

2009

Who's Your Daddy? A Proposal for Paid Family Leave to Promote the Growth of Families

Ashleigh Garvey

Claire Mitchell

Follow this and additional works at: <http://scholarlycommons.law.hofstra.edu/hlelj>



Part of the [Law Commons](#)

Recommended Citation

Garvey, Ashleigh and Mitchell, Claire (2009) "Who's Your Daddy? A Proposal for Paid Family Leave to Promote the Growth of Families," *Hofstra Labor and Employment Law Journal*: Vol. 27: Iss. 1, Article 7.

Available at: <http://scholarlycommons.law.hofstra.edu/hlelj/vol27/iss1/7>

This document is brought to you for free and open access by Scholarly Commons at Hofstra Law. It has been accepted for inclusion in Hofstra Labor and Employment Law Journal by an authorized administrator of Scholarly Commons at Hofstra Law. For more information, please contact lawcls@hofstra.edu.

NOTES

WHO'S YOUR DADDY? A PROPOSAL FOR PAID FAMILY LEAVE TO PROMOTE THE GROWTH OF FAMILIES

I. INTRODUCTION

Having a child and a career should not be mutually exclusive options for people today, but that is unfortunately the case for many Americans. The costs of raising a child are high, and many households are supported by two salaries. Taking time off from work to give birth to a child is a necessity for a pregnant woman, as is remaining out of work for a recovery period. Fathers are not faced with the requisite physical recovery time after the birth of a child, but they would ideally be able to take some time off from work to care for their new child and adjust to the new family dynamic. Because employment discrimination can make these leave periods prohibitive,¹ it is necessary to enact legislation to protect the development of nascent families. This note proposes a federally-supported system of paid parental leave that can address this need.

Under the relevant portion of the Family and Medical Leave Act of 1993 (FMLA),² any qualified employee working for an employer covered by the FMLA is eligible to take up to twelve workweeks off during any twelve month period for the birth or adoption of a child.³ Employers are deemed to be covered by the FMLA if they engage in commerce and employ fifty or more employees for the working days in twenty or more workweeks in the calendar year.⁴ Eligible employees are those workers who are employed by a covered employer for at least twelve months and have worked at least 1,250 hours in the twelve months prior to the commencement of their requested leave period.⁵ However, not all em-

1. See Family and Medical Leave Act, 29 U.S.C. § 2601(a)(6) (2006).

2. *Id.* §§ 2601-2654 (2006).

3. *Id.* § 2612(a)(1) (2006).

4. *Id.* § 2611(4)(A)(i).

5. *Id.* § 2611(2)(A)(i)-(ii).

ployees who are technically eligible to take leave are financially able to do so.⁶

About 60% of workers are covered by the FMLA and looking at the demographics of the 50 million people who have taken leave under the Act since it was enacted, 18% of the people taking FMLA leave took it to care for a new child.⁷ Unfortunately, 78% of the people who do not take leave (despite needing it) cannot do so because it is financially impossible.⁸ For the FMLA to truly work as it was designed to, it must be possible for employees to take the time off from work that they are permitted.⁹ It is not a novel idea for an employer to give an employee unpaid time off from work when necessary; not paying someone when he or she is not working makes sense. However, the FMLA was enacted to protect employees when they need to take time off from work temporarily for circumstances like a severe illness or childbirth.¹⁰ If the FMLA is to help employees, it must do more than barely guarantee an employee will not be terminated for taking leave (as it does now).¹¹ One way to make taking leave a financial possibility for employees would be to provide payment to them during some or all of their leave period.¹²

A paid system of leave to supplement the FMLA would make leave-taking more feasible, especially for fathers. However, the money to pay employees during leave periods has to come from somewhere. Employers reportedly spent \$21 billion in 2004 implementing the FMLA as it currently stands because of "net labor replacement costs, continuation of group health benefits, and lost productivity."¹³ The FMLA currently serves as little more than a job-security statute.¹⁴ In the proposed system, rather than asking employers to contribute even more money to

6. See NAT'L P'SHIP FOR WOMEN & FAMILIES, FACTS ABOUT THE FMLA: WHAT DOES IT DO, WHO USES IT, & HOW, available at <http://www.nationalpartnership.org/site/DocServer/FMLAWhatWhoHow.pdf?docID=965> (citing U.S. DEP'T OF LABOR, BALANCING THE NEEDS OF FAMILIES AND EMPLOYERS: FAMILY AND MEDICAL LEAVE SURVEYS, 2000 UPDATE (2001)).

7. *Id.*

8. *Id.*

9. See Kathryn Kroggel, Comment, *Absent Fathers: National Paid Paternity Leave for the United States—Examination of Foreign and State-Oriented Models*, 23 PENN. ST. INT'L L. REV. 439, 448 (2004) (stating only those employees who can afford unpaid leave are able to take advantage of the leave provided by the FMLA); see also Erin Gielow, Note, *Equality in the Workplace: Why Family Leave Does Not Work*, 75 S. CAL. L. REV. 1529, 1539 (2002) (discussing that only 32.3% of worksites not covered by the FMLA offer parental leave).

10. Family and Medical Leave Act, 29 U.S.C. § 2601(b)(2) (2006).

11. See Kroggel, *supra* note 9, at 443-44.

12. See *infra* Section V.

13. Priya Ganapati, *FMLA Costs Hit \$21 Billion in 2004*, INC., Apr. 28, 2005, <http://www.inc.com/news/articles/200504/fmlastudy.html>.

14. *Id.*

the implementation of the FMLA, the funds for paying employees on leave would come largely from the employees themselves.

Section II will detail the history of the FMLA. After considering the need for the FMLA as it was intended to function, Section III will show what weaknesses in the FMLA are preventing its effective implementation. As will be explained in Section IV, several states and foreign countries recognize the need for a paid system of family leave, and have, thus, begun to legislate and implement these systems. Looking forward, Section V will explain the details of a proposed supplement to the FMLA that will allow for family leave that will serve as more than just a job security provision by paying employees for a portion of their leave periods, thereby making leave a feasible option for more eligible employees.

II. WHAT IS THE HISTORY OF THE FAMILY AND MEDICAL LEAVE ACT AND WHY IS IT SUCH A NECESSITY?

Before the enactment of the FMLA, there were no federal laws providing workers with job security if the birth of a child or the sickness of a family member caused them to take a leave of absence from their jobs.¹⁵ As a result, it was common for workers to have their employment terminated if they took an extended leave of absence in order to take care of family-related matters.¹⁶ However, according to the legislative history of the FMLA, with a rise in the number of women entering the workforce, the increase in single parents, and the need for workers to maintain stability in their jobs and their families, there was a need for federal leave legislation.¹⁷

A. History of the FMLA

Beginning in the early 1900s, labor organizers, employers, employees, and social activists realized that family concerns and illness were legitimate issues in the workplace that could not be ignored.¹⁸ This

15. See generally S. REP. NO. 103-3, at 4 (1993) (discussing that prior to the FMLA, government policies did not address the burden imposed on families by the tensions created between work and family life).

16. See, e.g., *Flex v. Ill. Dep't of Labor Bd. of Review*, 466 N.E.2d 1050, 1052 (Ill. App. Ct. 1984) (finding plaintiff was ineligible for unemployment benefits when her employer had "to hire someone else" to replace her even though she could not return to work because of her newborn baby's illness).

17. See S. REP. NO. 103-3, at 5-6.

18. Am. Ass'n of Univ. Women, *The Family and Medical Leave Act: Brief Background*, <http://www.aauw.org/advocacy/laf/lafnetwork/library/FMLAbackground.cfm> (last visited Jan. 21,

notion became a more pressing matter when women were no longer the minority in the workplace during the later 1960s and 1970s.¹⁹ A formalized family and medical leave legislation bill was first brought to the attention of legislators in 1985.²⁰

Lobbyists for the family and medical leave bill were met with fierce opposition from businesses that did not want to bend to government control.²¹ Business coalitions lobbied to have modifications made to the original language of the bill that would exempt small businesses from providing mandatory family and medical leave benefits to employees.²² Before being passed, the bill was significantly changed to accommodate small and medium-sized businesses who believed that the enactment of such a law would cause an excessive burden.²³ As a result, “approximately ninety-five percent of all businesses and from forty to fifty percent of all United States employees” would not receive coverage under the FMLA.²⁴

Before the FMLA’s passage, only a few states had passed laws requiring certain employers to allow their workers to have a period of unpaid leave to care for certain family matters.²⁵ As the movement recognizing the need for family leave gained momentum, individual states began to follow the trend by providing their employees with a specified amount of leave time.²⁶ By 1993, “[a]pproximately 30 States, the District of Columbia and Puerto Rico [had] adopted some form of family or medical leave.”²⁷ There had been no federal action taken to ensure that men and women alike could maintain their job security if they were to take time off to perform the important duties of caring for a sick relative or a newborn child.²⁸ But, at last, the bill for the United States FMLA was proposed by Senator Christopher Dodd on January 21, 1993.²⁹ The

2010).

19. *Id.*

20. *Id.* (discussing that activist “groups gained bipartisan support in both the Senate and the House of Representatives and saw their bill introduced in each session of Congress from the 99th (1985-1986) to the 103rd (1993-1994)”).

21. *See id.* (stating that businesses were hesitant to adopt legislation that would cause greater government intrusion within their industry).

22. *Id.*

23. G. John Tysse & Kimberly L. Japinga, *The Federal Family and Medical Leave Act: Easily Conceived, Difficult Birth, Enigmatic Child*, 27 CREIGHTON L. REV. 361, 361 (1994).

24. *Id.* at 362.

