

3-5-2013

# A Step in the Right Direction: The Family and Medical Leave Act of 1993 at 20

Joanna L. Grossman

*Maurice A. Deane School of Law at Hofstra University*

Follow this and additional works at: [http://scholarlycommons.law.hofstra.edu/faculty\\_scholarship](http://scholarlycommons.law.hofstra.edu/faculty_scholarship)

---

## Recommended Citation

Joanna L. Grossman, *A Step in the Right Direction: The Family and Medical Leave Act of 1993 at 20* VERDICT (2013)

Available at: [http://scholarlycommons.law.hofstra.edu/faculty\\_scholarship/968](http://scholarlycommons.law.hofstra.edu/faculty_scholarship/968)

This Article is brought to you for free and open access by Scholarly Commons at Hofstra Law. It has been accepted for inclusion in Hofstra Law Faculty Scholarship by an authorized administrator of Scholarly Commons at Hofstra Law. For more information, please contact [lawcls@hofstra.edu](mailto:lawcls@hofstra.edu).

# Verdict

March 5, 2013

Joanna L. Grossman

## **A Step in the Right Direction: The Family and Medical Leave Act of 1993 at 20**



Twenty years ago, Congress passed the Family and Medical Leave Act (FMLA), the first federal law to guarantee (some) workers unpaid leave when they are forced to take time off to care for themselves or close relatives when seriously ill, or to care for a newly-born or adopted child. The bill that ultimately became law had been fought over for eight years and, during that time, had suffered a series of withering cuts until it was anemic enough to gain majority support in Congress.

As I will discuss in this column, the FMLA added important protections for eligible employees, but fell short of its aspiration to force employers to provide at least minimal accommodations for workers' caretaking obligations and serious illnesses. Many workers are not eligible for FMLA leave, and those who are often cannot afford to take it. And, although it provides men and women the same opportunity to take caretaking or parenting leave, it has done little to alter the disproportionate burden of caretaking that falls on women in most families. Nor did it improve the lives of workers enough to rescue the U.S. from its dismal ranking among industrialized countries when it comes to workers' medical and caretaking leave.

After twenty years, it's time to expand the FMLA's protections to facilitate broader access to affordable leave in times of need. The current system has proved helpful in that it has established a norm that employees should not risk job loss due to leave necessitated by short-term health crises or the new obligations of parenting. It has also proven that the wildly exaggerated fears about the burden on employers of the cost of accommodating such leave, which drove much of the eight-year debate before the FMLA finally passed, were just that—wildly exaggerated. Employers report that they can administer FMLA leave with little cost or trouble. It's now time to take the next step.

### **The FMLA: What it Does and Doesn't Offer**

The FMLA gives eligible employees the right to twelve weeks of unpaid leave per year such leave is needed to care for a newborn or newly-adopted child, to care for a seriously ill family member, or to attend to one's own serious health condition. To be eligible, an employee must have worked at least 1250 hours in the previous year for an employer who employs at least 50 workers within a seventy-five-mile radius of where the employee requesting leave reports to work.

What does it mean to have a right to unpaid leave? Fundamentally, the FMLA is a job-security law. A person who is allowed FMLA leave has the right to be restored to the same position following the period of leave, as long as the employer would not otherwise have fired the employee or eliminated the position during that period. The leave-taking employee also has the right to the continuation of benefits throughout the leave, and the right not to be retaliated against for taking leave.

The wrongful denial of FMLA leave or retaliation against a leave-taker can be challenged through a private lawsuit or through an administrative action by the Department of Labor. Two lawsuits over the constitutionality of allowing private lawsuits against state employers have reached the Supreme Court. In one, *Nevada Department of Human Resources v. Hibbs* (<http://supreme.justia.com/cases/federal/us/538/721/>) (2003), the Court held that state employees could sue to enforce the family-care (sick relative) provision of the Act.

But in *Coleman v. Court of Appeals of Maryland* (<http://supreme.justia.com/cases/federal/us/307/433/>), the Court held that the states' sovereign immunity under the Eleventh Amendment prevented lawsuits against them over the self-care provision.

### **Where the FMLA Falls Short: Coverage, Pay, and Gender Equality**

When the FMLA was signed on February 5, 1993, it was read as a symbol of Washington's change in power, for it was the first bill introduced into the House of Representatives in the session that began as Bill Clinton was inaugurated to the presidency. It was heralded as proof of the promised "end of gridlock," and as an endorsement of Clinton's "People First" campaign platform.

