japan’s fifty-year-old Labor Standards Law led to some improvements in childcare and family leave laws. The revised labor law prohibited women with family obligations from working graveyard shifts and required all firms employing thirty or more people to provide leave for women and men with a newborn.

“Although overt sexual harassment at the workplace has been reduced and opportunities for promotion for women have modestly increased since revisions in the Equal Employment Opportunity Law went into effect in 1999, the law still lacks real teeth.” As long as women are seen as the primary caregivers for children, they will continue to face obstacles to long-term employment.

3. Australia

The state of parental leave in Australia is characterized best by Chris Puplick, president of the NSW Anti-Discrimination Board, who said “[d]espite more than 20 years of anti-discrimination legislation and jurisprudence, it is as bad as it ever was . . . . Very often, it’s those employers who talk strongly about family values that are the ones who, when confronted with pregnancy issues in the workplace, act like Neanderthals.” In Australia, twenty-five percent of men and almost fifty percent of women have said that giving birth has a negative effect on a woman’s corporate image. This impact is even more apparent in the attitudes of employers toward women in the workforce. “They’ll be tolerant with leave like study, army reserve or sporting leave, but when it

191. See id. This law applied equality in recruitment and hiring, continuing for the duration of employment. See id. Consequently, the number of female employees expanded from 15.8 million in 1986 to 21.3 million by 1997. See id.

192. See id.

193. See id.

194. See Takahashi, supra note 189. In 1995, further revisions were passed to make family care leave applicable to all employers. See id.

195. Behind the Quest, supra note 185.

196. See Takahashi, supra note 189.

197. Behind the Quest, supra note 185.

198. Loane, supra note 174, at 11.

199. See id.

200. See id. (“Australian employers, particularly those in medium-sized and small business, still view women who become pregnant as trouble.”).
comes to pregnancy, they can be dreadfully mean.\textsuperscript{201}

"[T]here are still employers... who not only absolutely refuse to
consider offering part-time work after maternity leave, but [fire] women
for getting pregnant."\textsuperscript{202} A recent study revealed that women lost
approximately $336,000 in earnings when they took maternity leave, and
that both their career paths and retirement income were adversely
affected.\textsuperscript{203} Furthermore, it has been estimated that pregnancy
complaints, which have been filed under Australia’s sex discrimination
law, are only the “tip of the iceberg” and that ignorance about the need
for parental leave is at a high level among employers and workers.\textsuperscript{204}
Unfortunately, while some type of parental leave often covers public-
sector employees, the overwhelming majority of women are not
receiving any such coverage.\textsuperscript{205} “While almost 20 per cent [sic] of
public-sector employers now have family-friendly policies in place, only
5 per cent [sic] of those in the manufacturing sector have the same.”\textsuperscript{206}

There is anti-discrimination legislation in effect, but a report has
found a blatant disregard for it, as well as “widespread ignorance of
workplace regulations concerning pregnancy.”\textsuperscript{207} This blatant disregard
has led to “uncovered ‘horror stories’ such as women miscarrying
because they were not allowed to sit down at work, men [fired] for
attending their babies’ births, [and] women harassed about their
appearance or removed from front-desk work.”\textsuperscript{208}

Similar to the United States, Australia is attempting to repair the
problems surrounding pregnancy in the workforce. In the summer of 1999, Australia launched the Human Rights and Equal Opportunity Commission in an attempt to better educate employees about their rights. This Commission is seeking support from employers who understand the importance of an employee’s fundamental right to a decent parental leave program. Acknowledging the importance of educating employees is a fundamental step in the right direction.

Moreover, employers are starting to realize the need for flexibility in workplace policies and that “[t]reated with dignity and respect, a worker is likely to remain with a company, providing further years of valuable service.” Some companies have led the way by providing flexible workplaces, allowing for a gradual transition back to work, incorporating part-time work and telecommuting. In Australia, “[t]he notion of separate spheres of life - home and work - which are occupied by mutually exclusive groups of people (women and men) no longer holds true.” However, and possibly most distressing, the inability of female workers to take full advantage of maternity leave has resulted in Australia’s lowest fertility rate ever, at 1.7 births per woman. Although Australia has taken several steps in the right direction, the pace is much too slow.

4. England

England has long been known as a country with enlightened social policies and programs. Yet, even in a country where many employers

209. See id. The Commission is responsible for educating the Australian population about forty-six recommendations, covering issues such as breast-feeding options and the extension of unpaid maternity leave to casual workers at their job for at least a year. See id.