25. Joseph R. Meisenheimer II, *Employer Provisions for Parental Leave*, 112 MONTHLY LAB. REV. 20, 22, available at <http://www.bls.gov/opub/mlr/1989/10/art3full.pdf>.

26. *See* S. REP. NO. 103-3, at 20 (1993).

27. *Id.*

28. *Id.* at 7.

29. *Id.* at 21.

impetus for creating this bill came from the need for employees to have adequate time and sufficient job security to take a leave of absence from their employment to care for a family member, a child, or for themselves.³⁰ The growth of the labor force in leaps and bounds, and the change in the traditional look of the American family “sparked interest in the work-family relationship.”³¹ According to a Senate Report in its final consideration of the FMLA, it was determined that passage of the bill was a necessity because “[p]rivate sector practices and government policies . . . failed to adequately respond to recent economic and social changes that have intensified the tensions between work and family.”³² The bill for the FMLA was ultimately passed because it established a federally regulated standard which addressed a rapidly growing concern among employees throughout the nation: how to find a balance between the demands of work and family life.³³

Once Congress passed the bill and the FMLA became effective, the benefits of the Act were realized by workers and employers alike.³⁴ The Senate found that “[t]he testimony of chief executive officers as well as workplace studies indicate that family and medical leave encourages loyal and skilled employees to remain with the company—improving employee morale, reducing turnover, and saving on costs for recruitment, hiring, and training.”³⁵ Despite the advantages that were ultimately realized by the enactment of the FMLA, there were some criticisms from Congress while reviewing the initial FMLA bill.³⁶ The minority view of Senators Hatch, Kassebaum, Gregg, and Thurmond of the Committee on Labor and Resources, contained in the Senate Report, held that “family leave . . . should be encouraged through a policy of providing incentives and lifting legal restrictions.”³⁷ However, despite these objections to the bill, Congress supported the passage of the FMLA and the proposed leave legislation was looked upon favorably by the committee as a change in the right direction for families throughout

30. See Family and Medical Leave Act, 29 U.S.C. § 2601(a) (2006).

31. Meisenheimer, *supra* note 25, at 20.

32. S. REP. NO. 103-3, at 4 (1993).

33. 29 U.S.C. § 2601(b)(1).

34. See *id.* § 2601(b) (stating the purposes of the Act and that these purposes should be accomplished in a way that not only assists employees, but also considers the interests of employers).

35. S. REP. NO. 103-3, at 16.

36. See generally *id.* at 49 (discussing that the costs of implementing the FMLA would place a significant burden on small business owners). In this report during the legislative process, certain members of Congress noted that the legislature “cannot properly and adequately determine and regulate the individual needs of workers and their families.” *Id.* at 50. Those members of Congress expressed that mandating a national leave benefit program would only hinder the flexibility of leave programs already established by individual employers. See *id.*

37. *Id.* at 49.

the nation.³⁸

B. The FMLA as it is Now

The FMLA currently provides that “an eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period” for reasons that have to do with the life and care of a family.³⁹ According to the statute, an employee may take leave from work:

(A) Because of the birth of a son or daughter of the employee and in order to care for such son or daughter. (B) Because of the placement of a son or daughter with the employee for adoption or foster care. (C) In order to care for the spouse, or a son, daughter, or parent, of the employee, if such spouse, son, daughter, or parent has a serious health condition. (D) Because of a serious health condition that makes the employee unable to perform the functions of the position of such employee. (E) Because of any qualifying exigency.⁴⁰

Approximately 40% of workers in the United States currently do not qualify for leave benefits under the FMLA at all.⁴¹ Further, many employees who do qualify for FMLA benefits do not take the leave they are entitled to because they cannot afford it.⁴²

Since its creation, the FMLA has been enforced by the United States Department of Labor (“DOL”).⁴³ The DOL requires that all employers must post information about the FMLA so that employees have the opportunity to know their rights.⁴⁴ According to the DOL, when an employee returns from a period of leave, an employer must restore “the employee’s original job, or [restore the employee] to an equivalent job with equivalent pay, benefits, and other terms and conditions of employment.”⁴⁵ Moreover, the DOL provides that “[a]n employee’s use of FMLA leave cannot result in the loss of any employment benefit that the

38. See *id.* at 50.

39. 29 U.S.C. § 2612(a)(1) (2006).

40. *Id.*

41. See Gielow, *supra* note 9, at 1539.

42. See *id.* at 1546 (“[T]wo-thirds of workers covered by the FMLA who need family leave do not take it because they cannot afford the lost wages.”).

43. See U.S. DEP’T OF LABOR WAGE & HOUR DIV., FACT SHEET #28: THE FAMILY AND MEDICAL LEAVE ACT OF 1993 (2009), <http://www.dol.gov/whd/regs/compliance/whdfs28.pdf> [hereinafter FACT SHEET #28].

44. See Poster, Wage & Hour Div., Employment Standards Admin., U.S. Dep’t of Labor, *Employee Rights & Responsibilities Under the Family & Medical Leave Act of 1993* (2009), available at <http://www.dol.gov/whd/regs/compliance/posters/fmlaen.pdf>.

45. FACT SHEET #28, *supra* note 43.

employee earned or was entitled to before using FMLA leave.”⁴⁶ However, under the FMLA, in “specified and limited circumstances where restoration to employment will cause substantial and grievous economic injury to its operations, an employer may refuse to reinstate certain highly paid ‘key’ employees after using FMLA leave (during which health coverage was maintained).”⁴⁷

The federal government implemented this law in order to create a stable balance between the demands of personal and family life and job responsibilities.⁴⁸ In reviewing the current provisions of the FMLA, one must ask, are the leave benefits it provides really enough to create this so-called balance between family and career? Is encouraging state legislatures to create their own leave programs doing enough to address the problems presented? Maybe there should be changes made to the federal legislative scheme.

C. Purposes of the FMLA

Congress, when initially considering the passage of the FMLA bill, found that there was a growing need for family leave benefits across the nation for which there was no government policy.⁴⁹ Primarily, Congress determined the purpose of the Act was “to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity.”⁵⁰ As evidenced by the legislative history of the FMLA, and through studies, testimony, and careful consideration, Congress determined that it was within the best interests of the nation to provide its workers with a uniform standard that allows parents to truly be parents without the fear of losing their jobs.⁵¹

According to Congress, the purpose of the FMLA was to encourage parents to take leave to be with their children during the early days of their lives.⁵² In recent years the original purpose of the FMLA, in allow-

46. *Id.*

47. G. NEIL, FACTS ABOUT FMLA (2000), https://www6.miami.edu/hr-forms/Facts_About_FMLA.pdf.

48. See Family and Medical Leave Act, 29 U.S.C. § 2601(b)(1) (2006).

49. See *Id.* § 2601(a).

50. *Id.* § 2601(b)(1).

51. See generally S. REP. NO. 103-3, at 9-12 (1993) (discussing testimony from individuals who were fired as a result of taking time off from their jobs to care for a child, their own serious illness, or the illness of a child, parent, or spouse). Congress determined “that this is an area where a Federal minimum standard can, at relatively little cost, make a very real difference to workers.” *Id.* at 13.

52. 29 U.S.C. § 2601(b)(2).

ing working parents to find a balance between their jobs and their families, has been lost.⁵³ It seems that today, where the cost of living is high and the job market is grim, the initial goals of the FMLA are no longer being realized because parents cannot bear the added burden of taking unpaid leave from their jobs.

III. WHY THE FMLA HAS FAILED

While the FMLA is an important step towards allowing employees to care for their families and it sets a minimum level of permitted leave,⁵⁴ its reach is not broad enough for it to really be effective.⁵⁵ Indeed, “the FMLA only reaches goals of job security and work-family balance for a limited group of employees: those who work for large employers and whose families can afford to lose one income for up to twelve weeks.”⁵⁶ Many American families do not fall within those categories and are, thus, excluded from coverage.⁵⁷ As the FMLA currently stands, it serves as “a job security statute for middle-[class] and upper-class workers” and, therefore, does not really provide any assistance to workers in other demographics.⁵⁸ Although the FMLA was enacted in an attempt to give men and women equal career opportunities, allow both men and women the right to participate in the workforce and their families, and meet the needs of children,⁵⁹ it falls short of achieving many of its goals.⁶⁰ There is, therefore, a need to supplement the FMLA with additional legislation if the true goals of equality, participation, and well-being are to be reached.⁶¹

53. See Kroggel, *supra* note 9, at 448.

54. See Angie K. Young, *Assessing the Family and Medical Leave Act in Terms of Gender Equality, Work/Family Balance, and the Needs of Children*, 5 MICH. J. GENDER & L. 113, 144 (1998) (“The Act’s main strengths include its gender-neutrality, its inclusiveness of types of leave besides parental leave . . . and its establishment of a federal minimum standard.”).

55. See Kroggel, *supra* note 9, at 448.

56. *Id.*

57. See Gielow, *supra* note 9, at 1539. According to a report to Congress, “in effect, only one-tenth of private-sector worksites and half of all private-sector employees are covered.” *Id.*; see also U.S. DEP’T OF LABOR, COMM’N ON FAMILY & MED. LEAVE, A WORKABLE BALANCE: REPORT TO CONGRESS ON FAMILY AND MEDICAL LEAVE POLICIES xvi (1996), available at http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1002&context=key_workplace.

58. Kari Palazzari, *The Daddy Double-Bind: How the Family and Medical Leave Act Perpetuates Sex Inequality Across All Class Levels*, 16 COLUM. J. GENDER & L. 429, 432 (2007).