The Act may indeed have been emblematic of those things. But a significant factor in its easy passage through Congress was how little it offered employees, especially as compared with its earlier versions, which had suffered a variety of fates—including failure in either or both houses of Congress or, twice, a presidential veto. The enacted version was a compromise that reduced the number of weeks of leave, eliminated the possibility of taking full-length leaves for illness and parenting during the same year, and drastically reduced the number of employers bound by the FMLA by raising the minimum size of the businesses that would be bound by the statute from those with just one employee to those with at least fifty.

The costs of this compromise are well-documented. First, the law does not protect a sufficient number of employees. Nearly forty percent of employees in the United States are not eligible for FMLA leave either (1) because the employers they work for are too small; or (2) because they do not work sufficient hours to qualify.

Second, unpaid leave does not help employees who cannot afford to go without pay. While many employees take FMLA leave, many more are eligible but do not take it. A survey administered in the year 2000 by the Department of Labor to study implementation of the FMLA found that 3.5 million employees needed FMLA leave but did not take it. The most common reason cited by employees for not taking leave was the inability to afford unpaid leave, and almost 90 percent of the non-leave-takers reported that they would have taken leave if at least some of it had been paid. Even among those who do take FMLA leave, almost none take it more than once, and most such leaves are short—more than half, in the 2000 survey, lasted fewer than ten days, and fewer than 10 percent extended past eight weeks.

Third, although the law was ostensibly designed to promote men's involvement in caretaking and parenting, it has done little to alter the leave-taking or caretaking patterns of men relative to those of women. Parenting leaves constitute a relatively small percentage of the FMLA leaves taken. In the 2000 survey, only 7.9 percent of the workers taking FMLA leave used it for pregnancy-related disability, and 18.5 percent for new parenting. Women are the majority of leave-takers, especially those aged 25-34. Men primarily take leave to attend to their own health conditions, and while they do take parenting leaves, the average paternity leave still lasts less than a week.

And for women who provide the bulk of caretaking within the family, the FMLA is insufficient to protect their needs. For example, when women experience pregnancy-related disability, they often use up their entire allotment of FMLA leave before the baby even arrives. They are then left with neither salary replacement nor job protection if they stay home for any period of time with the baby. Women also disproportionately hold part-

time jobs, which means they are less likely to be covered by the FMLA.

### Next Steps: More Employees, Longer Leaves, Some Paid Leave

The U.S. is remarkable in its failure to support workers or their families. No other high-income country fails to provide paid leave for newborn care, and most others provide lengthy periods of paid leave, and even longer periods of job protection.

In the U.S., without a legal requirement of paid leave, the vast majority of employers do not provide it. Professional workplaces like law firms and high-tech companies are the most likely to provide generous paid-leave allotments; low-wage workplaces almost never do. And lower-income workers are least likely to have savings or other resources that allow them to forego their wages for any period of time.

A small handful of states have established systems to support short-term, paid parenting leave. The state systems are set up differently, but each is modeled on a short-term disability-insurance system to which employees contribute. They provide a model for the expansion of the federal FMLA, which could use the same model to add a paid-leave component.

The easiest next step for the FMLA—one that has been proposed in Congress many times—would be simply to reduce the minimum number of employees necessary for FMLA coverage. A reduction to 25 or 15 (the number used in most federal anti-discrimination laws) would vastly expand the number of employees who work for FMLA-covered employers. And while the business lobby has—and will continue to—object to any such change, the lesson from the passage of the FMLA in 1993, and our subsequent, successful experience with its implementation, is that we shouldn't always believe critics of leave laws when they say that the sky is falling.

The Department of Labor surveys have made clear that, despite their fears, employers have had no trouble implementing the FMLA. Indeed, a majority of employers surveyed reported that they were able to implement the required leave policies with minimal cost or administrative difficulty, and with “no noticeable effect” on productivity or profitability.

Now that the evidence is in, and cutting strongly in favor of more leave, let's urge Congress to take the FMLA—and the United States—to the next level.



Joanna L. Grossman, a Justia columnist, is the Sidney and Walter Siben Distinguished Professor of Family law at Hofstra University. She is the coauthor of [Inside the Castle: Law and the Family in 20th Century America](#) (Princeton University Press 2011), co-winner of the 2011 David J. Langum, Sr. Prize for Best Book in American Legal History, and the coeditor of [Gender Equality: Dimensions of Women's Equal Citizenship](#) (Cambridge University Press 2009). Her columns focus on family law, trusts and estates, and sex discrimination.

Follow @JoannaGrossman

Posted In [Employment Law](#)

Access this column at <http://j.st/ZQJY>

---

© 2011-2014 Justia :: Verdict: Legal Analysis and Commentary from Justia ::



The opinions expressed in Verdict are those of the individual columnists and do not represent the opinions of Justia  
[Have a Happy Day!](#)