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The Cost of Retaining vs. the Cost of Retraining: An Analysis of the Family and Medical Leave Act

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NOTE

THE COST OF RETAINING VS. THE COST OF RETRAINING: AN ANALYSIS OF THE FAMILY AND MEDICAL LEAVE ACT

I. INTRODUCTION

Jim Censullo of Hudson, New Hampshire, went to the hospital to be with his wife and their infant son who was having open heart surgery. Jim’s boss called him and told him to get back to work because, “If your baby dies, at least you will still have your job.” Jim remained with his family, and saw his son through to recovery. However, when he returned to work, he found that he no longer had a job to which he could return. Scenarios like this cannot continue to occur.

On February 2, 1989 a bill was introduced into the House of Representatives entitled the “Family and Medical Leave Act.” The sponsors of the bill viewed their proposal as a solution to a difficult problem which needed to be solved. The passage of this bill should reduce the strain on employees who feel they must choose between their families and their jobs. Certainly, no employee wishes to make this choice.

In 1988, the proponents’ hopes for the bill’s passage were

1. Letter from Bill Clinton, then Governor of Arkansas, to Ann Landers, NEWSDAY, Nov. 1, 1992, at 45.
2. Id.
3. Id.
4. Id.
6. Carla Cantor, Family Leave for Employees is Debated, N.Y. TIMES, Oct. 9, 1988, §12 LI, at 1 [hereinafter Family Leave is Debated].
7. Id.
buoyed by support from then-Vice President George Bush. Mr. Bush stated that we “need to assure that women don’t have to worry about getting their jobs back after having a child or caring for a child during a serious illness . . . . We’ve got to do something about that.”

Former President Bush had done something about this: as President he repeatedly vetoed the Family and Medical Leave Bill claiming that it was not what he had in mind as a solution. (Former President Bush’s plan is discussed below.) These vetoes came from a President who once stated that he was “working with congressional leaders for a ‘compassionate’ parental leave program, which he said was the ‘right thing to do’.”

Former President Bush did not seem too concerned with providing the promised “kinder, gentler nation” when he repeatedly vetoed the Family and Medical Leave Bill. The former President had also refused offers to work out a compromise with the Democratic Congress unless it was done entirely under his terms. By definition, that would not be a compromise.

The United States needed to put all the debate behind it and install some sort of legal protection to ensure that employees would not have to choose between their families and their jobs. In 1988, 57% of all women in this country were working, three-fourths of them at full-time jobs. Seventy-one percent of these women were of childbearing age (e.g., 16–44), therefore making them likely candidates to need some type of family leave. Apparently, the leaders of this country are finally realizing that women “have become an essential part of the American work force,” and that “the nation could not thrive without their productivity [and] their brainpower.” Additionally, this country needs its women to bear the next generation of

14. Id.
16. Id.
children and ensure that those children get the love and care that they will need to thrive.” “Women have a right to insist that it not be so difficult to balance these two essential, demanding roles.” Two out of five working people, both men and women, have said that they “feel pressed, feel stretched, feel that they’re torn between their responsibilities on the job and their responsibilities at home.” Furthermore, as we witness the aging of the “baby-boomers,” we will see more workers finding the need to take care of elderly parents and/or spouses.

II. THE FAMILY AND MEDICAL LEAVE ACT OF 1993

So, what is this creation that some seem to feel will cure so many of our families’ ills? This savior is the Family and Medical Leave Act of 1993. Upon investigating the needs of today’s work force, Congress found an increase in the number of single-parent households where that lone parent works, as well as two-parent households where both parents must work. Congress further found that it is “important for the development of children and to the family unit that fathers and mothers be able to participate in early childrearing and the care of their family members who have serious health conditions.” Congress concluded that the “lack of employment policies to accommodate working parents can force individuals to choose between job security and parenting.” One stated purpose in introducing this bill was to “balance the demands of the workplace and the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity.”

In order to be covered by this Act, a person must have worked

17. Id.
18. Id.
23. FMLA § 2(a)(1).
24. FMLA § 2(a)(2).
25. FMLA § 2(a)(3).
26. FMLA § 2(b)(1).
for an employer covered by this Act for at least twelve months,\textsuperscript{27} and performed at least 1250 hours of service to such employer during the previous twelve-month period.\textsuperscript{28} For an employer to be covered by this Act, he/she must employ fifty or more employees "for each working day during each of twenty or more calendar workweeks in the current or preceding calendar year."\textsuperscript{29} The firm must employ such fifty people within seventy-five miles of each other to be covered by this Act.\textsuperscript{30} For example, a manufacturer who only employs thirty people at a plant in New York and another thirty at a plant in California would be exempt from this Act because "the total number of employees employed by that employer within seventy-five miles of [either] worksite is less than fifty."\textsuperscript{31}

An eligible employee will be entitled to twelve weeks of unpaid leave during the twelve-month period\textsuperscript{32} immediately following the birth of a child\textsuperscript{33} or the placement of an adopted or foster child with their family.\textsuperscript{34} Eligible employees are also entitled to twelve weeks during a twelve month period to care for a seriously ill immediate family member,\textsuperscript{35} or for a serious health condition which makes the employee him/herself unable to work.\textsuperscript{36} If an employee requests leave due to his/her own illness, or that of a family member, an employer may require the employee to obtain certification from a

\begin{itemize}
\item[27.] FMLA § 101(2)(A)(i).
\item[28.] FMLA § 101(2)(A)(ii). Based upon the assumption that an employee would work 50 weeks out of the year and five days per week, this section would necessitate a minimum of only five hours per day during the required 12-month period, thereby allowing for the inclusion of "part-time" workers under this title. The previous version of the bill only required an employee to work 1000 hours during the previous 12 months. Again working under the assumptions of a 50-week year and a five-day work week, this would require an employee to have worked only four hours per day. H.R. 770 at § 101(3)(A)(i).
\item[29.] FMLA § 101(4)(A)(i).
\item[30.] FMLA § 101(2)(B)(ii).
\item[31.] Id.
\item[32.] FMLA § 102(a)(1).
\item[33.] FMLA § 102(a)(1)(A).
\item[34.] FMLA § 102(a)(1)(B).
\item[35.] FMLA § 102(a)(1)(C). This section declares a spouse, son, daughter, or parent to be such an immediate family member. Id.
\item[36.] FMLA § 102(a)(1)(D). H.R. 770 at § 101(10) defined a "serious health condition" as "an illness, injury, or impairment, or physical or mental conditions which involves — inpatient care in a hospital, hospice, or residential health care facility, or continuing treatment or continuing supervision by a health care provider." H.R. 770 at § 101(10). FMLA § 101(11) defines a serious health condition as "an illness, injury, impairment or physical or mental condition which involves — inpatient care in a hospital, hospice, or residential medical-care facility, or continuing treatment by a health-care provider," deleting the ambiguous term of "continuing supervision." FMLA § 101(11).
\end{itemize}
health care provider, at the employee’s expense, to support his/her request. A health care provider's certification must include the date the serious health condition commenced, its probable duration, the appropriate medical facts, and a statement that the employee is unable to perform his/her job (if the leave is for his/her own medical condition) or that the employee is needed to care for the ill family member. If the employer has reason to doubt the validity of the employee’s certification, he/she may require the employee to obtain a second opinion from a health care provider designated or approved by the employer, and paid for by the employer. The health care provider chosen by the employer cannot be one who is regularly employed by the employer. If the second opinion differs from the original certification, the employer may require the employee to get a third opinion from someone agreed upon by the employer and employee, again at the expense of the employer. The opinion of the third health care provider is considered to be final and binding. The employer also has a right to require the employee to obtain subsequent recertification, throughout the leave time, on a reasonable basis, though it is unclear who would bear the expense for this.

Intermittent leave may be allowed under certain circumstances. Leave may not be taken intermittently in the case of the birth or adoption of a child unless agreed upon by the employee and the employer. Intermittent leave may be taken when caring for a seriously ill family member or when the employee him/herself has a serious health condition. However, such intermittent leave may only be taken when it is “medically necessary” (e.g., in case of a medical emergency). If an employee requests intermittent leave for foreseeable medical treatment for his/her own health problem, or that of an ill family member, his/her employer may require that employee to temporarily transfer to another position that would better accommo-

37. FMLA § 103(a).
38. FMLA § 103(b).
39. FMLA § 103(c)(1).
40. FMLA § 103(c)(2).
41. FMLA § 103(d)(1).
42. FMLA § 103(d)(2).
43. FMLA § 103(e).
44. See generally FMLA § 102(b)(1).
45. Id.
46. Id.
47. Id.
date such recurring leaves than his/her present position. 48

If intermittent leave, or any leave, is foreseeable, based on the fact that it will be for a planned medical treatment, the employee must provide the employer with notice of at least thirty days before the leave is to begin. 49 Such notification must include the date upon which the leave is to begin and its duration. 50 The employee is also required to make a reasonable effort to schedule treatment "so as not to disrupt unduly the operations of the employer." 51 If the treatment requires that the leave begin sooner than thirty days, the employee must provide the employer with as much advance notice as possible. 52 In the case of foreseeable leave for the birth or adoption of a child, the employee again must give the employer at least thirty days of notice. 53 If the date of the birth or adoption requires the leave to begin in less than thirty days, the employee must give the employer as much notice as he/she can. 54

While some may worry that employees will not give their employers adequate notice, that should not be a problem if employees are educated about their rights and responsibilities under this Act. In fact, with regard to pregnancies, most women tell their bosses in the first three months, thus allowing for ample planning time. 55 Therefore, one can assume that most people would attempt to inform their bosses, in a reasonable amount of time, about potential leave situations in order to make it easier on all involved.