59. Family and Medical Leave Act, 29 U.S.C. § 2601(b) (2006).

60. See, e.g., FACT SHEET ON THE FEDERAL EMPLOYEES PAID PARENTAL LEAVE ACT OF 2009, <http://webb.senate.gov/issuesandlegislation/upload/FEPPLAfactsheet.pdf> (last visited Jan. 21, 2010). There is no way for the goals of the FMLA to be achieved if many employees are not able to take the twelve weeks of permitted leave. See *id.*

61. See *id.*

Taking twelve weeks of unpaid leave to care for a newborn can amount to losing almost a quarter of an employee's annual salary and having a newborn also means incurring more expenses.⁶² "For those who cannot afford to take such leave, the FMLA does little to resolve the work/family conflict."⁶³ The FMLA does not afford significant assistance to workers in low-income brackets, especially men; they are often-times forced to subsidize the cost of taking time off with loans since the leave provided for in the FMLA is unpaid.⁶⁴

Among the fears of those who need, but do not take, the leave to which they are entitled under the FMLA is the inability to afford leave and the fear the employee's career would suffer (or even be lost completely).⁶⁵ Jane Waldfogel explains that a study of leave-takers showed:

More than half (58.2 percent) of the leave takers who did not receive their full pay or who did not receive any pay while on leave reported that it was somewhat or very difficult to make ends meet, and about half (50.9 percent) said that they would have taken a longer leave if some or additional pay had been available.⁶⁶

Even when families need to take time off from work to care for a newborn, many are prevented from doing so because of their inability to afford it, and 87.8% of employees who could not take the leave they needed "would have taken leave if at least some of it had been paid."⁶⁷

A. The Practical Impact of the FMLA

The cost of living in the United States is increasing and it is difficult for most families to survive on only one income.⁶⁸ Fathers, who are still considered to be the main breadwinners of the family, cannot afford to take as much time off as they would like to care for a newborn child.⁶⁹ "If men have enough money and time they can 'do both' breadwinning

62. This claim assumes that salary is paid to employees evenly throughout the year and that twelve weeks is approximately a quarter of the year.

63. Young, *supra* note 54, at 141.

64. Chuck Halverson, Note, *From Here to Paternity: Why Men are Not Taking Paternity Leave Under the Family and Medical Leave Act*, 18 WIS. WOMEN'S L.J. 257, 265 (2003).

65. Kroggel, *supra* note 9, at 450.

66. Jane Waldfogel, *Family and Medical Leave: Evidence From the 2000 Surveys*, 121 MONTHLY LAB. REV. 17, 21 (2001), available at <http://www.bls.gov/opub/mlr/2001/09/art2full.pdf>.

67. Joanna L. Grossman, *Job Security Without Equality: The Family and Medical Leave Act of 1993*, 15 WASH. U. J.L. & POL'Y 17, 52-53 (2004).

68. Arielle Horman Grill, Comment, *The Myth of Unpaid Family Leave: Can the United States Implement a Paid Leave Policy Based on the Swedish Model?*, 17 COMP. LAB. L.J. 373, 385 (1996).

69. Palazzari, *supra* note 58, at 432-33.

and caregiving, but employer practices can severely limit one or both of these resources.”⁷⁰ Unfortunately, many new fathers are forced to make a choice between two mutually exclusive options: spending time with their newborn child or working to support their growing family.⁷¹ Some men are able to take time off from work to care for their newborn children by using accrued vacation or personal time.⁷² Even though fathers are not taking a direct financial hit by taking parental leave, there are still potential downfalls to taking extended periods of time off from work.⁷³

While taking family leave combines a loss of financial support and a potential for the loss of a competitive edge, many men also decline paternity leave due to the fear of being ridiculed, discriminated against, or losing their jobs.⁷⁴ Societal conditioning in the workplace has led to some men not being taken seriously when they request time off for paternity leave.⁷⁵ “[T]he FMLA places an administrative burden on employers, so many employers create obstacles to men taking FMLA paternity leave.”⁷⁶ Some workplaces have “unofficial rules” about how much time is reasonable or allowed for paternity leave.⁷⁷ Taking the full amount of time is not only frowned upon, but it is very unlikely because no employee wants to be the first person to challenge what has become customary.⁷⁸ Indeed, “[i]t appears that many employers extend parental leave to fathers so that they can give the appearance of gender-neutral policies, but never intend for fathers to use it.”⁷⁹

Rationales like this show that men clearly meet opposition when

70. *Id.* at 451.

71. *See id.* at 457; *see also* Martin H. Malin, *Fathers and Parental Leave*, 72 TEX. L. REV. 1047, 1065-67 (1994).

72. Malin, *supra* note 71, at 1071-72; *see also* Grossman, *supra* note 67, at 35 (“Leave-taking men often try to have their leave classified as vacation or personal leave, rather than paternity leave, to avoid negative reactions from the employer or even co-workers as well as having to come to terms with their own desire to be home with children.”).

73. *See, e.g.*, Grossman, *supra* note 67, at 35, 38-39.

74. *Id.* at 35; *see also* Gielow, *supra* note 9, at 1534, 1536.

75. Gielow, *supra* note 9, at 1533.

76. Halverson, *supra* note 64, at 261; *see also* Grossman, *supra* note 67, at 26 (“Evidence before Congress showed that male employees received discriminatory treatment when they requested supposedly available paternity leave, and to the extent leave was left to the discretion of supervisors, that pattern of discrimination was exacerbated.”).

77. *See, e.g.*, Craig H. Kliger, *Taking Father Time: Paternity Leave Issues*, WEBMD, Oct. 9, 2000, at 1, <http://www.webmd.com/parenting/features/taking-father-time> (providing an example of a district attorney’s office only allowing a maximum of two weeks leave instead of the twelve weeks allowed under the FMLA).

78. *See id.*

79. Malin, *supra* note 71, at 1078.

they try to take greater roles in child care.⁸⁰ In a Catalyst survey, only about a third of large companies surveyed offered unpaid leave for men with a job guarantee.⁸¹ Most employers surveyed disapproved of paternal leave in general.⁸² Therefore, men are warranted in their hesitancy to take time off from work upon the birth, adoption, or placement of a child; their fear of unknown repercussions and stereotyping is justified.⁸³ Indeed, "[f]athers who take parental leave justifiably fear for their jobs and their families' financial security."⁸⁴ If employers view taking "no time" for parental leave as appropriate, choosing to take parental leave can be a huge risk for an employee.⁸⁵

Even if part of the allowed twelve weeks of family leave permitted under the FMLA is paid through an employee's use of accrued sick time or vacation time, there is still a potential loss that employees will sustain as a result of their leave.⁸⁶ Employees taking extended leave risk falling behind the competition for promotions or additional employer-granted benefits because of an absence that is deemed ill-timed.⁸⁷ As the expenses of supporting a family increase, an employee must focus on job security and financial gains, and avoid taking steps that can lead to potential losses of security.⁸⁸ Although taking leave is supposed to be permitted under the FMLA, the attitudes in the corporate world tend to be discriminatory against men who choose to take parental leave (even though it is legally permitted).⁸⁹ Men who choose to take family leave are still putting themselves at risk for disparate treatment in the workplace.⁹⁰

80. *Id.* at 1049.

81. Kathryn Fruch Patterson, Comment, *Discrimination in the Workplace: Are Men and Women Not Entitled to the Same Parental Leave Benefits Under Title VII?*, 47 SMU L. REV. 425, 439 (1994).

82. *Id.*

83. *Id.* at 440.

84. Malin, *supra* note 71, at 1078.

85. Young, *supra* note 54, at 117.

86. See Gielow, *supra* note 9, at 1535 ("In order to avoid being perceived as less committed, men often take time off following the birth of a child by using accrued vacation time, personal days, or sick leave, rather than taking family leave. This practice is often encouraged.")

87. *Id.* at 1537 (explaining that changes in certain fields happen so quickly that taking extended time off from work would cause "a large problem for employees who want to take time off for the birth or adoption of a child").

88. See *id.* While some companies provide job security after extended periods of leave, many do not. *Id.*

89. See Patterson, *supra* note 81, at 439; see also Malin, *supra* note 71, at 1078 (stating that some companies view fathers negatively when they paternity leave); Young, *supra* note 54, at 117 (explaining that a majority of employers feel paternity leave is unreasonable); Gielow, *supra* note 9, at 1533 (asserting that men do not take leave because of workplace hostility).

90. See Patterson, *supra* note 81, at 440.

B. The Costs of Raising a Child

In general, both men and women have to change their lifestyles to accommodate the arrival of a child into the family. Women tend to do more work raising the child and taking care of household chores while men tend to be responsible for providing financial support for the family.⁹¹ The approximate cost of raising a child in a two-parent household can average as high as \$11,973 (in 2006 dollars) for the first year in some regions of the United States.⁹² The median annual income for households in the United States is \$50,233.00 according to the 2007 Census Bureau (approximately \$966.00/week), but men make a median income of \$45,113 while women only make \$35,102.⁹³ This financial data illustrates that either parent taking an extended period of unpaid time off from work can make it very difficult to support the needs of the family. Raising a child is very costly, and compounding increased expenses with a loss of wages makes taking unpaid time off from work prohibitive for most fathers since a mother's salary is already being temporarily lost as she recovers from childbirth.⁹⁴ Women who give birth to a child need to take at least some time off from work to physically recover, and it is suggested that at least six weeks are necessary, but more time is preferred.⁹⁵ It is, therefore, a financially stable decision for men to work as much as possible to accommodate the increased expenses that having a newborn brings.⁹⁶ The remaining problem is that it is difficult for men to provide financial security for their growing families and still

91. Malin, *supra* note 71, at 1047-48 ("Whereas the careers of single women without children tend to follow the male pattern, women with children often interrupt their careers, begin them later, or otherwise find that child-care responsibilities limit their career involvements.").