210. See Approach, supra note 204, at 8. While there are still many employers who clearly resent the few weeks of maternity leave which must be granted to a new mother, and who bridle at the small accommodations which must be made for a female worker in the later stages of pregnancy or new motherhood, there are others who appreciate that these adjustments are crucial not only to the career paths of a significant proportion of the workforce, but ultimately benefit the individual workplace.

Id.

211. Id.

212. Loane, supra note 174, at 11 (“[T]he accountancy firm Ernst and Young has a database listing different work and family practices all over the world, which employees can access to choose a plan to suit them.”).

213. Approach, supra note 204, at 8.

214. See Lawson, supra note 203, at 5.

215. See Lewis, U.S., supra note 161, at 4F (discussing how American Patricia Welsby, while living in England, was pleasantly surprised when she discovered her employer granted her request
already offer generous maternity packages. Parliament’s attempt to implement family-friendly legislation was met with severe backlash and “split the world of work into two.” Similar to Mexico, Japan, and Australia, England faced an increase in discrimination against women of childbearing age when it tried to implement a European Union Council Directive.

On December 15, 1999, new provisions relating to maternity leave went into effect in England. The proposed “family friendly package of measures” submitted to Parliament included the right to thirteen weeks of unpaid leave for both mothers and fathers during the first five years of each of their children’s lives. Additionally, traditional paid maternity leave would be extended from fourteen to eighteen weeks. Unfortunately, like the FMLA, the British Family Friendly Package encountered an unfavorable response.

The same issues originally debated before Congress in the early 1990s were echoed in the debates surrounding the passage of the British Family Friendly Package. Those who believe maternity and childcare leaves are “essentials in a civilized society” feared many low paid workers would be unable to take unpaid leave. Advocates urged the government to introduce paid paternity leave and requested funding for low paid workers who cannot afford to take advantage of parental leave. The concerns of small businesses were also considered. The Trade and Industry Secretary established a family commission to discuss more flexible provisions for smaller companies. Additionally, the

for nine months maternity leave with pay).

See id.


Levene, supra note 217.

See id.


See Levene, supra note 217.

See id.; see also Kate Hilpern, How Parental Rights Could Go Very Wrong, INDEPENDENT, Sept. 1, 1999, at 12, available at 1999 WL 2126511 (“This could discriminate against low-paid parents who may have to sit in envy watching wealthier colleagues take advantage of the law.”).


See id.
British Chambers of Commerce urged the government to compensate small businesses obligated to hire temporary staff for individuals on leave under the family-friendly legislation.227

The debates surrounding the passage of these family-friendly laws were not limited to economic theory or fiscal liability. Some believed that the legislation carried with it far reaching social ramifications.228 Although some English companies already give generous leave packages to employees,229 it is feared that such lucrative packages will be lost if the legislation is enforced.230 Furthermore, the legislation poses a threat to job security because the law may make women less employable.231 As the legislation is drafted, it gives employers incentive not to employ women of childbearing age.232 While the new rules permit parental leave and are intended to encourage fathers to take time off, a comparison with the effect of implementing similar legislation in Germany shows that it is women who overwhelmingly take advantage of the leave program provided.233 More importantly, British research shows that thirty-five percent of women intend to use these new rights, as compared to only two percent of men.234

Women in favor of expanding maternity rights already face discrimination throughout the United Kingdom.235 While the Judiciary has reacted in a pro-maternity pattern,236 which puts increasing pressure on companies to respect the rights of working parents, “owners of smaller companies could well establish an unofficial ban on employing women who are likely to have children.”237 In fact, a survey done by the Institute of Directors found that forty-five percent of companies would

228. See Lewis, U.S., supra note 161, at 4F; Hilpem, supra note 224, at 12.
229. See Lewis, U.S., supra note 161, at 4F.
230. See Hilpem, supra note 224, at 12 ("By bringing set-in-stone regulations on parental leave into such companies, these kinds of schemes—which are more generous than the Government's—may have to be thrown out to make room for the new law.").
231. See id.
232. See Alexandra Frean, Parental Break May Cut Jobs for Women, TIMES, July 22, 1999, at 7. It is feared that employers will be even more reluctant to hire women of childbearing age "prefer[ring] to invest in capital and machinery." Id.
233. See id.
234. See Levene, supra note 217.
236. See generally Levene, supra note 217 (recounting the Judiciary's response to cases involving unfair dismissal and sex discrimination).
237. Levene, supra note 217.
hesitate before hiring a woman who may demand maternity rights, and that only one percent are in favor of hiring women who might demand those rights. Despite a long history of legislating in favor of maternity leave, England is still as far from a viable solution as the United States.