The Act also allows for the employer and employee to agree upon a reduced amount of leave, 56 which would not reduce the total amount of leave to which the employee is entitled. 57 Therefore, an

48. FMLA § 102(b)(2)(B).
49. FMLA § 102(b)(1).
50. See FMLA §§ 102(b)(1), (e)(2)(B), 103(b)(5).
51. FMLA § 102(e)(2)(A). For example, an accountant should make a reasonable effort to schedule treatment so that he/she does not have to take the 12 weeks of February 5 to April 30 as the dates of his/her leave. See id.
52. FMLA § 102(e)(2)(B).
53. FMLA § 102(e)(1).
54. Id.
56. FMLA § 102(b).
57. Id. For example, an employer and an employee may agree that the employee will take six weeks of leave for a child's sickness, however this will not preclude the employee from later taking the other six weeks of leave he/she is entitled to. In other words, an employer may not say to an employee that he/she will allow that employee to take the six
employee could not contract out of his/her rights to leave time under this Act. Additionally, an employee may elect, or an employer may require the employee, to substitute some type of accrued paid leave for any part, or all, of the twelve-week leave period required under the bill.

If an employee has taken leave due to his/her own serious health condition, his/her employer may require the worker to obtain certification from his/her health care provider that he/she is able to return to work. Such a requirement must be a “uniformly applied practice or policy” of the employer and, therefore, cannot simply be used to harass an individual employee. An employer also cannot require such recertification if state or local law or a collective bargaining agreement prohibits it.

Although an employer is required to maintain coverage under any existing employer-provided group health plan, the employer may recover such premiums paid during the employee’s leave period under certain conditions. The employer may recover health premiums paid by the company if the employee fails to return from leave for a reason other than “the continuation, recurrence, or onset of a serious health condition that entitles the employee to leave ... or other circumstances beyond the control of the employee.” If an employee maintains that he/she is unable to return to work due to the “continuation, recurrence, or onset of [a] serious health condition,” either his/her own or that of a family member, the employer may again require certification from the employee’s (or the family member’s) health care provider.

The statute further requires the employer to restore the employee to the same position, or one with equivalent benefits, pay and other

weeks of leave only if the employee is willing to completely forego the other six weeks of leave allowed under the Act. Id.

58. See id.

59. FMLA § 102(d)(2).

60. FMLA § 104(a)(4).

61. Id. (H.R. 770 at § 104(a)(4) allowed an employer to have such a policy, but did not require that it be “uniformly applied.” H.R. 770 at § 104(a)(4)).

62. Id.

63. See generally FMLA § 104(c) (although H.R. 770 at § 104(c) required the employer to maintain the leave-taker’s health coverage, it did not provide for any restitution to be made to the employer under any circumstances. H.R. 770 at § 104(c) (1989)).

64. FMLA § 104(c)(2)(B).

65. FMLA § 104(c)(3)(A).

66. FMLA § 104(a)(1)(A).
terms and conditions of employment. However, an employer may deny such restoration to an employee who is among the highest paid 10% of his/her employees within a seventy-five mile radius if (1) the denial is "necessary to prevent substantial and grievous economic injury to the operations of the employer," and (2) the employer notifies the employee of such intent when the determination that such injury would occur is made. While this distinction may seem arbitrary, it is an important protection for employers. The highest paid 10% of employees are, in all probability, the most vital to the company, possessing important skills and/or knowledge. An employer would not likely be able to replicate these skills and/or knowledge with a temporary employee or by having other employees handle the absent employee's duties.

The statute also provides for injunctive relief against anyone violating the title, as well as monetary damages at least equal to any type of compensation denied or lost, plus interest (calculated at the prevailing market rate). If wages, salary, benefits or other compensation were not denied to the employee, the employee may receive damages equal to the amount of money lost due to the violation of this Act, such as the cost of providing care for a seriously ill family member. Such damages may be awarded up to an amount equal to twelve weeks of the employee's wages or salary. Additional liquidated damages "equal to the sum of" any wages, salary, benefits or other compensation denied or lost and the interest on such amounts may also be awarded. Attorney's fees, reasonable expert witness fees and other costs of the action may also be awarded to the plaintiff if he/she prevails.

67. FMLA § 104(a)(1)(B). The definition of "other terms and conditions of employment" has been disputed. See infra notes 127-130 and accompanying text.
68. FMLA § 104(b)(2).
69. FMLA § 104(b)(1)(A).
70. FMLA § 104(b)(1)(B).
71. FMLA § 107(d).
72. FMLA § 107(a)(1)(A)(i).
73. FMLA § 107(a)(1)(A)(ii).
74. FMLA § 107(a)(1)(A)(iii).
75. Id.
76. FMLA § 107(a)(1)(A)(ii). H.R. 770 allowed consequential damages of up to three times the employee's lost or denied wages, salary, benefits or other compensation. H.R. 770 at § 109(b)(1)(B).
77. FMLA § 107(a)(3). The only court costs to be awarded under H.R. 770 were attorney's fees which could be awarded to the prevailing party (regardless of whether the plaintiff or defendant was the prevailing party). H.R. 770 at § 109(c).
The statute is not meant to be a maximum level of leave benefits; it specifically states that it should not be construed to discourage employers from adopting more generous leave policies. The statute also states that it does not supersede any state or local laws which provide "greater employee leave rights" than the Act itself does. Similar to the Pregnancy Discrimination Act, this statute is meant to be "a floor beneath which . . . benefits may not drop — not a ceiling above which they may not rise."

III. THE PROS AND CONS OF THE FAMILY AND MEDICAL LEAVE ACT

A. Benefits

A national leave policy is necessary to ensure that this country will be able to maintain a "qualified, trained and dedicated" workforce. The requirements of the Family and Medical Leave Act should reduce the strain on people who, in fear of losing their jobs, would return to work too soon after a birth or adoption, often before they are physically or emotionally ready. Parents will be given an opportunity to recover from childbirth, begin "bonding" with the child and seek a suitable day-care facility for use when he/she does return to work.

The Act will also allow employees to take leave time to care for a seriously ill family member, thus allowing him/her to either assist

78. FMLA § 403.
79. FMLA § 401(b).
83. See Family Leave is Debated, supra note 6.
84. Webster's Ninth New Collegiate Dictionary 166 (1990). Bonding is defined as "the formation of a close personal relationship (as between a mother and child) especially through frequent or constant association." Id.
85. See Family Leave is Debated, supra note 6.
86. See FMLA § 102(a)(1)(C).
the family member in recovering, or to spend some of the “final time” with that relative before he/she passes away.

B. Costs

Many critics have claimed that this program will lead to huge costs to businesses. To the contrary, companies who have initiated their own family leave plans have found them to cut employee turnover, reduce absenteeism, lessen stress and help recruit the best workers. It has also been shown that almost all companies which have initiated programs to comply with state leave statutes have found little or no increase in costs. Employees at these companies will tend to feel as if their company respects them as a whole person, one with a life, interests and responsibilities outside of their jobs. This, in turn, will foster more loyalty to the company.

Although an employer may want to simply fire a worker and hire someone to replace him/her, the permanent replacement of a worker taking leave may not always be the most cost-effective response. It seems that many employers have not realized how expensive it is to replace someone, with all the additional hiring and training costs. A recently-released study by the Families and Work Institute in New York City found that when a leave-taker’s work is reassigned, the average cost of that leave was 32% of the employee’s annual salary (39% for managers and 28% for non-management). Replacement, however, costs a company 150% of a manager’s annual salary and 75% of a non-manager’s. The study also showed that, when companies have offered their employees parental leave, 94% of

88. See Best-Run Firms, supra note 15.
89. JAMES T. BOND ET. AL., BEYOND THE PARENTAL LEAVE DEBATE: THE IMPACT OF LAWS IN FOUR STATES 53 (1991) [hereinafter BEYOND THE PARENTAL LEAVE DEBATE]. This state parental leave study was conducted by the Families and Work Institute of New York City, and was begun in 1988. The purpose of this study was to identify the major issues in the debate over family leave and investigate how the passage of state leave laws was affecting both employees and employers in the respective states. Id.
91. See generally Parental Leave Law Not Negative, supra note 55.
92. Noble, supra note 90; see also Parental Leave Law Not Negative, supra note 55.
93. Parental Leave Law Not Negative, supra note 55.
all employees taking leave returned to work after such leave.\textsuperscript{94} Another response to the high cost argument is the estimate by the General Accounting Office that it would actually cost as little as "$4.35, or less, per employee per year; 2 cents a day" to implement this plan.\textsuperscript{95} Opponents argue that the bill will increase business costs due to the problem of filling an employee's position while he/she is gone, especially if the employee is in a management position.\textsuperscript{96} However, in the case of an employee in management, under the Act an employer may opt to deny restoration and simply hire someone to fill the position upon the manager's departure.\textsuperscript{97} With regard to non-managerial employees, most often a replacement will not necessarily be needed; the remaining workers can simply split up the tasks normally performed by the person on leave.\textsuperscript{98} Those with overlapping responsibilities should be able to "cover" for the absent employee. Some advance planning and "cross-training" may be required so that employees are able to handle others' tasks, but there should be others who are able to perform the jobs of lower-level employees.\textsuperscript{99} Even hiring a temporary employee to fill the vacancy would cost less than having to hire and completely train a new person to replace the departing worker.\textsuperscript{100} If it is determined that a temporary worker is to be hired the employer will have as long as thirty days\textsuperscript{101} to find a "temp" who has at least some of the skills and knowledge that the position requires. The employer may also opt to temporarily hire back