92. BabyCenter.com, Cost of Raising a Child Calculator, <http://www.babycenter.com/cost-of-raising-child-calculator> (last visited Jan. 21, 2010). The cost for the first year of raising a child in the Northeast is \$11,594; the cost for the first year of raising a child in the South is \$11,114; the cost for the first year of raising a child in the Midwest is \$10,195; the cost for the first year of raising a child in a rural area is \$10,299. *Id.* All figures in 2006 dollars, calculated for a two-parent household having a child in 2008 and of average annual income using the "cost of raising a child calculator." *Id.*

93. Press Release, U.S. Census Bureau, Household Income Rises, Poverty Rate Unchanged, Number of Uninsured Down (Aug. 26, 2008), http://www.census.gov/Press-Release/www/releases/archives/income_wealth/012528.html.

94. Malin, *supra* note 71, at 1074 ("The birth of a child usually results in an increase in household expenses and is often accompanied by a decrease in maternal contribution to household income.").

95. See Pat McGovern et al., *Postpartum Health of Employed Mothers 5 Weeks After Childbirth*, 4 ANNALS OF FAM. MED. 159, 164 (2006). Physical recovery after childbirth takes about six weeks, and the process can take longer if a baby was operatively delivered. *Id.*

96. See generally Malin, *supra* note 71, at 1074 (finding that men with younger children face greater expenses and work more hours compared to men without young children).

establish a close relationship with their children without taking paid parental leave.⁹⁷ Many men today face “a no-win situation. If they focus on work, they neglect their family. If they focus on family, they lose income.”⁹⁸

Unfortunately, “[j]ust as the absence of adequate maternal leave policies has been a barrier to women’s roles in the workplace, the absence of adequate paternal leave policies has been a barrier to men’s roles in the home.”⁹⁹ “[F]athers are more emotionally involved with their families than with their paid employment and . . . they derive more satisfaction and self-worth from family involvement than from paid employment.”¹⁰⁰ Nonetheless, they are oftentimes forced into the workplace because someone has to make money to support the financial needs of the family.¹⁰¹ Unfortunately, “[l]ow paternal participation rates in parental leave programs are matched by low parental participation rates in child-care tasks.”¹⁰² When a child’s father is not as involved in the child-rearing process as the child’s mother, the child’s interactions with his or her parents are affected.¹⁰³ “Even when the father was viewed as competent, the mother was viewed as better” at caring for a child’s needs.¹⁰⁴ Also, there are long term consequences of a father’s absence in a child’s life.¹⁰⁵ A father being forced to work to support his family, in the absence of a paid leave option, creates lasting negative effects on the wellbeing of his child.¹⁰⁶ A father’s role in his child’s life is invaluable; indeed:

Studies confirm that “at every stage of child development from infancy through adolescence, fathers’ involvement has significant positive effects on their children.” Children of involved, loving fathers are significantly more likely to do well in school, have healthy self-esteem, exhibit empathy and pro-social behavior, and avoid high-risk behaviors

97. *Id.* at 1066-67.

98. Palazzari, *supra* note 58, at 442.

99. Malin, *supra* note 71, at 1052.

100. *Id.* at 1065.

101. *See id.* at 1066.

102. *Id.* at 1050.

103. *See id.* at 1056.

104. *Id.*

105. *Id.* at 1067 (describing the affects of a father’s limited involvement in his children’s upbringing).

106. *See id.* at 1056; *see also* Beth E. Schleifer, Comment, *Progressive Accommodation: Moving Towards Legislatively Approved Intermittent Parental Leave*, 37 SETON HALL L. REV. 1127, 1147 (2007) (stating that the successful development of a well-rounded child depends on the presence of both a man and a woman in its nurturing process).

such as drug use, truancy, and criminal activity.¹⁰⁷

If fathers find they are pulled away from their families because of work obligations, “[t]he father’s role as a primary income provider limits him to intermittent contact with the children at the same time that the mother usually has continuous contact because she has either dropped out of the labor force, reduced her hours in paid employment, or taken leave from her job.”¹⁰⁸ As a result, mothers are oftentimes viewed as knowing more about their children than fathers, and, therefore, they are understood to be “superior caregivers.”¹⁰⁹

Despite the societal benefits of having two parents involved in the child-rearing process,¹¹⁰ the social and economic costs of doing so generally makes taking extended time off from work impossible.¹¹¹ Even if a family would lose less money when a mother takes time off from work to care for a child than when a father does so, it is not always feasible (and certainly not preferable) to leave the entire child-rearing process to one parent for only financial reasons.¹¹² “Senator Paul Wellstone . . . comment[ed], ‘[i]f it is not possible to support a family on one income any longer, then we must make it possible for at least one family member to take some time out of work.’”¹¹³ If both parents’ salaries are required to support the family, but neither one of them can really work when a child is born, something must be done to reconcile the problem.¹¹⁴ Cutting down a family’s income from a two-earner household to a one-earner or a no-earner household should not be the only option for a family that wants to have a child.

There is a definite need to make some provisions for paid parental leave in order to care for a newborn child.¹¹⁵ If taking leave is going to be a reasonable option, it must be affordable to men and women.¹¹⁶ One way to make parental leave more affordable would be to make part of the leave (if not all of it) paid in some capacity.¹¹⁷ If leave were to be paid, it would not be a “hollow right” like it is “for most dual-earner and

107. Palazzari, *supra* note 58, at 446 (citations omitted).

108. Malin, *supra* note 71, at 1067.

109. *Id.*

110. See Schleifer, *supra* note 106, at 1147 (discussing the need for two parents to be involved in a child’s successful upbringing).

111. See Malin, *supra* note 71, at 1066.

112. See Grill, *supra* note 68, at 386.

113. *Id.* at 385-86.

114. See *id.* at 386; Waldfogel, *supra* note 66, at 22.

115. Waldfogel, *supra* note 66, at 21.

116. See Young, *supra* note 54, at 154.

117. *Id.*

single-parent households.”¹¹⁸

IV. CURRENT DOMESTIC LEGISLATION REGARDING THE IMPOSITION OF PAID PARENTAL LEAVE PROGRAMS ON A STATE LEVEL AS WELL AS RELEVANT LEGISLATION ABROAD

Although there has not yet been a federal implementation of paid parental leave in the United States, California, Washington, and New Jersey have already enacted paid parental leave laws.¹¹⁹ Other states, including Arizona, Massachusetts, Minnesota, New York, and Pennsylvania, currently have paid family leave bills being considered by legislators.¹²⁰ In addition, countries around the world have undertaken to establish national paid leave systems in order to provide employees in the private sector with family leave benefits.¹²¹

A. California

On July 1, 2004, California became the first state in the United States to make available a comprehensive paid family leave law.¹²² In allowing this law to pass, the California state legislature found that “[t]he majority of workers in this state are unable to take family care leave because they are unable to afford leave without pay. When workers do not receive some form of wage replacement . . . families suffer from the worker’s loss of income, increasing the demand . . . on the state’s welfare system.”¹²³ The Paid Family Leave Act directly addressed this problem by giving mothers and fathers the opportunity to

118. *Id.*

119. See CAL. UNEMP. INS. CODE §§ 3301-3306 (West 2009); N.J. STAT. ANN. § 43:21-39 (West 2009); WASH. REV. CODE ANN. § 49.86.020 (West 2008).

120. See Press Release, The Paid Family Leave Collaborative, Nation’s First Paid Family Leave Law Celebrates 4th Anniversary of Success (July 15, 2008), http://www.paidfamilyleave.org/press/press_release_4thanniv.pdf.

121. See generally JODY HEYMANN, ALISON EARLE & JEFFREY HAYES, WORK, FAMILY, AND EQUITY INDEX: HOW DOES THE UNITED STATES MEASURE UP? 1-2 (2004), available at <http://www.mcgill.ca/files/ihs/WFEI/Final2007.pdf> (showing that according to statistical data “[o]ut of 173 countries studied, 168 countries offer guaranteed leave with income to women in connection with childbirth; 98 of these countries offer 14 or more weeks paid leave”). According to studies performed by the Project on Global Working Families, the United States remains one of the only nations in the world that still does not offer paid leave for mothers. See *id.* The only other nations that lack a paid leave system for women are: Lesotho, Liberia, Papua New Guinea, and Swaziland. *Id.* In terms of paid paternity leave, there are 66 countries that currently provide such leave to their male employees. See *id.*

122. See CAL. UNEMP. INS. CODE § 3301(a)(1).

123. *Id.* § 3300(f).

spend time with their newborn or newly adopted child without sacrificing their weekly paychecks.¹²⁴

Prior to the introduction of the Paid Family Leave Act, California adopted its own version of the FMLA called the California Family Rights Act ("CFRA"), which provides unpaid leave to parents who want to bond with newly born or adopted children.¹²⁵ Citizens of California rallied around the idea of paid family leave throughout the 1990s.¹²⁶ In its unrevised form, the California state family leave bill provided for twelve weeks of paid parental leave to be funded by both employer and employee contributions; however, the bill was modified to reflect much less extensive parental leave benefits as a result of employer pressures.¹²⁷

With the long overdue passage of the Paid Family Leave Act in California came the realization of a significant expansion of employee leave benefits as compared to the CFLR modeled after the FMLA. The statewide plan provides employees with a maximum of six weeks of partial pay every year in order to care for a newly born or adopted child.¹²⁸ Although this does not allow employees to maintain their full pay during leaves of absence, it still provides a better option than the current benefits under the FMLA and California's CFLR. Unlike the FMLA, the California family and medical leave laws do not limit coverage to those employers with fifty or more employees.¹²⁹ Instead, all employees in the state of California who pay into State Disability Insurance are eligible for paid leave benefits.¹³⁰

Under the Paid Family Leave Act, "employees will be eligible to receive 55 percent of their wages during their absence, up to a maximum of \$728.00 per week."¹³¹ According to the system that has been established by law in California:

124. See *id.* § 3301(a)(1).

125. See Poster, Paid Family Leave Collaborative, *Five Key Laws for Parents* (2008), available at <http://www.paidfamilyleave.org/pdf/FiveKeyLawsPoster.pdf>.