IV. AN OVERALL SOLUTION

Although much can be learned from foreign models of maternity leave policy, "they cannot be used as a [sole] basis for evaluating whether the American FMLA will be successful in accomplishing its purposes." The foundation of American society is vastly different from that of many other countries; therefore, we should not base our legislation on foreign models. At the same time, we should learn from their mistakes. Maternity legislation existed in Europe as early as 1891, yet problems still exist. Although the United States is beyond the discrimination that plagues Mexico and the historical and cultural problems of Japan, this country can learn from these nations.

A system of paying for maternity leave from a social security fund, as done in Hungary and Brazil, could prove to be a beneficial proposition. Furthermore, as done in Australia, recognizing the importance of maternity leave education would help a pregnant American worker make the best choice for her individual situation. However, because the United States must be cautious when looking at other countries' maternity leave policies, Congress should use state, domestic company, and citizen proposals as the basis for its legislation.

According to Donna Lenhoff of the National Partnership for Women & Families, "[the FMLA] isn't fair because some families are in

238. See id. Ruth Lea, Institute Director head of policy notes that the "45% who admitted they might discriminate on recruit-ment [sic] may just be the honest ones. The real total might be greater. Female employers were just as likely to argue against employing women who might have children."

239. Schuchmann, supra note 155, at 333 (noting the three essential criteria to be considered when using European legislation to analyze American law: the social ideologies of the countries, the purposes of the legislation, and the coverage of the law).

240. See id. An analysis of the aforementioned criteria reveals that the United States cannot look to a country like Germany "without also considering those differences and their significance."

241. See supra text accompanying note 157.

242. See supra notes 174-84 and accompanying text.

243. See supra notes 185-97 and accompanying text.

244. See supra text accompanying notes 162-63.

245. See supra notes 209-10 and accompanying text.
a much better position to save up for leaves than others are." Congress should not solely consider whether an employer can afford to lose an employee on maternity leave. Congress must also consider whether an employee can afford the costs incurred during an unpaid leave so as to be able to take advantage of it. However, unpaid time off (which may last up to twelve weeks), maintenance of health insurance, and the mandate to keep the position open undoubtedly create costs for the employers. On the other hand, employers must realize that they may also reap benefits by enabling new parents to take time off. Morale will increase along with productivity.

Funding appears to be the biggest concern of both employers who must pay for an employee on leave and employees who are forced to go without a paycheck when their cost of living has just increased... severely. While the United States government, as well as other governments around the world, has investigated numerous solutions, it just may not be possible to establish one standard maternity leave policy. As evidenced by the prosperity at UNUM insurance company, maternity leave policies can only be successful when individual employers and employees work together. When legislating, the government needs to recognize the fact that only these individuals know what is best for them. Perhaps strengthening the individual right to contract between employers and employees, while not infringing on unions and collective bargaining agreements, is a preliminary step. England's Equal Opportunities Commission states that "'[a] willingness to use good will on both sides can usually result in a mutually acceptable solution. Being flexible increases commitment and loyalty from other employees as well.'"

The government needs to create a Family Friendly Commission, similar to the education commission in Australia and the small business commission in England. This Commission should operate to both investigate the actual impact the FMLA will have on small businesses and suggest possible 'flexible' alternatives. It should further investigate possible solutions for both small companies struggling to meet the federal mandates and individuals who want to take time off, but cannot do so.

Alternatively, the government could investigate the possibility of establishing an application process for both employers and employees

246. DeBare, supra note 83, at B1.
247. See supra notes 147-48 and accompanying text.
248. Levene, supra note 217.
who would like to grant/take leave, but simply do not have the resources. Funding could be provided by donations through federal and state taxes. Individuals wishing to support the right to paid maternity leave could opt to contribute a percentage of their yearly salary. Those who choose not to contribute would be excluded from receiving maternity leave funds. Those who do contribute, but never take advantage of the paid leave, would be entitled to some type of reimbursement. As a sign of intent to alleviate the situation, the government could follow the lead of Wisconsin and allow for the combination of paid and unpaid leave programs.  

The government will only have an accurate idea of the problems surrounding the FMLA after these studies are completed. Without a clear idea of the problems, the family leave debates will continue in rhetoric and parents will be forced to face extremely difficult choices while their children's welfare continues to suffer.

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