\textsuperscript{94} Id.
\textsuperscript{95} 136 CONG. REC. 7980 (daily ed. June 14, 1990) (statement of Sen. Dodd); see also Letter from Paul Simon, U.S. Sen. (D.-Ill.), Chairman, Senate Subcommittee on Employment and Productivity, to Ann Landers, NEWSDAY, Oct. 18, 1992, at 44 (citing a federal study which found that the cost to employers would be $5.30 per year for each covered employee).
\textsuperscript{96} See Evaluating the Desirability, supra note 87, at 349-50.
\textsuperscript{97} FMLA § 104(b)(1).
An employer may deny restoration . . . to any eligible employee if — such denial is necessary to prevent substantial and grievous economic injury to the operations of the employer; [and] the employer notifies the employee of the intent of the employer to deny restoration on such basis at the time the employer determines that such injury would occur.
\textsuperscript{98} Barbara Sturken, Family Leave: Wide Effects are Seen for Employers, N.Y. TIMES, Sept. 9, 1990, § 12, at 1 [hereinafter Family Leave: Wide Effects are Seen].
\textsuperscript{100} See Family Leave is Debated, supra note 6.
\textsuperscript{101} FMLA § 102(e). This section provides that an employee must give an employer thirty days notice before taking leave if the leave is foreseeable. If the employee cannot give thirty days notice he/she must give as much notice as is practicable. Id.
one of the company's laid-off or retired workers that would have the required skill and/or knowledge. It is also very likely that an employer would pay a temporary employee less than he/she was paying the leave-taker so that, while the employee is on unpaid family or medical leave, the employer would actually be paying out a lower salary for the position.

The United States Small Business Administration conducted a survey of various-sized companies. The association examined the use of outside temporary workers to replace leave-takers. The study found that 70% of all companies simply divided up the work of the absent employee among the remaining workers (when the employee was in a non-management position). Forty-two percent of small firms (1-15 employees) and 64% of larger companies brought in temporary replacements for non-managerial employees. Twenty-three percent of the small companies and 8% of the medium firms (16-99 employees) hired temporary replacements for company managers taking leave, while 60% of the smaller firms and 80% of the medium and large companies opted to divide the missing manager's work among other employees. The study further found that in small and medium companies the cost of covering an employee's duties was only $22 per week when subtracting out the salary which would have been paid to the absent employee, and larger firms found the per week cost to be $90 per employee. An option not addressed by the study was the temporary hiring of retirees or other former employees who possess the required knowledge and/or expertise and could adequately fill the leave-taker's position.

Another fear is that employees will defraud their employers in order to take undeserved leave time. State Senator Gerald Cardinale, a Republican from Demarest, New Jersey, is worried that "loopholes" will allow employees to use their leave for vacation or to seek a new job, or simply take leave for "a child's stomachache or

102. The Family and Medical Leave Act provides for unpaid leave. See FMLA § 102(d)(1).
106. Id.
107. Id.
109. See Family Leave is Debated, supra note 6.
cold.” However, there are arguably no “loopholes”; the Act precludes an employee from simply taking leave for a mere cold. If an employer is unsure of an employee’s truthfulness regarding a serious health condition, the employer may require the employee to obtain certification from the health care provider of the ill person (the employee him/herself or the family member), presumably at the expense of the employee. If the employer doubts the validity of that certification, he/she can require the employee, at the employer’s expense, to obtain a second opinion from a health care provider of the employer’s choosing. If such opinions conflicted with one another, the employer could then require the employee to obtain a third opinion from a health care provider agreed upon by both the employer and the employee, again at the expense of the employer. The employer can also require the employee to obtain subsequent recertification of illness on a reasonable basis. If utilized, these stringent requirements should serve to prevent an employee from taking leave for a minor illness. Although the cost to the employer may be a disincentive for a firm to require an employee to obtain a second and third opinion, it would not be fair to force an employee to obtain such opinions at his/her own cost. At that point, the employee will have provided proof of an illness, and the burden should be on the employer to disprove such a condition. If subsequent opinions comport with the original opinion, then it should certainly be the burden of the employer to cover, at the very least, the cost of such opinions. If the additional examinations indicate that there is no medical condition necessitating leave, an employer should be entitled to bring suit against the employee to recover the cost of those visits. Litigation may also result if an employer does not avail him/herself of these rules and later discovers an employee took leave for a minor illness,

110. Id.
111. FMLA § 102(a)(1)(C)-(D). These sections enable an eligible employee to take leave to care for a son, daughter, spouse or parent who has a serious health condition; or because of a serious health condition which renders the employee unable to perform his/her job. Id. FMLA § 101(11) defines a serious health condition as “an illness, injury, impairment or physical or mental condition that involves—inpatient care in a hospital, hospice, or residential medical care facility, or continuing treatment by a health care provider.” FMLA § 101(11).
112. FMLA § 103(a). See supra notes 37-43 and accompanying text.
113. FMLA § 103(c)(1). Such health care provider designated by the employer may not be one who is regularly employed by the employer. FMLA § 103(c)(2).
114. FMLA § 103(d)(1). The opinion of the third health care provider will be considered final and binding upon the parties. FMLA § 103(d)(2).
115. FMLA § 103(e).
or no illness at all. If litigation does result it should nonetheless con-
tinue to be the burden of the employee to show that a serious illness
did strike him/her or someone in his/her family. If, after certification
is obtained, it was discovered that an employee actually took leave
under false pretenses, he/she would not be covered by the Act and
the employer would therefore be entitled to fire the worker if he/she
chose to do so.¹¹⁶

Detractors have also claimed that the passage of this statute may
cause increased discrimination against women because they will be
viewed as more likely to take advantage of this leave.¹¹⁷ However,
the Civil Rights Act and the Pregnancy Discrimination Act make
discrimination of this sort illegal.¹¹⁸ The passage of this statute may
even make employment discrimination against women less common.
The Act would not discriminate, because it entitles men as well as
women to take leave for the birth/adoptions of a child or the serious
illness of the employee or a member of his/her family. Although
detractors of the Family and Medical Leave Act will still argue that
women will take leave more often, as they are the more likely
caregiver, this Act would make it quite conceivable that men could
take leave almost as frequently as women. The Act itself states its
purposes to be "to balance the demands of the workplace with the
needs of families"¹¹⁹ and "to entitle employees to take reasonable
leave for medical reasons"²² in a manner that . . . minimizes the
potential for employment discrimination on the basis of sex by ensur-
ing . . . that leave is available . . . on a gender-neutral basis;¹²¹ and
to promote the goal of equal employment opportunity for men and
women.²²²

The strongest argument to be made against the Family and Medi-
cal Leave Act is that it will only benefit those who can afford to take
advantage of it.²³ The leave being offered here is unpaid,²³¹ thus

¹¹⁶. FMLA § 101(11) did not include colds or other such minor illnesses in the defini-
tion of a serious health condition, therefore the taking of leave under such conditions would
render the employee unprotected by the Act. FMLA § 101(11).

¹¹⁷. Donna R. Lenhoff & Sylvia M. Becker, Family and Medical Leave Legislation in

¹¹⁸. See generally the Civil Rights Act, 42 U.S.C. §§ 2000e to 2000e-17 (1964), and the

many people are likely to feel they cannot afford to take such leave. "Two out of three women that work are either sole-providers for their families or have husbands who make less than $12,000 per year." However, although we cannot cure all the possible family leave difficulties, we must accept this as a start and grapple with further problems with additional policy.

IV. AMBIGUITIES AND INTERPRETATIONS

There are certain clauses within the Act which need to be further defined in order to avoid needless litigation regarding the terms of the Act. The federal Family and Medical Leave Act requires that an employee be restored to the same or an equivalent position upon return, with such an equivalent position carrying with it equivalent "benefits, pay and other terms and conditions of employment." The Act does not, however, specifically define "other terms and conditions." The Wisconsin Supreme Court, in construing the phrase "other terms and conditions" in the Wisconsin Family and Medical Leave Act (an act similar to the federal Act), determined that it should encompass many factors of the employment situation, including the employee's authority and responsibility.