126. See Ruth Milkman & Eileen Appelbaum, *Paid Family Leave in California: New Research Findings*, ST. OF CAL. LAB. 45, 51 (2004), available at <http://repositories.cdlib.org/cgi/viewcontent.cgi?article=1038&context=ile>.

127. *Id.* at 51.

128. See *id.*

129. See generally CAL. UNEMP. INS. CODE § 3303 (showing that the only requirements for an employee to be eligible to receive paid family leave benefits is for the employee to make "a claim for temporary disability benefits" and to show that he or she "has been unable to perform his or her regular or customary work for a seven-day waiting period during each disability benefit period").

130. See U.S. Department of Labor, Employment Standards Administration, *Federal vs. California Family and Medical Leave Laws*, <http://www.dol.gov/esa/whd/state/fmla/ca.htm> (last visited Oct. 25, 2009).

131. *Id.*

The maximum amount payable to an individual . . . for family temporary disability insurance shall be six times his or her "weekly benefit amount," but in no case shall the total amount of benefits payable be more than the total wages paid to the individual during his or her disability base period.¹³²

The money used to compensate employees during their time of leave is funded entirely from employee contributions.¹³³ Providing compensation to a parent during a period of leave will create more incentives for those parents, especially fathers, to take the adequate leave to care for their new child.

Today, the California's paid leave program is going on its sixth year in effect.¹³⁴ The program now boasts over thirteen million employees who have been able to take advantage of the paid leave benefits administered by the State Disability Insurance.¹³⁵ Surveys have indicated that "[p]aid leave commands wide support among Californians of all ages, all education levels, all racial and ethnic groups, among the native-born as well as among immigrants, and among self-described liberals, moderates, and conservatives."¹³⁶ The surveys of Californians concerning the legislation that took effect in 2004 provide evidence that statewide paid family leave is here to stay. The widespread approval of the program bodes well for proposed family leave legislation in other states.

B. Washington

Following the success of California's 2004 enactment of a family leave program, paid parental leave laws took a foothold in Washington State in May 2007. There were significant public policy reasons for why Washington legislators decided to pass paid family leave laws, including that such a law:

- (1) Allows parents to bond with a newborn or newly placed child; (2) provides limited and additional income support for a reasonable period while an individual is away from work on family leave; (3) reduces the impact on state income support programs by increasing an individual's

132. CAL. UNEMP. INS. CODE § 3301(c).

133. *Id.* § 3300(g).

134. *See id.* § 3300.

135. *See* Press Release, The Paid Family Leave Collaborative, Nation's First Paid Family Leave Law Celebrates 4th Anniversary of Success (July 15, 2008), http://www.paidfamilyleave.org/press/press_release_4thanniv.pdf.

136. Milkman & Appelbaum, *supra* note 126, at 63.

ability to provide caregiving services for a child while maintaining an employment relationship; and (4) establishes a wage replacement benefit to be coordinated with current existing state and federal family leave laws.¹³⁷

According to the legislature's findings, being an employee and being a parent each comes with its own set of obligations, which can often conflict.¹³⁸ As a result, it is the job of the state and the nation to provide a system that allows working Americans to more easily balance the responsibilities they have to their families and to their employers.¹³⁹

Despite the findings of the Washington state legislature, business leaders in the state felt that the paid family leave program was "unnecessary, and that the proper policy approach would be to offer incentives and flexibility to encourage employers to structure their workforce in such a way that allowed for paid family leave."¹⁴⁰ Additionally, "[m]any small business owners told the Legislature they cared for their employees and accommodated them on a case by case basis and appreciated that flexibility. Many larger employers pointed out they already offer better benefits to their workers than the bill would require."¹⁴¹ However, large activist groups such as Washington State Labor Council and Working America fought for the passage of this bill and won.¹⁴²

According to this recently enacted law, parents will be entitled to take up to five weeks of paid parental leave to care for their newborn or adopted child with a maximum stipend of \$250 to be paid per week.¹⁴³ Once the employee is aware that he or she will need to take a leave of absence in order to care for a child, the employee may file an application with the appropriate state agency in order to begin receiving funds for the leave period.¹⁴⁴ Unlike the California system, however, employees in the state of Washington are capped at the amount of money they can receive in leave benefits,¹⁴⁵ whereas in California employees receive a certain percentage depending on their salaries.¹⁴⁶ The Washington fami-

137. WASH. REV. CODE ANN. § 49.86.005 (West 2008)

138. *See id.*

139. *See id.*

140. ASS'N OF WASH. BUS., WASH. STATE'S CHAMBER OF COMMERCE, 2009 LEGISLATIVE OBJECTIVES (2009), available at <http://www.awb.org/legislative/govaffairs/2009lo/2009LO.pdf>.

141. *Id.*

142. Posting of Mike Hall to AFL-CIO NOW BLOG, <http://blog.aflcio.org/2007/05/10/washington-state-workers-win-paid-family-leave/> (May 10, 2007, 14:38 EST).

143. *See* WASH. REV. CODE ANN. §§ 49.86.050(1), 49.86.060(1) (West 2008).

144. *See id.* § 49.86.020(2).

145. *See id.* § 49.86.060(1).

146. *See* CAL. UNEMP. INS. CODE § 3301(b) (West 2009).

ly leave insurance system became fully effective on October 1, 2009.¹⁴⁷

Employers were opposed to the program since its introduction to the state Legislature and their opposition continues even now.¹⁴⁸ One major complaint of both employers and their employees is that the state has yet to determine a long-term plan for paying the administrative costs and the leave benefits associated with the leave program.¹⁴⁹ Washington employers and business owners are of the opinion that “[t]here’s nothing to be gained from another costly and complex mandate. Washington employers already comply with the federal [FMLA], the state Family Leave Act, the state Family Care Act, and the state Maternity Disability Regulation.”¹⁵⁰ Business owners are against the notion that the government should force employers and employees to participate in a mandatory system for paid family leave.¹⁵¹ Instead, employers have suggested that benefits for family leave are best left to the individual companies to decide rather than to the state.¹⁵² However, those employers from Washington remain in the minority when compared to a poll of voters across the nation.¹⁵³

C. New Jersey

The third state to follow in the footsteps of California and Washington was New Jersey, which signed a Family Leave Insurance program into law on May 2, 2008.¹⁵⁴ What has been referred to as “one of the most far-reaching and progressive workplace reforms in many, many decades,” the Family Leave Insurance system in New Jersey went into effect on January 1, 2009 with the widespread support of New Jersey

147. Encyclopedia Britannica, Washington Passes Paid Family Leave, <http://www.britannica.com/bps/additionalcontent/18/26000117/Washington-Passes-Paid-Family-Leave> (last visited Jan. 21, 2010).

148. See Don Brunell, Editorial, *Paid Family Leave Threatens Washington Employers*, PUGET SOUND BUS. J., Apr. 6, 2007, at 1, available at <http://seattle.bizjournals.com/seattle/stories/2007/04/09/editorial5.html> (“Employers, whether they are private or public, oppose state-mandated paid family leave.”).

149. See generally LINDA LEVINE, CRS REPORT FOR CONGRESS: LEAVE BENEFITS IN THE UNITED STATES CRS-7 (2008), available at http://assets.opencrs.com/rpts/RL34088_20080507.pdf (showing that the Washington State Legislature provided \$6.2 million to the program to cover the initial costs because there was no financial plan in place to fund the program). Instead of having a funding plan, the start-up costs for the program were taken directly out of the state budget. See *id.*

150. Brunell, *supra* note 148, at 1.

151. See *id.*

152. See *id.*

153. See MULTISTATE WORKING FAMILIES CONSORTIUM, FAMILY VALUES AT WORK: IT’S ABOUT TIME! 7 (2007), available at http://www.paidfamilyleave.org/press/family_values_report07.pdf.

154. See N.J. STAT. ANN. § 43:21-39 (West 2009).

residents.¹⁵⁵ The program has been widely accepted throughout the state likely because the program provides for a long-term funding plan, unlike Washington State's family leave program.¹⁵⁶ Also similar to California's system, New Jersey's program for paid leave provides a maximum of six weeks paid leave for parents to care for and bond with their children.¹⁵⁷ During those six weeks, the employee is entitled to receive approximately two-thirds of his or her current salary; however, this amount is limited to \$548 per week of leave.¹⁵⁸ The disbursement of benefits is paid for entirely through minor employee contributions which began in January 2009.¹⁵⁹ Under the state's system, there is no required employer contribution,¹⁶⁰ thus, the onus of sustaining the paid leave program rests solely on the employee. However, according to the provisions of the statewide plan, the financial burden this places on the individual employee is fairly insignificant.¹⁶¹ According to the program, "[i]n 2009, employees will be taxed at a rate of 0.09% on wages up to the limit for temporary disability insurance (currently \$27,700), rising to 0.12% in 2010. Thus, the maximum annual tax would be about \$25 per employee in 2009 and \$33 in 2010."¹⁶²

D. International Law

Recently, studies have been performed that show a major disparity between the types of leave offered in the United States and leave benefits offered in other countries around the world. According to a survey of 173 nations, the United States remains far behind the modern global trend of offering paid leave to working parents.¹⁶³ The United States maintains a stagnant position when it comes to family leave, keeping the country on the same level as other nations such as Lesotho, Swaziland,

155. New Jersey Citizen Action, Work & Family Balance Campaign: Governor Corzine Signs Family Leave Insurance into Law, <http://www.njcitizenaction.org/pfl.html> (last visited Jan. 21, 2010) [hereinafter Work & Family Balance Campaign].

