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## FINDING A FIX FOR THE FMLA: A NEW PERSPECTIVE, A NEW SOLUTION

Nicole Buonocore Porter\*

### I. INTRODUCTION

When the Family and Medical Leave Act (“FMLA”)<sup>1</sup> was enacted in 1993, it was considered landmark legislation.<sup>2</sup> It was the first statute to contain an affirmative obligation on some employers to provide up to twelve weeks of unpaid leave for certain enumerated reasons, including for the birth or adoption of a baby, to care for a family member with a serious health condition, or because of the employee’s own serious health condition.<sup>3</sup> Although it was recognized at the time that the FMLA was a compromise bill, it seemed to have symbolic significance, recognizing the importance of women being able to take time off to have or care for babies without losing their jobs.<sup>4</sup>

Yet, despite the promise of the FMLA, by almost all accounts it has not achieved much.<sup>5</sup> Critics of the FMLA complain about several

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\* Professor of Law, University of Toledo College of Law. I would like to thank the Hofstra Labor & Employment Law Journal for asking me to write this article, and inviting me to their symposium. I would also like to thank the participants at the symposium at Hofstra Law for their helpful feedback. I would also like to thank my College of Law for its generous support of this project through a summer research grant.

1. 29 U.S.C. § 2601-2654 (2006).

2. See Nicole Buonocore Porter, *Why Care About Caregivers? Using the Communitarian Theory to Justify Protection of “Real” Workers*, 58 U. KAN. L. REV. 355, 377 (2010).

3. 29 U.S.C. § 2612(a)(1) (2006), amended by 29 U.S.C. § 2612(a)(1)(E) (Supp. 2013).

4. See Michael Selmi, *Is Something Better than Nothing? Critical Reflections on Ten Years of the FMLA*, 15 WASH. U. J. L. & POL’Y 65, 67-68 (2004); Joanna L. Grossman, *Job Security Without Equality: The Family and Medical Leave Act of 1993*, 15 WASH. U. J. L. & POL’Y 17, 36 (2004) (referring to the FMLA as a compromise statute and stating that its “symbolic power surpassed its substance”).

5. See Katharine B. Silbaugh, *Is the Work-Family Conflict Pathological or Normal Under the FMLA? The Potential of the FMLA to Cover Ordinary Work-Family Conflicts*, 15 WASH. U. J. L. & POL’Y 193, 194-95 (2004); Porter, *supra* note 2, at 379; Selmi, *supra* note 4, at 67; 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, 140 (1998) (“While the FMLA is a step in the right direction in terms of recognizing work/family conflict, its provisions are meager.”); Emily A. Hayes, *Bridging the Gap Between Work and Family: Accomplishing the Goals*

primary problems with the statute.<sup>6</sup> First of all, there is a huge percentage of the population who are not protected by the statute.<sup>7</sup> Second, because the FMLA only provides for unpaid leave, many workers who are entitled to it cannot afford to take it.<sup>8</sup> Third, the list of the reasons for which employees are entitled to leave is very narrow; thus, scholars complain that it does very little to help parents deal with day-to-day work/family conflicts.<sup>9</sup> Fourth, although the FMLA was drafted to be gender neutral with the goal of improving equality in the workplace for women,<sup>10</sup> it remains the case that of those who take FMLA leave for the birth of a child or to care for a sick family member, the overwhelming majority are women.<sup>11</sup> And finally, employers complain about employee abuse and the difficulty of administration of the serious health condition provisions of the statute.<sup>12</sup>

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*of the Family and Medical Leave Act of 1993*, 42 WM. & MARY L. REV. 1507, 1507 (2001) (stating that the Act has not proven to be “quite the panacea that it was intended to be” and that it is evident that the “FMLA is not achieving the goals expressed at the time of its passage.”).

6. Chuck Halverson, *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, 257 (2003) (stating that many articles have been written since the passage of the FMLA addressing its shortcomings).

7. As will be discussed more below, this is because of the combination of several of the FMLA’s limitations. *See infra* Part III.A.1. First, only employers with fifty or more employees within a seventy-five mile radius are covered by the FMLA. 29 U.S.C. § 2611 (2)(B)(ii) (2006). Second, the FMLA defines eligible employees to include only those who have worked more than one year for the company and have worked 1,250 or more hours in the past twelve months. 29 U.S.C. § 2611(2)(A) (2006). Thus, because of these limitations, almost forty percent of all employees are not entitled to FMLA leave. Porter, *supra* note 2, at 377-78.

8. 29 U.S.C. § 2612(c) (2006); *see also* Ann O’Leary, *How Family Leave Laws Left Out Low-Income Workers*, 28 BERKELEY J. EMP. & LAB. L. 1, 45 (2007) (stating that seventy-five percent of employees reported not being able to afford to take leave); Young, *supra* note 5, at 140-41 (stating that many cannot afford to take unpaid leave and thus, this creates a disparity between those who can and cannot afford to take an unpaid leave).

9. *See, e.g.*, Porter, *supra* note 2, at 378-79 (stating that because the FMLA provides leave for only certain enumerated reasons, it does little to cover routine issues that affect the ability of men and women to balance work and family).

10. 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, 431 (2007) (stating that the FMLA was an “attempt at redressing women’s inequality through a gender-neutral social policy”).