124. FMLA § 102(c).
126. See generally FMLA. Clauses such as the ones which state that an employee must be restored to an equivalent position with equivalent terms and conditions of employment, FMLA § 104(a)(1)(B); that two parents may not take leave at the same time for the same child, H.R. 770 at § 102(a)(2)(A); and when a complaint must be filed by, FMLA § 107(c) must be clearly defined.
127. FMLA § 104(a)(1).
129. See Wis. STAT. § 103.10(8)(a) (1990).
130. See Kelley Co. v. Marquardt, 493 N.W.2d 68 (Wis. 1992). The employer claimed that the legislature intended to leave the definition of "other terms and conditions of employment" broad enough to encompass many various situations, thereby giving employers the flexibility to "make reasonable job assignments when an employee's position is no longer
The phrase "other terms and conditions" should be defined rather broadly in order to include a myriad of items. The legislature could not have determined every factor which a person may deem crucial in determining whether an offered position is equivalent to the position left behind. Therefore, in order for a position to be equivalent to the one the employee held before taking leave, it must incorporate factors which the employee considers to be vital elements of his/her former position. Conditions such as authority and responsibility must be understood as included in the definition of "other terms and conditions." Employers have also argued, with no success, that they need only attempt to reinstate the leave-taker at the precise moment he/she chooses to return. They have claimed that, even if no suitable positions are available at the time the employee returns, the employer's obligation of reinstatement is nonetheless filled. Interpreting their own Family and Medical Leave Act, which is similar to the federal Act, the Oregon Court of Appeals found that an employer's obligation to find a suitable position for an employee continues until such a position is found. If the federal Act does not mandate a continuing obligation by employers to reinstate leave-takers, employers could defeat, or at least frustrate, the purpose of the Act by claiming there are no suitable positions available at the time of the employee's return. Employers would then claim that they have fulfilled their obligation to the employee. Such an occurrence may lead to needless litigation regarding whether or not an employer has actually fulfilled his obligation to a leave-taking employee. Additionally, a reasonable time limit should be set, by which time an employer must find a suitable position for a returning employee or be charged with violating the Family and Medical Leave Act. Employers must be required to strictly adhere to the reinstatement rule and either reinstate the employee to his/her previous position or find another suitable position as soon as possible.

vacant upon return from family or medical leave." Id. However, the court concluded that the phrase "other terms and conditions" was intended to include authority and responsibility. The court further found that if only the employee's wages, hours and regular benefits were protected people would be deterred from taking leave. The court stated that it would be punitive to strip an employee of his/her authority and responsibility. Id.


132. Id. at 370.

133. Id. The applicable rule provides that "[i]f the employer has no suitable position available or if a parent refuses an unsuitable job, the employer has not met its obligation . . . and the employer must offer a suitable job, or the former or an equivalent job, whichever is first available." OR. ADMIN. R. 839-07-860(8) (1991).
Furthermore, the 1989 federal Family and Medical Leave Bill stipulated that "if one parent of a son or daughter takes leave under § 102(a)(1)(A) [for the birth of a child], the other parent of such son or daughter may not take leave under such paragraph at the same time." The bill, however, does not differentiate as to parents who may be taking leave which is voluntarily offered by an employer, although not mandated by the Act (e.g., an employer who employs ten people may give parental leave as a matter of his/her own policy). The Oregon Court of Appeals, in construing its own Family and Medical Leave Act, held that an employer can reduce the amount of leave time granted to an employee by the amount of parental leave taken by the other parent, regardless of whether the other parent works for a "covered employer." While it may seem reasonable to not allow both parents to "take advantage" of family leave at the same time, it nearly defeats the purpose of the Act. The stated purposes of the federal Act includes promoting stability in families and allowing both fathers and mothers to participate in early child-rearing as well as caring for seriously ill family members. These need not be "tag-team" events; there is no reason why both the father and the mother cannot take leave at the same time to bond with a new child or care for an ailing relative.

Another issue, along the same vein, which has not been addressed is where one of the parents is not working at all. Will the Act then disallow the other parent from taking leave? This cannot be allowed to happen, because an individual should be permitted to take family leave regardless of whether the other parent will be home as well.

The Family and Medical Leave Act of 1993 made an effort to clear up this ambiguity. Congress omitted the language that specifically prohibits both parents of the same child from taking leave under the Act simultaneously. The only remaining language in the 1993

135. Id.
136. See OR. REV. STAT. § 659.360(2) (1988). "The employer is not required to grant an employee parental leave which would allow the employee and the other parent of the child, if also employed, parental leave totaling more than the amount specified [in this statute, generally 12 weeks]." Id.
137. Oregon Bankers, 796 P.2d at 369.
138. FMLA § 2(b)(1).
139. FMLA § 2(a)(2).
140. See generally FMLA. The 1989 version of the proposed legislation forbade both parents of the same child from taking leave under the Act at the same time. H.R. 770 at §
Act stipulates that spouses "employed by the same employer" may take only an aggregate amount of twelve weeks of leave to care for an infant or an ill family member. It can be argued that Congress only intended to limit the leave of a husband and wife where a single employer is exposed to their simultaneous departure. Therefore, Congress' specific omission indicates that, unless employed by the same employer, both spouses should be entitled to take leave under the Family and Medical Leave Act. Still, can similarly employed parents take their aggregate leave under the Act at the same time, or must they divide the twelve weeks between them, taking leave at different times? If the Act is to limit the amount of leave time to an aggregate of twelve weeks, spouses should be allowed to take leave simultaneously so as to avoid the "tag-team" effect.

The federal bill further requires a charge against an employer for violating the Act to be filed not more than two years after the date of "the last event constituting the alleged violation." If an employer willfully interferes with an employee's exercise of his/her rights under this Act, or interferes with any proceeding under the title, the interested employee has three years to file a claim under the Act. What exactly the "last event constituting the alleged violation" is must be clarified. It is doubtless that both an employer and an employee will argue for different definitions of this phrase. In construing the Wisconsin Family and Medical Leave Act (again, an Act similar to the federal Act), the Supreme Court of Wisconsin found that it

102(a)(2)(A).
141. FMLA § 102(f).
142. FMLA § 107(c). The 1989 version had set a one year statute of limitations. H.R. 770 at § 106(b)(3).
143. FMLA § 105(a). It is a prohibited act for an employer to "interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under this title. It shall [also] be unlawful for any employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by this title." Id.
144. FMLA § 105(b). The statute provides:
It shall be unlawful for any person to discharge or in any other manner discriminate against any individual because such individual has filed any charge, or has instituted or caused to be instituted any proceeding, under or related to this title; has given, or is about to give, any information in connection with any inquiry or proceeding relating to any right provided under this title; or has testified, or is about to testify, in any inquiry or proceeding relating to any right provided under this title.
145. FMLA § 107(c)(2). The 1989 bill did not distinguish such willful violations for statute of limitations purposes. See generally H.R. 770.
146. FMLA § 107(c).
147. Wis. STAT. § 103.10(12)(b) (1990). "An employe [sic] who believes his or her em-
was reasonable for the employee to believe that no violation occurred until the completion of a post-termination procedure. In order to protect employees the "last act constituting the alleged violation" must be construed to mean what a reasonable employee would believe the "last act" to be.

V. FORMER PRESIDENT BUSH'S ALTERNATIVE

Former President George Bush refused to assist in the passage of the Family and Medical Leave Bill in any form, except his preconceived optimal plan, and vetoed the bill twice. Bush proposed to grant tax credits to small- and medium-sized businesses which voluntarily established their own family leave plans. He had stated that he wants to "encourage voluntary parental leave policies for those innovative and forward-looking employers to allow reasonable amounts of time off," and that granting such leave would make for better workers and a more productive America. However, many companies will not voluntarily offer their employees family leave plans. In fact, even in the case of pregnancy leave, some companies have gone so far as to violate not only their own voluntarily-established company policy, but state and federal law as well.

The problem with convincing companies to voluntarily establish

148. See Jicha v. State, 485 N.W.2d 256 (Wis. 1992). The employer claimed that the last event was the notice of termination, while the employee argued that the last event was the conclusion of the post-termination procedure. The court, taking note of a similar Supreme Court opinion, held that it was reasonable for the employee to believe that a violation did not occur until after the post-termination procedure. Id. The Supreme Court decision stated that "the grievance procedure, by its nature, is a remedy for a prior decision, not an opportunity to influence that decision before it is made . . . . [W]e already have held that the pendency of a grievance, or some other method of collateral review of an employment decision, does not toll the running of the limitations periods." Delaware State College v. Ricks, 449 U.S. 250, 261 (1980).

149. FMLA § 107(c).

150. See supra note 9 and accompanying text.


leave programs is above and beyond the fact that the President's proposal would cost the federal treasury an estimated $2.7 billion over five years, whereas the Family and Medical Leave Act should cost employers covered by the Act no more than $5.30 per year for each covered employee, with no money coming from the federal treasury. 154 This cost ($5.30 per year per covered employee) would also be spread out amongst the employers governed by the Act and thus would not deplete the federal reserve. Bush's alternative also would not have assured workers a return to the same or comparable positions held before taking leave. 155 It seems quite clear that companies cannot simply be encouraged to voluntarily provide family leave for their employees. Simply trying to encourage employers to adopt leave programs would not be the best option for the country or its employees.