156. See LEVINE, *supra* note 149, at CRS-8.

157. See N.J. STAT. ANN. § 43:21-39.

158. See Work & Family Balance Campaign, *supra* note 155.

159. *Id.* (showing that employee contributions are currently .09% of their regular paycheck).

160. See *id.*

161. See David W. Chen, *New Jersey Senate Approves Paid Leave to Care for Kin*, N.Y. TIMES, Mar. 4, 2008, at B1 (providing that in order to maintain the program and its employee benefits, it will require employees to contribute approximately \$0.64 per week or about \$33 per year).

162. Buck Consultants, *New Jersey Enacts Paid Family Leave Law*, 31 F.Y.I. 1, 3, (May 5, 2008) available at http://www.buckconsultants.com/buckconsultants/Portals/0/Documents/PUBLICATIONS/Newsletters/FYI/2008/FYI_05_05_08.pdf.

163. See HEYMANN, EARLE & HAYES, *supra* note 121, at 1-2.

Papua New Guinea, and Liberia.¹⁶⁴ In fact, according to the legislative history of the FMLA, “[w]ith the exception of the United States, virtually every industrialized country, as well as many Third World countries, have national policies that require employers to provide some paid form of maternity or parental leave.”¹⁶⁵ In other nations, such as Great Britain, France, Japan, Canada, and Italy, the benefits of a paid parental leave program are regulated by the national government, in which “[l]eave is provided either through a national paid sick leave system or as part of a national family policy designed to enhance and support families.”¹⁶⁶

The Child Care Leave Act of 1978 in Sweden, for example, has been noted to be “perhaps the most comprehensive parental leave policy in the world.”¹⁶⁷ According to that Act, “[u]ntil July 1, 1994, Swedish parents were entitled to fifteen months of parental leave at any time before their child’s eighth birthday.”¹⁶⁸ The program allows for workers to take up to a full year of leave in order to bond with and care for their children.¹⁶⁹ In addition, each parent is given 180 days to use for family leave purposes; however, the statute provides that one parent may transfer 150 of those days to the other parent.¹⁷⁰ It is evident that by not allowing a parent to transfer the whole amount of paid leave, Sweden’s system is promoting the notion that both parents should be actively involved in matters of the family. Particularly, this provision has been said to encourage fathers to take leave because they are given an entitlement of thirty days leave.¹⁷¹

When comparing Sweden’s system of leave to California’s, which has been deemed a hugely progressive program in the United States,¹⁷² California’s legislation still lags far behind. According to its program, “Sweden grants its citizens more leave time, pays for a longer period of time, and mandates that employers offer more options after the leave period ends.”¹⁷³ Specifically, the Swedish parental leave system is also one of the best programs in the world for paternal leave.¹⁷⁴ The Swedish

164. *See id.* at 2.

165. S. REP. NO. 103-3, at 19 (1993).

166. *Id.*

167. Meisenheimer, *supra* note 25, at 23.

168. Grill, *supra* note 68, at 375.

169. *See id.*

170. *Id.*

171. *Id.*

172. *See* Jennifer Thompson, *Family and Medical Leave for the 21st Century?: A First Glance at California's Paid Family Leave Legislation*, 12 U. MIAMI BUS. L. REV. 77, 99 (2004).

173. *Id.* at 100.

174. *See id.*

government found that fathers were not taking parental leave, so in order to correct the problem, "Sweden made it mandatory for all men to take at least one month off after the birth of their child."¹⁷⁵ However, those far-reaching policies on parental leave do not come without a high cost to Swedish employers, which might not be as widely accepted in the United States.¹⁷⁶ The fact remains that if the United States wants to allow working families to achieve a balance between their jobs and their family obligations and allow fathers, in particular, to take leave, the nation must follow the global trend of providing paid leave to working fathers.¹⁷⁷

E. The Future

Despite previous failures of federal legislators to pass proposed changes to the FMLA, there are currently two bills in the initial stages of the legislative process that are seeking to implement a program that will provide workers with paid parental leave.¹⁷⁸ The Family Leave Insurance Act of 2008 was first introduced on April 22, 2008.¹⁷⁹ The bill, if passed, would direct the Secretary of Labor to establish a Family and Medical Leave Insurance Program in which employees and employers would be required to pay a premium for their paid family leave benefits.¹⁸⁰ The premium would be paid in the form of a certain percentage withheld from the employee's weekly earnings.¹⁸¹ This money would then go to a general depository or trust fund in the Treasury Department to allow for benefits to be paid.¹⁸² The benefits under this proposed program would allow for workers to take up to twelve weeks of paid parental leave.¹⁸³

Another recent development in federal legislation is the introduction of the Federal Employees Paid Parental Leave Act of 2008 on June 16, 2008.¹⁸⁴ This bill proposes a law mandating that four of the twelve

175. *Id.*

176. *See id.*

177. *See generally* Int'l Labour Org. [ILO], *Conditions of Work and Employment Database*, <http://www.ilo.org/public/english/protection/condtrav/family/reconcilwf/specialleave.htm> (last visited Jan. 21, 2010) (displaying forty nations worldwide that currently provide some form of paid paternal leave).

178. *See* H.R. 5873, 110th Cong. (2d Sess. 2008); S. 3140, 110th Cong. (2d Sess. 2008).

179. H.R. 5873.

180. *See id.* § 102.

181. *See id.* § 103(c).

182. *See id.* § 104(b)(7)(D).

183. *Id.* § 103(a).

184. S. 3140.

weeks of leave already permitted under the current FMLA be paid for federal employees.¹⁸⁵ However, this bill would only create changes in parental leave programs for federal employees and would not affect employees working in the private sector.¹⁸⁶ On June 19, 2008, the House of Representatives passed this bill, and if it is passed by the Senate and signed by the President, it will not only make significant progress for federal employees, but for all Americans seeking paid parental leave benefits.¹⁸⁷

The future of the FMLA is also looking bright when considering President Barack Obama's plans for expansion of the FMLA's coverage. In a speech that came early on in his campaign, President Obama voiced his views about the future for working families in the United States:

We need to give working families a break We know that the cost of the American dream must never come at the expense of the American family. You're working longer hours. More families have two parents working. Meanwhile, it's hard to get a hand. It's even harder to get a break. . . . And that's why I'll expand the Family Medical Leave Act to include more businesses and millions more workers; to let parents participate in school activities with their kids And we'll finally put federal support behind state efforts to provide paid Family and Medical Leave. . . . I'll be a President who stands up for working parents We'll enforce laws that prohibit caregiver discrimination. And we'll encourage flexible work schedules to better balance work and parenting for mothers and fathers. That's the change that working families need.¹⁸⁸

In looking towards the future of the working family in the United States, President Obama hopes to allow more Americans to realize the benefits of family leave by expanding the FMLA to cover businesses 25 employees of more.¹⁸⁹

V. A PROPOSED COMPANION LAW TO THE FMLA

Giving employees unpaid time off from work to care for a sick fam-

185. *Id.*

186. *See id.*

187. H.R. 5781: Federal Employees Paid Parental Leave Act of 2008, GOVTRACK.US, <http://www.govtrack.us/congress/bill.xpd?bill=h110-5781> (last visited Jan. 21, 2010).

188. Barack Obama, President of U.S., Remarks at Bettendorf, Iowa: Reclaiming the American Dream (Nov. 7, 2007) (transcript, available at http://www.barackobama.com/2007/11/07/remarks_of_senator_barack_obam_31.php).

189. Change.gov, The Obama-Biden Plan, http://change.gov/agenda/economy_agenda/ (last visited Jan. 21, 2010).

ily member or new child is important, but the FMLA only makes doing so a hollow right. A paid system of family leave would make leave-taking more feasible, but the money to pay the employees taking leave has to come from somewhere. Currently, employees take home less money in each pay period than their allowed salaries because of contributions to Social Security and Medicare under the Federal Insurance Contributions Act ("FICA"), 401(k), taxes, and possible other deductions.¹⁹⁰ Adding a deduction for leave pay would not be crippling to employees or employers, especially if the money deducted from the employee's paycheck was put into a privatized account specifically for the purpose of funding a leave period. Such a system would merely reallocate funds to create a cushion for when additional funds are needed. The proposed system would function as a hybrid of the currently-implemented Social Security and 401(k) plans.

A. Social Security

A need for social welfare programs in the United States has been felt since the nineteenth century.¹⁹¹ As the needs of the American public have changed, federal, state, and local governments have taken steps to provide health and medical care for citizens.¹⁹² The current Social Security system implemented in the United States is detailed in the Social Security Act.¹⁹³ Considering the Social Security Act, it is important to focus on two major programs that provide benefits to Americans based on their disability: Supplemental Security Income ("SSI") and Social Security Disability Insurance ("SSDI").¹⁹⁴ SSI payments are made on the basis of financial need and are funded by general tax revenues.¹⁹⁵ SSDI payments are based on prior work that an employee completed.¹⁹⁶ This system of Social Security will be the focus of the discussion here, as the Social Security taxes that employers and employees contribute to the

190. See Diana Van Blaricom, Payroll Taxes: Basic Information for Employers, ABOUT.COM, http://taxes.about.com/od/payroll/qt/payroll_basics.htm (last visited Jan. 21, 2010).

191. See SOC. SEC. ADMIN., HISTORICAL DEVELOPMENT 2, <http://www.ssa.gov/history/pdf/histdev.pdf> (last visited Jan. 21, 2010).

192. See *id.* at 1-2.

193. Social Security Act of 1935, Pub. L. No. 74-271, 49 Stat. 620 (codified as amended in scattered sections of 42 U.S.C.).

194. See SOC. SEC. ADMIN., 2009 RED BOOK: A SUMMARY GUIDE TO EMPLOYMENT SUPPORTS FOR INDIVIDUALS WITH DISABILITIES UNDER THE SOCIAL SECURITY DISABILITY INSURANCE AND SUPPLEMENTAL SECURITY INCOME PROGRAMS 21 (2009), available at <http://www.ssa.gov/redbook/eng/ssdi-and-ssi-employments-supports.htm> [hereinafter RED BOOK].

195. SOC. SEC. ADMIN., SUPPLEMENTAL SECURITY INCOME (SSI) OVERVIEW (2009), available at <http://www.socialsecurity.gov/ssi/text-over-ussi.htm>.

196. RED BOOK, *supra* note 194, at 12.

common Social Security fund are paid out to the individuals receiving SSDI payments.¹⁹⁷

Individuals who are no longer working and are receiving SSDI payments are essentially being paid out of the salaries of today's employees.¹⁹⁸ Over \$630,000,000 was paid out in Social Security in 2003 and more than \$530,000,000 came from employee net contributions.¹⁹⁹ If an additional small portion of money was taken from each employee's paycheck, alongside the FICA contributions, and used to subsidize the cost of family leave, paid family leave would probably become feasible. However, beginning to implement that type of pooled system might not be favored in the short term because of the length of time it would take to accrue enough money in the pool to be able to afford payouts. Moreover, the stresses on the Social Security system today show the need for a slightly different system to be set up to fund family leave.²⁰⁰ By taking principles from 401(k) plans, the proposed system can be strengthened and improved.

B. 401(k)

When section 401(k) of the Internal Revenue Code became effective in 1980, the United States realized a new system that would allow employees to save for their retirement while receiving the benefit of deferred tax payments.²⁰¹ Within the first few years after the enactment of section 401(k), large companies recognized the benefits of instituting such a program and began adopting the plan for the benefit of their employees.²⁰² Today, after more than twenty-five years in existence, there are hundreds of thousands of 401(k) plans that have been implemented across the country with tens of millions of active participants in those plans.²⁰³

197. *Id.*

198. *See id.*

199. DEP'T OF THE TREASURY, ANNUAL STATISTICAL SUPPLEMENT, 4.6 tbl.4.A3 (2008), available at <http://www.ssa.gov/history/pdf/4a.pdf>.

200. *See, e.g.,* SOC. SEC. REFORM CTR., SOCIAL SECURITY'S PROBLEM, <http://socialsecurityreform.org/problem/index.cfm> (last visited Jan. 21, 2010) (explaining repercussions on Social Security System of baby-boomer generation nearing retirement).

201. *See* 26 U.S.C. § 401(k)(2)(A) (2006).

202. *See* EMPLOYEE BENEFIT RESEARCH INST., FACTS FROM EBRI 2 (2005), available at <http://www.ebri.org/pdf/publications/facts/0205fact.a.pdf>. According to this fact sheet, "[s]everal companies, Johnson & Johnson, FMC, PepsiCo, JC Penney, Honeywell, Savannah Foods & Industries, Hughes Aircraft Company, and Coates, Herfurth, & England (a San Francisco-based consulting firm) develop[ed] 401(k) plan proposals, many of which officially began operation in January 1982." *Id.*

203. *See id.* at 3.

The language of the statute provides that:

[A] covered employee may elect to have the employer make payments as contributions to a trust under the plan on behalf of the employee, or to the employee directly in cash; [or] under which amounts held by the trust which are attributable to employer contributions made pursuant to the employee's election—may not be distributable to participants or other beneficiaries earlier than—severance from employment, death, or disability.²⁰⁴

By enacting section 401(k), the Internal Revenue Service ("IRS") created a way for employees to truly save money for the future without the concern that the employee would try to dip into his or her savings too soon. The system functions today by only permitting withdrawals of the saved money upon the occurrence of certain contingencies listed in the statute.²⁰⁵ If funds are withdrawn from a 401(k) plan before one of those events occurs, there is a monetary penalty of an additional 10% tax placed on those funds.²⁰⁶ The IRS insists on this penalty in order to encourage employees to save for retirement in the future.²⁰⁷

It is our position that encouraging saving early in life is not only important when thinking about retirement, but also when making plans to have a family. Setting aside money in a separate trust similar to a 401(k) plan will allow mothers and fathers to save adequate funds for the high costs of parenthood. Our proposed supplemental law to the FMLA would function much like a traditional 401(k) plan; however, instead of access to funds being contingent upon retirement or turning fifty-nine and a half, the funds would be made available for a parent to take leave to care for a child. Much like the operation of a 401(k), funds would be withdrawn from the employee's paycheck, placed into a trust, and held there until the birth or adoption of a child. Having a system like this would make it easier for parents, in particular fathers who are generally the primary breadwinners, to take the family leave to which they are entitled. In addition, if for some reason the funds needed to be withdrawn from the trust account prior to the birth or adoption of a child, a tax would be placed on those funds removed before the condition precedent of parenthood. Much like the national 401(k) system in the United

204. 26 U.S.C. § 401(k)(2)(A)-(B)(i)(I).

205. *See id.* § 401(k)(2)(B)(i) (providing that deferred savings will not be distributed unless the employee's position is terminated, the employee dies, the employee incurs a disability, or the employee attains the age of fifty-nine and a half).

206. *See* INTERNAL REVENUE SERV., DEP'T OF TREASURY, PUB. 575, PENSION AND ANNUITY INCOME: FOR USE IN PREPARING 2008 RETURNS 30 (2009).

207. *See id.*

States, our family leave plan would place this tax on prematurely withdrawn funds in order to encourage potential parents to save for parental leave.

C. Tying it all Together

Ultimately, the money for paid family leave programs should come from a contributory fund and an insurance fund which functions much like a Social Security combined with a 401(k) program. An entirely privatized system where an employee saves a portion of his or her own earnings in an account for the specific purpose of paying his or her salary while on leave would only reallocate the salaries of employees. Moreover, employees can choose to save money to be used for the expenses of the birth or adoption of a child on their own, without any change to the FMLA. However, a salary that would not permit taking unpaid leave before the implementation of a privatized forced savings program would still be inadequate afterwards. By allocating money from both employees and employers to be used for this specific purpose, the parental leave as provided for by the FMLA will become more accessible to employees. Ideally, such a change will allow for more employees to take the FMLA leave that they cannot currently take for the reasons outlined above.

The first step in the proposed system would take a percentage of an employee's salary, drawn from each paycheck, and set it aside to preserve funds to be drawn on at the birth or adoption of a child. The money taken from the employee's paycheck will be put into a privatized trust account much like a 401(k) account.²⁰⁸ The funds can be withdrawn on the occasion of parental leave at the birth or adoption of a child, just as 401(k) funds can be accessed upon retirement.²⁰⁹ Employees can elect to set aside up to 5% of their salary at their own discretion up to a fixed amount, namely \$5,000, for their own private use.

Second, an amount equal to half the employee's contributions to his or her own private savings fund will be put, by his or her employer, into a generalized federal fund. As a result, every employer with employees covered by the FMLA would share the cost of paying employees while they are on leave. Because employer contributions would be in proportion to employee contributions, there is a clear incentive for employees

208. See generally 26 U.S.C. § 401(k) (providing that employee contributions withheld from their paychecks will be deposited into a private account held in trust until those funds may be properly withdrawn).

209. *Id.* § 401(k)(2)(B)(i)(I).

to set aside a maximum amount of money. The federal fund will ultimately be used to pay employees for the time they are not working during periods of family leave. Thus, this system will be self-sustaining because withdrawals will be limited by the contributions received.

Third, when it comes time for an employee to take family leave at the birth or adoption of a child, the employee will apply to his or her employer to have the privatized funds released to offset the costs of taking leave. Every employee taking parental leave would be eligible to draw on his or her own privatized fund, and simultaneously petition the government for continued pay during the leave period. Leave pay will come from the general fund of contributions employers make on behalf of their employees who elect to set money aside. The government will provide the employee on leave with a reduced percentage of his or her annual salary for the period of leave. The amount of leave pay will be commensurate to the amount of withholding the employee opted for before the leave period; the more an employee sets aside, the more the employee can get back. Employees on leave will receive their leave pay in the form of direct deposits from the general fund into their bank accounts.

As proposed above, and unlike Social Security, the amount paid out to an employee on leave will be limited by the contributions to the fund for the individual, even though the payment is coming from a general fund.²¹⁰ By preventing employees from receiving more money from the fund than was allocated for their paid leave and assuring that the amount paid out is proportionate to the amount of leave taken, the system will remain self-sustaining and each employee who elected to participate in the program will be entitled to a "fair" amount of money, determined by how much he or she chose to set aside. In addition, proportionate disbursement of funds will also prevent an abuse of the system.

Essentially, employees should not suffer for taking the leave permitted by the FMLA and the proposed system attempts to make taking leave more possible for employees. While our system does not pay an employee full salary while on leave, it does give the employee on leave some money to ease the financial burden of taking significant time off from work. However, the proposed system of paid leave is not designed to give employees a bonus because a child is born or adopted.