VI. PIONEERS OF FAMILY LEAVE

A. What Other Countries Have Done

Presently the United States is one of the only industrialized nations, besides South Africa, without a national family leave policy. 156 Even non-industrialized nations like Haiti and the Philippines have government-mandated parental leave. 157

The United States is quite far behind the rest of the world when it comes to family leave. 158 For example, Denmark is a country which has far-reaching policies in the area of family leave. 159 Denmark provides its workers with twenty-four weeks of family leave, 160 ten of which can be taken by the father as well as the mother. 161 A father need not take ten weeks of leave, but he is absolutely entitled to take a minimum of two weeks of paternity leave upon the birth of a child. 162 Danish workers also find it easier to take parental leave

155. Id.
157. See Family Leave is Debated, supra note 6.
159. Id.
160. Id. at 356. "Family leave" may be maternity leave or other leave taken because of pregnancy or for the adoption of a child. Id. at 356.
161. Id.
162. Id.
because they are ensured as much as 90% of their income while they are on leave. The Danes are guaranteed their jobs upon return from maternity leave and leave due to pregnancy or the adoption of a child. Even Iraq entitles workers to ten weeks of leave, with an extension of up to nine months in case of illness due to pregnancy, all with the promise of a job waiting for them upon return. Six months of additional leave may also be taken in Iraq during the first four years of the child’s life. Such leave may be taken up to four times during those four years. Iraqi social security or insurance pays a leave-taker the full amount of her wages during maternity leave, 75% of wages during an extended leave and 50% of wages during the additional six-month leaves.

Sweden is a prime model of how government can help people balance work and families. Sweden has one of the most comprehensive and integrated work-family programs and may serve as a good model to look to for other proposals in the field of family and work interaction. A representative of the Swedish Confederation of Employers stated that “there’s no question we need [family leave policy] . . . . [T]here’s no way to measure all of the benefits to the next generation.” When Swedish employers are asked how they respond to problems that arise from parental leaves, the most common response is, “Problems, what problems?”

In Sweden, a mother has the right to transfer from her position or leave the workplace altogether up to two months before she gives birth if her work environment presents a medical risk to her pregnancy. Swedish workers also have parental insurance which provides

163. Id. Manual workers receive 90% of their wages for the first 18 weeks of their leave (the first three of which are paid by the employer, the remaining by social security); other workers receive at least 50% of their average earnings for up to five months (paid by the employer). Id.

164. Id.

165. Id.

166. Id.

167. Id.


169. Id. at 319. Swedish policy covers pregnancy benefits, family allowances, social welfare, health care, child care, elder care, and general tax policy. Id.


171. Id. at 254.

172. Envisioning Work and Family, supra note 168, at 320; ANDERS AGELL, INFORMA-
income to parents who take leave to care for a newborn, newly-adopted or ill child. If it is medically necessary, Swedish parents may take up to sixty days of paid sick leave per year to care for an ill child. This insurance plan also provides new parents with 360 days of leave for each child; 270 days of which are at 90% of full pay, and ninety days at a fixed, minimum amount. More than 95% of all Swedish parents utilize the first nine months of parental leave. Mothers and fathers can divide this time in any way they and their employers agree upon. They can alternate months, days and even half-days, as long as both parents are not simultaneously absent from work. In 1974, only 3% of all Swedish fathers took advantage of available family leave. By 1981, approximately 44% of Swedish fathers were taking parental leave, usually when their children reached five or six months of age. As much as three months of this leave may be saved to be used at any time until the end of the child's first year of school. Swedish fathers are entitled to take ten days following the birth or adoption of a child (regardless of the fact that the mother is at home as well), and either or both parents may work a six-hour day until their child is eight years old. Such income and job guarantees certainly make it easier for a...
parent to take leave in Sweden, especially a single parent who may not be able to forego an income for any extended period of time. In fact, single parents in Sweden actually receive preferential treatment in order to make it as easy for them to take leave and care for their families as it is for two-parent families. Still, the Swedes are careful not to make single parenthood too desirable, so that the standard two-parent family is still encouraged.

Swedish women in blue-collar jobs are the most likely to take the full amount of leave time that is covered by parental insurance, while their husbands have been found to be the least likely to take such leave. This imbalance has been attributed to family attitudes regarding "traditional sex roles" as well as the relative conditions of many women's blue-collar jobs. Under the United States' Family and Medical Leave Act we are also likely to see very few blue-collar men take leave time. We will also see fewer blue-collar women take the full amount of leave than we see in countries like Sweden, due to the fact that the leave offered in the United States is unpaid.

Additionally, France has an encompassing social welfare policy to help support its families. The fundamental thought underlying the French policy is that children are essential to perpetuate the society, and the family policy is a "means of ensuring all children a minimal level of opportunity and support regardless of class." The French provide their workers with a need-based family allowance, to be given on a gender-neutral basis. A French mother is entitled to a family allowance from her fourth month of pregnancy until her child is three months old, regardless of whether the mother was employed. Other French family allowances continue until a child reaches the age of two or three, regardless of whether one or both

184. See Envisioning Work and Family, supra note 168, at 315. Single parents are entitled to the same benefits that two-parent families receive as well as receiving preferences for child-care and housing, and special tax breaks. Id.
185. Id. at 325.
186. Id. at 326-27.
187. Id. at 327.
188. See FMLA § 102(c).
189. See generally Envisioning Work and Family, supra note 168.
191. Id. at 330.
192. Id. at 331.
193. Id. at 321.
parents of the child are working.194

When a woman becomes pregnant, she may request other work in her workplace if she has a medical certificate stating that the work she does could be dangerous to her.195 The woman would still be entitled to the same salary regardless of the position to which she is transferred.196

The French system also provides generous leave time for both new fathers and new mothers.197 French employers can be penalized if a pregnant woman works during the six weeks before and ten weeks after the birth of her child.198 It is illegal to fire a French woman during her maternity leave and for four weeks thereafter.199 More time off is given, and paid for, if the child is the third or later child, if the birth is complicated, or if there is a multiple birth.200 During this time, the woman’s work agreement or contract is automatically extended, thereby keeping her job available for her to reclaim upon her return.201 The French social security system pays a pregnant woman 90% of her salary during her leave time before the baby is born.202 Some collective bargaining agreements also require the employer to pay an additional 10% to the employee.203 Both mothers and fathers can take a one-year unpaid postnatal leave of absence after the birth of a child.204 Although these leaves are not job-guaranteed, employers are obligated to give such leave-takers priority when job openings exist.205 Parents also have a right to take up to two years of job-guaranteed, unpaid leave (called “Parental Leave for the Education of Their Children”) following the birth of a child with the right to receive retraining, if necessary, upon their return.206 To be eligible for this leave, a person must work for a firm

194. Id.
195. MICHEL, supra note 190, at 120.
196. Id.
197. See generally Envisioning Work and Family, supra note 168.
198. MICHEL, supra note 190, at 119.
199. Id. at 120.
201. MICHEL, supra note 190, at 119.
202. Id.
203. Id. at 120.
204. Id. Although mothers can simply use this leave to extend their maternity leaves, fathers must apply for this leave two months after the birth of the child. Id.
205. Id.
206. ALLEN, supra note 170, at 252; see also SHEILA B. KAMERMAN, MATERNITY AND
which employs at least one-hundred employees.\textsuperscript{207} Although the French do not allow a parent to take leave for a sick child,\textsuperscript{208} the system does provide a father or mother up to two years of job-guaranteed unpaid leave for the birth or adoption of a child.\textsuperscript{209} An employee must work for at least twelve months at a company which employs at least one-hundred employees in order to qualify for such leave.\textsuperscript{210}

Most industrialized nations provide a leave period with compensation and some form of job reinstatement guarantee.\textsuperscript{211} Italy gives workers five months of mandatory maternity leave during which the worker receives 80\% of her earnings (paid by social welfare).\textsuperscript{212} Either parent may also take six months of optional leave, during which he/she would receive 30\% of his/her wages (also paid by social welfare).\textsuperscript{213} If an Italian worker adopts a child, he/she may take three or six months of leave (depending on the age of the child) and would receive 30 or 80\% of his/her wages (again determined by the age of the child).\textsuperscript{214} An Italian worker may also take up to twelve weeks of unpaid leave if a child under three is sick.\textsuperscript{215} Japan grants its workers maternity leave plus thirty subsequent days during which their jobs are guaranteed.\textsuperscript{216} During this time a leave-taker would receive 60\% of his/her wages from social security or insurance.\textsuperscript{217} Saudi Arabia gives its workers a ten week maternity leave, with the possibility of a six-month extension in case of illness due to the pregnancy.\textsuperscript{218} During this time the employee’s job is guaranteed and the employer pays the leave-taker 50\% or, in some cases, the full amount of their wages.\textsuperscript{219} Working Saudi Arabian parents are also entitled to at least five days of leave to care for a sick child.\textsuperscript{220} West Germany

\textbf{Parental Benefits and Leaves; An International Review} (1980).

\textsuperscript{207} ALLEN, \textit{supra} note 170, at 252.

\textsuperscript{208} Envisioning Work and Family, \textit{supra} note 168, at 333.

\textsuperscript{209} \textit{Id.} at 321.

\textsuperscript{210} MICHEL, \textit{supra} note 190, at 120.

\textsuperscript{211} \textit{See generally Policies for the Working Poor, supra} note 158, at 355-56.

\textsuperscript{212} \textit{Id.} at 355; \textit{see also Maternity and Parenting Benefits, supra} note 200, at 241.