210. See Larry DeWitt, *Research Note #3: Details of Ida May Fuller's Payroll Tax Contributions*, SOC. SECURITY ONLINE, July 1996, at 1, <https://www.socialsecurity.gov/history/idapayroll.html>. Ida May Fuller was the first American to receive a Social Security retirement check on Jan. 31, 1940. *Id.* She contributed \$24.75 in taxes to the general fund from which payments were made, and collected \$22,888.92 in Social Security benefits before her death in 1975. *Id.*

Consider a concrete example: an employee taking twelve weeks off from work is taking approximately one quarter of the year off while an employee taking six weeks of leave is taking about one eighth of the year off. Assuming the average employee is paid \$50,000,²¹¹ the employee taking twelve weeks of leave is losing approximately \$12,500 in salary whereas the employee taking six weeks of leave is losing about \$6,250. If both employees had previously set aside 5% of their earnings, after a year, each would have \$2,500 in his or her own account and \$1,250 in the general fund allocated to him or her. It would be unfair to the employee taking twelve weeks of leave to receive 30% of his or her salary while on leave if an employee taking six weeks of leave would receive 60% of his or her salary because they each set aside the same dollar amount. The employees taking short leave periods are losing less money when taking leave because fewer days of work are missed. Taking the maximum leave period should allow an employee to receive the maximum amount of leave pay, but employees taking a shorter period of leave should receive a smaller portion. Thus, leave pay shall be paid out to an employee on leave in proportion to the amount of leave he or she takes.

There would be no way for the employee's leave pay to exceed the amount paid into the fund by the employer because the disbursement of the funds would be capped at full payout and further restricted by the length of leave taken. While employees may have unrestricted access to the funds set aside in their privatized contributions, an employee's access to the general fund will be curtailed. Those employees who choose to take the full leave period would receive their entire allocated amount in installments from the fund over the course of their leave period; the employees who elect to take less than the maximum period of allowed leave will be paid a proportionate amount for their time off and the remaining money allocated by their employers to the general fund will remain.

By implementing a plan like the one proposed on a national scale through federal legislation, the United States can assure that every eligible worker reaps the benefits of such a system as the minimum level of care required by law is increased. States will still be able, and encouraged, to supplement the federal system with their own local parental leave legislation. Because the current system of leave allowed under the FMLA does not satisfy the needs of employees, raising the bar nationwide by requiring the implementation of a paid leave system will carry out the goals the FMLA has failed to satisfy thus far.

211. See Press Release, U.S. Census Bureau, *supra* note 93.

D. Common Objections

In light of the poor financial position in which many Americans have found themselves, it is important to consider the challenges a proposal of this sort presents. While the administrative costs of implementing a companion to the FMLA of this sort may be relatively high at first, the system itself is designed to be self-sustaining. This proposal could be seen as costly to administer, especially to certain groups of people who do not see themselves benefitting from the program. While homosexual couples can benefit from the proposed program if they choose to adopt a child, anyone who does not plan to have children or is incapable of doing so (because of age or otherwise) may oppose this type of legislation. The proposed program does not require all employees to contribute funds to the privatized savings account, nor does it dictate an amount that must be set aside. However, any employee who does not choose to set money aside cannot benefit from the increased return that would be available at the birth or adoption of a child because of matching employer contributions.

People may not find it reasonable to set money aside into an account that can only be accessed when a child is born or adopted because the arrival of a child is never guaranteed; there must be some way to reach the money in the privatized employee account even if a child never arrives. Therefore, if an employee does not draw on the fund during the course of his or her employment, the money set aside into the personalized account will be available to the employee at retirement. This arrangement would make it wiser for employees to set money aside, and in the worst case, simply gain access to it at retirement. In addition to potentially providing a financial cushion for employees who give birth to or adopt a child, the proposed system also creates a tax-deferred system of savings that potentially helps take the burden off the Social Security system. The administrative costs of this program would also be reduced if the unused portion of allocated money rolls into a retirement investment. Because the money in the personalized savings accounts is not taxed until it is withdrawn, there are positive tax consequences for employees. The employers' matching contributions in the general federal fund, although they would not go to the employee, can remain in the general fund to offset the administrative costs for implementing this system. Although this seems detrimental to those employees who do not take parental leave, the money they directly "lost" to the program will be available at retirement, and the money set aside on their behalf never became theirs to use before.

While the benefits of this proposed system are clear for employees,

it still seems employers will be harmed by the implementation of it. In addition to funding another payroll deduction by matching half each employee's savings, the employers are taxed on this expense. It is not a company's fault that an employee chose to have a child. Moreover, the burden of providing for an employee's growing family should fall on that employee, not his or her employer. Even though it is not the responsibility of an employer to provide for an employee's growing family, the uniform implementation of the proposed system can allow employers to remain competitive in terms of salary offerings and other benefits while still promoting the growth of families.

The proposed system creates an incentive for employees to plan the growth of their families financially and only the employees who choose to take advantage of the system will benefit. Ultimately, that makes employers more aware of impending changes in the company workforce. When an employee starts to set aside a greater portion of his or her salary, it is likely that employee is thinking about having a child. This planning allows an employer to adequately address the needs of the company's workforce to accommodate the predicted leave needed by an employee.²¹² This ability to predict impending leave improves workplace efficiency and smoothes transitions. Clearly, these are employer benefits rather than social costs. Employers will benefit from the continued employment of their employees before and after leave periods rather than risking the permanent departure of employees who take leave and never return to work.²¹³

It may still seem this proposed companion law to the FMLA is concerned with employees' rights at the expense of employer protections because of the financial costs that fall on employers. However, this proposed companion law to the FMLA is designed to benefit both employees and employers. To ensure that no employer loses the benefit of his or her matching payroll contributions, the federal fund will be administered by a federal agency that operates under the auspices of the United States DOL. An annual accounting will document each employer's contributions and each employee's accruals for the year. This account-

212. Employers cannot retaliate against employees who are predicting their needs to take leave. 29 U.S.C. § 2615(a)(2) (2006). "An employer 'retaliates' against an employee for exercising FMLA rights when the employee has engaged in FMLA-protected activity, the employer takes an adverse action, and there is a causal link between the two." Leslie E. Silverman & Gershom R. Smith, *Biting The Hand That Rocks The Cradle: What Employers Should Be Doing About Caregiver Discrimination Right Now*, 15 HR ADVISOR: LEGAL & PRAC. GUIDANCE 14, 15 (2009).

213. See, e.g., Gielow, *supra* note 9, at 1539. "Some employers actually reported cost *savings* [after the implementation of the FMLA], generated from reduced employee turnover, enhanced productivity, and goodwill." *Id.*

ing will serve a two-fold purpose: it will assure employees they will continue to have funds available to them to allow for paid parental leave, and it will also protect the employer by showing the funds contributed have been allocated appropriately.

Additionally, the employers, making contributions to the general fund on behalf of their employees, can withhold those contributions as an operating expense rather than as taxable salary.²¹⁴ Therefore, employers will not have to pay Social Security on the money being paid to the general fund.²¹⁵ Meanwhile, the government will continue to collect income tax upon the employee's payment from the fund. Because employers are not paying any additional taxes on the money that is going to the general fund on behalf of their employees, this system maintains many of the advantages of unpaid leave and also benefits employees. Essentially, the proposed system does not have the same negative tax consequences for employers as paying employees' salaries has and, therefore, employers will also benefit from this proposed system.

VI. CONCLUSION

A companion to the FMLA like the one proposed above is necessary if the ultimate goals of the FMLA are to be achieved. Rather than allowing pressures in the workplace, both socially and financially, to keep men in their traditionally stereotyped roles as breadwinners while women are assumed to be caregivers, the proposed system would allow the FMLA to truly address the needs of working families. It would give men an opportunity to bond with their children and it would make it easier for women to balance having a career and having a family. Providing financial support to families as they grow will help relieve the pressures employees currently feel to forego taking parental leave; such support will help ameliorate the deleterious effects of taking parental leave and even encourage leave-taking.

It is evident that a system of paid parental leave could work. Looking to legislation currently in force at the state level and abroad has shown that paid leave programs can be successful.²¹⁶ Only implementing a system of paid parental leave at the federal level can achieve the

214. See generally INTERNAL REVENUE SERV., DEP'T OF TREASURY, PUB. 15, (CIRCULAR E) EMPLOYER'S TAX GUIDE: FOR USE IN 2009 5 (2009), available at http://www.irs.gov/publications/p15/ar02.html#en_US_publink100011577 (discussing the breakdown of employer taxation).

215. See Rebecca Berlin, *What are Payroll Taxes*, ALLLAW.COM, <http://www.alllaw.com/articles/tax/article5.asp> (last visited Jan. 21, 2010).

216. See *supra* Section IV.A-E.

ultimate goals of the FMLA.

Ashleigh Garvey & Claire Mitchell***

* J.D. Candidate, 2010, Hofstra University School of Law. Thank you to everyone who helped to bring this Note from a rough outline to a finished product. Specifically, I would like to thank my co-author, Claire Mitchell, for her diligence and creativity as our topic developed into a final draft. Also, without the guidance of Professor J. Herbie DiFonzo and Hilary McHugh, writing this Note would have been much more difficult; thank you for your patience and suggestions. I would also like to thank my family who served as a constant, supportive sounding board for my ideas, and Thomas W. Moyher, Aaron Solomon, and Robert T. Szyba, whose friendship and encouragement I truly appreciate. Finally, I would like to thank the editors and staff of the *Hofstra Labor & Employment Law Journal*, whose assistance prepared this Note for publication.

** I would like to sincerely thank my co-author, Ashleigh Garvey, for her constant energy and enthusiasm and her diligence throughout the entire writing process. Thank you to our advisor, Professor Herbie DiFonzo, for his patience, guidance and wisdom. Thank you to the entire staff of the *Hofstra Labor and Employment Law Journal* who truly made this publication possible. Most importantly, thank you to my wonderful parents, Cecily and Thomas Mitchell, whose love and encouragement has always given me the strength to succeed.