\textsuperscript{213} Maternity and Parenting Benefits, \textit{supra} note 200, at 241.

\textsuperscript{214} Policies for the Working Poor, \textit{supra} note 158, at 355.

\textsuperscript{215} \textit{Id.}

\textsuperscript{216} \textit{Id.} at 355.

\textsuperscript{217} \textit{Id.}

\textsuperscript{218} \textit{Id.} at 356.

\textsuperscript{219} \textit{Id.}

\textsuperscript{220} \textit{Id.}
offers fourteen weeks of job-guaranteed maternity leave (six weeks before birth and eight after),\textsuperscript{221} with four additional weeks in case of a premature or multiple birth.\textsuperscript{222} Both fathers and mothers may take the subsequent thirty-eight weeks of leave, also with the guarantee of the same or a comparable position upon return.\textsuperscript{223} During this time the employee receives money from a health fund to cover maternity costs, and the employer pays the employee the difference between this amount and 100\% of the employee’s wages.\textsuperscript{224} Throughout the first fourteen weeks of leave a woman would be paid, by social security, a flat rate equal to the average wage for all woman workers, and her employer would be required to supplement this amount to cover the woman’s full salary.\textsuperscript{225} Any parent (mother or father) taking the additional thirty-eight weeks of leave allowed would be paid modestly by social security as well.\textsuperscript{226}

While different countries provide different programs to aid working parents, all of the countries in the above-mentioned group give some form of cash benefits, usually in the form of paid family leave.\textsuperscript{227} These countries all finance such benefits through social insurance funding, regardless of employee direct contribution.\textsuperscript{228} Although the United States may never be ready to execute programs such as those discussed above, these programs are quite informative and should be studied. Most Americans are tax-averse and would not tend to look kindly on paying greater taxes to fund such programs; on the other hand it is possible that some facets of these programs could be implemented with little or no additional tax burdens in the United States. It is also possible that, in the future, the government may find increased need or desire for certain programs, and could then use these foreign programs as models.

B. Individual States with Their Own Family Leave Statutes

Twenty-five states and the District of Columbia have developed some type of family leave plans of their own.\textsuperscript{229} As of February,

\textsuperscript{221} Maternity and Parenting Benefits, supra note 200, at 241.

\textsuperscript{222} Policies for the Working Poor, supra note 158, at 355.

\textsuperscript{223} Maternity and Parenting Benefits, supra note 200, at 241.

\textsuperscript{224} Policies for the Working Poor, supra note 158, at 355.

\textsuperscript{225} Id.

\textsuperscript{226} Id.

\textsuperscript{227} Maternity and Parenting Benefits, supra note 200, at 239.

\textsuperscript{228} Id. at 240.

\textsuperscript{229} See CAL. GOV'T. CODE. §§ 12945(1)-(2), 12960-75 (West 1980 & Supp. 1988); 1987
1992, some form of leave legislation was pending in fourteen additional states.\textsuperscript{230} Almost all of the existing plans cover the birth and adoption of a child.\textsuperscript{231} However, of the existing plans, only sixteen states’ policies include leave for family illness,\textsuperscript{232} and only four provide for leave in the case of an employee’s own illness.\textsuperscript{233}

On May 1, 1990, New Jersey put into effect a law very similar to the federal Family and Medical Leave Act.\textsuperscript{234} Under the New Jersey law, both male and female employees can take a twelve-week

\begin{verbatim}


234. The Leave Chart at 3.
\end{verbatim}
leave for the birth or adoption of a child, or to care for a seriously ill child, parent or spouse. It is up to the employer whether the leave is paid or unpaid, but the employer must continue to provide medical benefits and must restore the worker to the same or an equivalent position upon his/her return. The New Jersey bill originally covered only companies with at least one-hundred employees, but in 1991 it was expanded to companies employing more than seventy-five people, and it will be further expanded to companies with greater than fifty employees by May, 1993.

While there has been much speculation as to difficulties that may result from the passage of a family and medical leave law, a study has been done to determine the actual effects of state family and medical leave laws in four states. Eighty-three percent of all the surveyed employers reported that they offered job-guaranteed leaves to biological mothers following childbirth. However, only 25% of the companies surveyed actually had formal, written leave policies, thereby assuring an employee of the availability of leave. The study further found that 77% of the surveyed employers in all four states were offering biological mothers at least the statutorily required length of job-guaranteed leave even before the laws were passed (partial compliance). In Minnesota, a full 93% of covered firms were giving the required amount of leave time before the bill was enacted. Approximately 65% of all covered employees were in full compliance with their states’ bills before the bill was actually passed. Minnesota remained the state with the highest rate of pre-passage compliance with an 86% compliance rate. Comparing pre-passage full compliance with pre-passage partial compliance, it seems that compliance rates went down the most in Rhode Island (a 36% drop) and Wisconsin (an 18% drop). However, these two states are the only ones whose bills require an employer to continue contri-

235. See Family Leave: Wide Effects are Seen, supra note 98.
236. Id.
237. See Best-Run Firms, supra note 15.
238. BEYOND THE PARENTAL LEAVE DEBATE, supra note 89. The study researched the impact of family leave laws in Minnesota, Oregon, Rhode Island and Wisconsin. Id.
239. Id. at 29.
240. Id.
241. Id. at 38.
242. Id.
243. Id. at 39.
244. Id.
245. Id.
butions to pre-existing health insurance plans,\textsuperscript{246} which employers apparently do not voluntarily do. It would appear that, with regard to biological mothers taking leave for birth, the federal Act will not change many employers' practices; it simply forces the benefits to be provided under the law.

In the case of biological fathers taking leave for the birth of a child, the numbers change dramatically. Only 60\% of covered employers offered leave to fathers before the state bills were enacted,\textsuperscript{247} and only nineteen of these companies had a formal written leave policy.\textsuperscript{248} The lowest average number of weeks for paternal leave was 5.4 weeks in Minnesota,\textsuperscript{249} as compared to 10.7 weeks which the Minnesota employers gave to mothers before the passage of the Minnesota Family and Medical Leave Law.\textsuperscript{250} Rhode Island employers claimed to allow an average of 15.7 weeks of leave for fathers before their law was passed,\textsuperscript{251} while granting only 11.8 weeks of leave for mothers pre-passage.\textsuperscript{252} Pre-statute full compliance with regard to biological fathers averaged only 34\% of all employers.\textsuperscript{253} It would appear that a federal Family and Medical Leave Act is needed to protect the rights of a biological father in the child-rearing process more so than needed to protect a biological mother.

Apparently even adoptive parents were better off pre-statute than biological fathers. Seventy-one percent of all the surveyed employers stated that they offered leave time to adoptive parents before the enactment of the statutes.\textsuperscript{254} Minnesota employers again gave the lowest length of time with an average of nine weeks allowed.\textsuperscript{255} However, this was three and one-half weeks longer than the Minnesota employers, on the average, gave to biological fathers.\textsuperscript{256} Also, before the state statutes were enacted, approximately 44\% of all employers surveyed met the statutory requirements for leave after the

\textsuperscript{246} See R.I. GEN. LAWS § 28-48-1 to 28-48-10 (1988), and Wis. STAT. ANN. § 103.10 (West Supp. 1988).

\textsuperscript{247} BEYOND THE PARENTAL LEAVE DEBATE, supra note 89, at 41.

\textsuperscript{248} Id.

\textsuperscript{249} Id.

\textsuperscript{250} Id. at 29.

\textsuperscript{251} Id. at 41.

\textsuperscript{252} Id. at 29.

\textsuperscript{253} Id. at 42.

\textsuperscript{254} Id. at 44.

\textsuperscript{255} Id.

\textsuperscript{256} See supra note 249 and accompanying text.
adoption of a child, whereas only 34% did so for biological fathers. Only 50% of the surveyed employers already meet all of the major requirements of the federal Family and Medical Leave Act regarding parental leave for biological mothers. This percentage drops dramatically when all parents, biological mothers and fathers and adoptive parents, are considered. A mere 14% of all the surveyed companies presently have policies for all parents which would meet the standards of the federal Act. Judging by these statistics, it does not seem possible that these companies can simply be "encouraged" to have a family leave policy, because most will be severely lacking in many important areas; they will only establish leave policies when it is in their own self-interest.

C. Some Innovative Companies

Some companies have taken the initiative and voluntarily developed family leave plans and other alternatives of their own. The most used option by companies has been the subsidizing of day-care or the establishment of an on-site day-care facility. Large corporations such as Apple Computer, Campbell Soup Co., Champion International, Dominion Bankshares, FirstAtlanta, Hoffman-LaRoche, and StrideRite are a few who provide day-care at their facilities. Some companies are opting instead to move to industrial parks where child-care centers are already available.

Another fast-growing choice is a provision for emergency child-care. Honeywell, Inc. will pay for 80% of licensed child care at home to take care of a sick child, or 80% of the cost of an emergency center that takes sick children. Even small firms are beginning to help out. For example, the MBA Center in Sunnyvale, California employs only six people, but they will pay one-half of the $39 it costs to send a sick child to the Feeling Better Get-Well Daycare

257. BEYOND THE PARENTAL LEAVE DEBATE, supra note 89, at 45.
258. See supra note 253 and accompanying text.
259. BEYOND THE PARENTAL LEAVE DEBATE, supra note 89, at 46.
260. Id. at 47.
261. Id.
263. Id.
264. Shelley Liles-Morris and Mindy Fetterman, Child Care in a Pinch, More Firms Offer Help in Emergency, USA TODAY, Jan. 17, 1990, at 1B.
265. Id.
Some companies also have their own family leave policies. Almost half of the companies listed in the book *The 100 Best Companies to Work for in America* provide their employees with family leave or other benefits to assist their workers in balancing work and family. IBM provides its employees with up to three years of unpaid family leave with a reinstatement guarantee and all the employee’s benefits retained. The Lotus Development Corporation in Cambridge, Massachusetts gives its employees parental leave, leave to care for ill parents, maternity leave, and one month of leave for new fathers to help care for their newborns.

Merck & Company of Rahway, New Jersey (hereinafter “Merck”) is one of the forerunners in responding to the demands of working parents. For over thirty years, Merck has given pregnant women approximately six weeks of paid disability leave for the birth of a child and an unpaid leave of absence of up to eighteen months. After a six-month absence, the employee will be reinstated to the same or a similar position with “like status and pay.”

Failing that the company will “make every effort” to place the employee in a position for which they are best suited, but there is no guarantee that they will be given their former position or one of like status. Merck also offers “flextime” to its workers, allowing them to work their normal amount of hours while coming in anywhere from 7:00 a.m. to 9:30 p.m. Although this is not leave, per se, it does allow a parent to be at home during hours he/she would not otherwise be if he/she were working full-time. This would enable two parents to rotate the care of a child or ailing relative if they so desired, without necessitating any actual leave time.

If all companies were like Merck and developed their own comprehensive programs to assist their employees in balancing work and

266. *Id.*
268. *Id.*
269. *Id.*
272. *Id.* at 173. Although the leave of absence is unpaid, the company continues to provide the employee with medical and dental coverage. *Id.*
273. *Id.*
274. *Id.*
275. *Id.* at 174.
family, legislation like the Family and Medical Leave Act would not be necessary. Unfortunately, most companies are not like Merck; they see such programs as expensive and wasteful and tending to encourage employees to defraud them.\textsuperscript{276}

\section*{VII. Final Passage of the Family and Medical Leave Act}

Then-Arkansas Governor Bill Clinton had promised that, if he were elected to the Presidency, the enactment of family leave legislation would be “just about a done deal.”\textsuperscript{277} He stated that “[p]arents should not have to choose between the job they need and the family they love. I will immediately sign into law the Family and Medical Leave Act.”\textsuperscript{278} Upon signing the bill, President Clinton again stated: “Now millions of people will no longer have to choose between their jobs and their families.”\textsuperscript{279} The President felt that the bill would strengthen business and the economy as well as families.\textsuperscript{280}

On February 3, 1993, the United States House of Representatives passed its version of the Family and Medical Leave Bill of 1993 by a vote of 265 to 163\textsuperscript{281} following ten hours of debate on the bill.\textsuperscript{282} The following day, the United States Senate passed its own version of the bill by a vote of 71 to 27.\textsuperscript{283} In order to eliminate the need for a conference to work out the differences between the two bills, the House of Representatives substituted the Senate-passed bill for its own and thus sped the bill’s delivery to President Clinton.\textsuperscript{284} President Clinton then signed the Family and Medical Leave Bill into law.

\begin{footnotes}
\item[276] World News Tonight With Peter Jennings (ABC television broadcast, Feb. 4, 1993). Quoting Ann Rhoads of Southwest Airlines, “We are very concerned that it has become so liberal that frankly people will take advantage of it, and thus increase our cost of doing business.” \textit{Id}.
\item[277] Jerry Geisel, \textit{Clinton Calls for Family Leave; Health Reform, Medicare Tax Highlight Democratic Platform}, BUS. INS., July 20, 1992, at 1; \textit{see also} letter from [Then-] Governor Bill Clinton, \textit{supra} note 1.
\item[278] \textit{Id}.
\item[280] \textit{Id}.
\item[281] 139 CONG. REC. H446 (daily ed. Feb. 3, 1993).
\item[283] 139 CONG. REC. S1349 (daily ed. Feb 4, 1993).
\item[284] 139 CONG. REC. H557-568 (daily ed. Feb. 4, 1993); \textit{see also} \textit{Senate Clears Family Leave Bill}, \textit{supra} note 282.
\end{footnotes}
on February 5, 1993. The Labor Department now has 120 days from the February 5 enactment date to issue its final regulations on the implementation of the Act. This time period is quite a compromise from the 150-day period that the Labor Department had initially sought and the sixty-day period which was originally suggested.

Despite its seemingly rapid passage, the Family and Medical Leave Act has existed in various forms for eight years. Even at the last minute, Republican Senators tried to threaten its passage by refusing to vote for it unless an amendment was added to the bill codifying the ban on gays in the military. Senate Minority Leader Bob Dole (R-Kan.) said, “I don’t want anyone to have the impression we’re holding up the family leave act, although I wouldn’t mind doing just that.” The bill’s chief sponsor, Sen. Christopher Dodd (D-Conn.) strongly urged the Senate to pass the bill without the “ban on gays” amendment, stating that major compromises had recently been made to make the bill more responsive to employers’ needs, while protecting employees. Senate Majority Leader George Mitchell (D-Maine), however, had little doubt that there would be enough votes to defeat such an amendment. By a vote of 98-1 the Senate passed the Democrat-sponsored “Sense of the Congress” proposal to explore the situation for six months before making a final determination. At the same time, the Senators disposed of the Re-
publican amendment that would keep the existing ban on gays in the military in effect until it is changed by law. This amendment was defeated by a vote of 62-37.

The Senate also voted down a number of other proposed amendments to the bill. The substitute bill that Sen. Larry Craig (R-Idaho) offered to the Senate was defeated by a vote of 67-33. Sen. Craig’s bill would have given a 20% tax credit to companies which provided their employees with paid or unpaid family emergency leave. Sen. John Danforth’s (R-Mo.) amendment to encourage the mediation of complaints under the Act was defeated 56-42. Senators David Durenberger (R-Minn.) and Charles Grassley (R-Iowa) proposed an amendment to allow for voluntary arbitration of complaints instead of litigation. This, too, was tabled by a vote of 53-47.

Although Sen. Dodd agreed with the concept here, he stated that the enforcement of the Act under the Fair Labor Standards Act amounted to “de facto arbitration procedures” because most of the disputes will be settled by the Labor Department before the case would go to a court.

Two of Sen. Slade Gorton’s (R-Wash.) proposed amendments were tabled by the Senate. One of Sen. Gorton’s suggested amendments would have allowed an employer to designate who he wished to exempt from the bill, instead of having to arbitrarily exempt the most highly paid 10% of his/her employees. This proposition was vocally defeated with no recorded vote taken. The House of Representatives also defeated a similar amendment, proposed by Rep. William Goodling (R-Pa.), by a vote of 239-184.

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295. Id.
296. See generally Congress Poised to Clear Family Leave Bill, supra note 292; see also Congressional and Presidential Activity, Feb. 5, 1993.
305. See FMLA § 104(b)(2).
Some feared that discrimination could result if employers were free to designate those who were "too valuable" to take family leave.\footnote{Some feared that discrimination could result if employers were free to designate those who were "too valuable" to take family leave.\footnotemark[308] The other Gorton amendment, requiring employees to provide written notice regarding foreseeable leave, was also turned down on a 60-40 vote.\footnotemark[309]} The amendment introduced by Sen. Nancy Kassenbaum (R-Kan.) to allow employers to include family and medical leave in a "cafeteria plan" of benefits was also defeated by a vote of 63-36.\footnotemark[310] Rep. Goodling also introduced this amendment in the House where it was again defeated 242-189.\footnotemark[311]

One amendment was passed by the House of Representatives.\footnotemark[312] Rep. Goodling's proposal to revise H.R. 1 section 102 governing intermittent leave was passed on a vote of 226 to 205.\footnotemark[313] The amendment edited out language that allowed employees to take a "reduced leave schedule when medically necessary," without an employer's agreement.\footnotemark[314] The section\footnotemark[315] once again uses the language present when the bill was introduced this year,\footnotemark[316] giving an employee the option to take leave "intermittently" when medically necessary, without an employer's agreement.\footnotemark[317] This change was cited to be a "difference without distinction" by House Education and Labor Committee Chairman William Ford (D-Mich).\footnotemark[318]

The Family and Medical Leave Act of 1993 takes effect six months after its enactment date of February 5, 1993 (on August 5, 1993).\footnotemark[319] However, where employees are already covered by a collective bargaining agreement, the Act will not apply until the existing agreement expires or one year after enactment (February 5, 1994),

\footnotetext{308}{Senate Clears Family Leave Bill, supra note 282, at 23.}
\footnotetext{309}{139 Cong. Rec. S1093 (daily ed. Feb. 3, 1993); see also Senate Clears Family Leave Bill, supra note 282, at 23.}
\footnotetext{310}{139 Cong. Rec. S1111-18 (daily ed. Feb. 3, 1993). This plan would have allowed each employee to choose whether or not he/she wanted to have family leave as one of his/her benefits. \textit{Id.}}
\footnotetext{315}{FMLA § 102(a)(3).}
\footnotetext{317}{\textit{Id.}}
\footnotetext{319}{FMLA § 405(b)(1); see also Senate Clears Family Leave Bill, supra note 282, at 24.}
whichever comes first.  

VIII. REACTION TO THE PASSAGE OF THE FAMILY AND MEDICAL LEAVE ACT

Many have reacted to the passage of the Family and Medical Leave Act of 1993, from workers and unions to companies and countries.  

Workers like Vicki Yandle, of Marietta, Georgia, are thrilled that this Act was finally passed. Although Mrs. Yandle already lost her job when she took time off to care for her daughter who had cancer, others like her should no longer have to make the agonizing choice between work and family. Some company heads have stated that such leave from the company generally has little, if any, impact on daily operations. Paul Lehman, president of Fel-Pro Incorporated (hereinafter “Fel-Pro”) feels that “businesses across America should embrace, rather than fear, family leave and other work and family benefits.” The Fel-Pro gasket company voluntarily instituted its own family leave program ten years ago. Of the 1800 Fel-Pro workers, only twelve per year actually take family leave, and company officials say that “increased productivity and satisfaction among employees more than offset the cost.” One human resource manager stated that “if you are a decent company, you should see this as a natural part of the employer’s relationship with its employees.”

National Small Business United (NSBU) has voiced opposition to the bill stating that its passage will make it harder for businesses to afford to hire more employees. Although the National Retail Federation had previously opposed the legislation, it has formally endorsed its passage, citing the “flexibility and protections afforded the

320. FMLA § 405(b)(2); see also Senate Clears the Family Leave Bill, supra note 282, at 24.
322. See Family Leave: Clinton Signs, supra note 279.
323. Id.
324. No Sweat, supra note 99.
326. World News Tonight with Peter Jennings, supra note 276.
327. Id.
328. No Sweat, supra note 99.
329. Family Leave: Clinton Signs, supra note 279.
labor-intensive retail industry."

Canadians have described the Family and Medical Leave Act as "something many Canadian workers only dream of." Although some unions have bargained for some sort of family leave, and many Canadian companies voluntarily offer leave to their employees, not all Canadians have the right to take time off from work for their own serious illness or that of a family member. For now, it seems Canadians will have to rely on the kindness and understanding of their employers to allow necessary leave.

IX. CONCLUSION

The United States must respect its past, have concern for its present, and plan for the future.

Presently, regardless of an employee's occupation, workers are afraid to take time off from work. Competition in the current job market is very stiff; there are too many people and not enough jobs. Employees are frightened that if they take leave from their jobs, even if it is necessary, they may lose that job. In the present economy, no one can afford to risk losing their job.

The future of our nation rests in our children. In order for their future to be as bright as it can be we must take care of their present. Taking care of our children includes allowing parents to be able to spend time and bond with their children. Parents need to be assured that their children will be adequately taken care of if they are placed into day care, and the parents must be there for the children if they are seriously ill. Studies have shown that a "flexible and supportive leave policy mitigates the negative effects of pregnancy." Companies who are most supportive and helpful during this period are most likely to find that pregnant women will work longer into their pregnancies, miss fewer days and return to their jobs after the leave time has expired.

Certainly a nationally assisted day care program implemented in tandem with the Family and Medical Leave Act would be the optimal solution to this problem; however, this is beyond the scope of the primary issue being discussed here. The principal goal here would

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330. Id.
332. Id.
333. Parental Leave Law Not Negative, supra note 55.
334. Id.
335. But see I.R.C. § 129 (1986). Through the Internal Revenue Code, the federal govern-
be to establish a program in which an employee is given time to spend with his/her child and the opportunity to find a day-care provider before he/she must return to work. Once we have implemented the Family and Medical Leave Act, the issue of day care on a national level could then be adequately addressed.

The past has been given to us by our elders, and there exists a responsibility to care for them as well. Certainly many employees wish they could take time off from work to spend with ailing parents. Until now it was much more difficult to take such time off from work.

The United States needs a federal policy like that which the Family and Medical Leave Act provides. People must be given the opportunity to take time from their jobs to care for their families when it is truly necessary. They must be given time to spend with their children when they are first born and, in the case of biological mothers, to recuperate from the strain of childbirth. Workers should not be forced to choose between a job and their family. This is not a fair choice; it is tantamount to telling someone to choose between their livelihood or their loved ones.

The Family and Medical Leave Act of 1993 is not perfect, but it is a good starting point. The United States may never have the tax revenue, or the desire, to go beyond the policies implemented by this Act, but at least this plan should serve the country’s workers well. Should the leaders of this country choose to go further in the area of work and family, they may look to many other nations, particularly the Europeans, as models for additional options. It would be wonderful for people to be able to take paid leave time from work in order to be with their families when they were needed. However, this is not likely to occur since Americans are not likely to easily accept the accompanying tax increase that such a program would require. The United States may also never see the extension of leave to the length of those in some countries (e.g., twenty-four weeks in Denmark, and a full year in Sweden). However, there is no reason this country cannot become more accepting of a father taking leave to care for a newborn or newly adopted infant. Again, this article did

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336. See supra notes 156-228 and accompanying text.
337. Policies for the Working Poor, supra note 158, at 356.
not discuss the topic of government-sponsored child day care, but perhaps a program such as that would be beneficial not only to parents, but to children and the country as a whole.

As mentioned above, ambiguities remain in certain clauses of the Act. 339 Regulations must be promulgated to assist in the understanding and enforcement of this Act.

To determine if a job is an equivalent position as the one left behind, one must take into account not only pay and benefits, but "other terms and conditions." 340 However, the phrase "other terms and conditions" has not been clearly defined. Understandably, no legislative body could definitively state every element which an employee would consider in determining whether two positions are equivalent, but some guidelines must be provided. Job components such as authority and responsibility must, necessarily, be included in defining "other terms and conditions." Factors such as working hours and the space and condition of the employee's immediate work area should also be considered to be "other terms and conditions." An employer should not be entitled to move a returning employee from a reasonable office to a small, cramped room where the employee would be unable to perform well, or to a noisy area where concentration is impossible.

Another bone of contention which may arise is the issue of two parents being home to care for a child at the same time. The 1989 version of the Federal Act did not allow two parents to take leave under the bill at the same time to care for the same child. 341 The 1989 bill did not state whether a parent could take leave under the bill if the other was voluntarily given leave by his/her employer. 342 The 1993 version of the Act disallows only parents working for the same employer from taking leave at the same time for the same child. 343 This restriction is reasonable to ensure that an employer does not suffer from the loss of employees. However, the Act still does not address all, or even a few, possible permutations of two-parent care for a single child. One could assume, or at least argue, that since the previous language has been dropped, two parents working for different employers can both take leave to care for the same child at the same time. If this is in fact true, it should be made clear

339. See supra notes 126-149 and accompanying text.
340. FMLA § 104(a)(1)(A)-(B).
343. FMLA § 102(f).
in regulations accompanying the Family and Medical Leave Act in order to avoid needless litigation.

The Act also does not address the possibility of one non-working parent who is continually in the home. Such a situation should not preclude the working parent from taking leave to care for a child, and regulations should provide as such. Another issue which was not addressed by the Act is the possibility of multiple children, or other extreme cases, in which both parents may be needed. Presumably, if a woman gave birth to triplets which were premature and needed a great deal of attention, it would be acceptable for both the husband and the wife to take leave. However, this, too, should be affirmatively stated in regulations governing family leave, if this is so intended.

The Family and Medical Leave Act is also unclear regarding responsibility for certain expenses in the certification of illnesses. The Act definitively states that if an employer requires an employee to obtain a second and/or third opinion on an illness, it is the employer's responsibility to pay for such health-care visits. The Act also allows an employer to require the employee to obtain recertification throughout the leave time, on a reasonable basis, although the Act does not affirmatively state who should bear the cost of such recertification. However, if an employer simply requests initial certification of an illness, this cost should be, and presumably would be, borne by the employee. This responsibility is based upon the assumption that an employee would go (or take his/her ill family member) to a doctor to initially determine what malady he/she actually has. At the time of such visit, the employee could easily request the health-care provider to put his/her conclusions in writing for the purpose of informing the employer of the situation. Additionally, if all cost responsibility is placed on the employer, he/she may decide that it is not worth the expense of paying for continual medical opinions, and simply opt to bring suit if he/she later discovers that an employee took leave when no acceptable reason existed. This is more likely to occur in a larger company which has attorneys on its regular staff than in a smaller company which would have to first hire and then pay an attorney.

Furthermore, the Act itself must be widely publicized so that

344. FMLA § 103(c)(1).
345. FMLA § 103(e).
346. See FMLA § 103(a) (allowing an employer to require certification of illness by a health care provider).
employees know their rights and what they are entitled to under the Act. Workers must also be educated on redress procedures, so that if they feel an employer has violated their rights under this title they know what course of action to take.

The bottom line in this area has been stated honestly and succinctly: “Unhappy employees are bad for business, and trained, experienced employees are often expensive to replace.”

Elissa Hope Gainsburg