11. *See* Young, *supra* note 5, at 143 (stating that “the FMLA does little to . . . promote equal opportunity for women in the workplace”); Porter, *supra* note 2, at 379 (stating that the FMLA might actually harm “women because it has done nothing to change the leave-taking patterns of men and women”); Selmi, *supra* note 4, at 75 (stating that the FMLA has not increased the number of men taking leave so has not contributed to women’s equality in the workplace); Palazzari, *supra* note 10, at 432 (stating that the FMLA has “left most men and women in the same position they occupied when the Act was passed”).

12. *See infra* Part IV.A; *see also* Heather A. Peterson, *The Daddy Track: Locating the Male Employee Within the Family and Medical Leave Act*, 15 WASH. U. J. L. & POL’Y 253, 255 (2004) (discussing the fact that the “[c]ongressional debate surrounding the [FMLA’s] passage centered on

Over the years, scholars have proposed many solutions to improve the FMLA.<sup>13</sup> Many have proposed lowering the number of employees an employer has to employ in order to trigger protection of the Act.<sup>14</sup> Another way of increasing the number of employees protected by the Act is to decrease or eliminate the one-year and 1,250 hours of work required to trigger coverage.<sup>15</sup> Many have argued that allowing only twelve weeks is woefully inadequate, especially when compared to other countries.<sup>16</sup> Some have proposed expanding the list of individuals for which an employee can take leave to provide care.<sup>17</sup> Several scholars have suggested expanding the reasons for which an employee can qualify for FMLA leave.<sup>18</sup> Finally, many scholars have argued that the FMLA should provide paid leave and not just unpaid leave.<sup>19</sup> Of course,

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the cost of implementation” for employers).

13. For a list of potential FMLA-related reforms, see Porter, *supra* note 2, at 405-07.

14. O’Leary, *supra* note 8, at 59-60; see Young, *supra* note 5, at 153. During his first-term campaign, President Obama proposed expanding the FMLA to cover businesses with twenty-five or more employees, rather than the current requirement of fifty. Porter, *supra* note 2, at 406 n.356.

15. O’Leary, *supra* note 8, at 59-60.

16. See Julie C. Suk, *Are Gender Stereotypes Bad for Women? Rethinking Antidiscrimination Law and Work-Family Conflict*, 110 COLUM. L. REV. 1, 1 (2010); Silbaugh, *supra* note 5, at 194; Erin L. Kelly, *Failure to Update: An Institutional Perspective on Noncompliance With the Family and Medical Leave Act*, 44 LAW & SOC’Y REV. 33, 33 (2010) (stating that the parenting leave rights given to parents in our country “are quite modest compared to other countries’ leave benefits.”); Young, *supra* note 5, at 155 (proposing longer leaves of at least six months); Arianne Renan Barzilay, *Back to the Future: Introducing Constructive Feminism for the Twenty-First Century—A New Paradigm for the Family and Medical Leave Act*, 6 HARV. L. & POL’Y REV. 407, 408 (2012); Hayes, *supra* note 5, at 1525-26 (stating that the twelve-week period does not provide for proper bonding between parents and babies and that this problem is exacerbated if the mother had any kind of pre-birth complications that required leave); Lisa Bornstein, *Inclusions and Exclusions in Work-Family Policy: The Public Values and Moral Code Embedded in the Family and Medical Leave Act*, 10 COLUM. J. GENDER & L. 77, 77 (2000) (noting that the United States was “among the last industrialized nations to pass parental leave legislation”).

17. See Bornstein, *supra* note 16, at 109 (criticizing the FMLA because families that fail to meet the standard family form cannot seek protection under the Act); Silbaugh, *supra* note 16, at 194; cf. Barzilay, *supra* note 16, at 414-15 (“Some state FMLA-type laws have expanded the definition of family to include a wider range of family members, such as domestic partner, grandparents, and parents-in-law.”).

18. See Porter, *supra* note 2, at 379 (criticizing the FMLA for failing to provide protection for “routine childcare obligations”); Young, *supra* note 5, at 142-43 (arguing that the FMLA fails at protecting the needs of children and the ability for women to equally excel at work).

19. See Young, *supra* note 5, at 153-54 (arguing for wage replacement for family leave); Nicole Buonocore Porter, *Synergistic Solutions: An Integrated Approach to Solving the Caregiver Conundrum for “Real” Workers*, 39 STETSON L. REV. 777, 836-40 (2010) (proposing a paid leave program and discussing a bill proposed in Congress that would provide for paid leave); Barzilay, *supra* note 16, at 408; Patricia A. Shiu & Stephanie M. Wildman, *Pregnancy Discrimination and Social Change: Evolving Consciousness About a Worker’s Right to Job-Protected, Paid Leave*, 21 YALE J.L. & FEMINISM 119, 120 (2009) (“[a]lthough common around the world, job protected, paid leave remains an unachieved goal for the U.S. workforce.”).

there are criticisms of all of these proposals, most frequently from employers who argue that these proposals are too expensive.<sup>20</sup>

In this article, I am taking a different perspective and proposing a reform that I have not seen proposed before.<sup>21</sup> Of all of the problems with the FMLA, the one that gets the least attention is the frequency with which employees abuse their rights under the FMLA and the difficulty employers have administering the statute.<sup>22</sup> In other words, very little scholarship analyzes the FMLA from the perspective of employers.<sup>23</sup> After considering this perspective,<sup>24</sup> I am proposing a two-part solution. The first part of my proposal is to sever the FMLA coverage for the birth or adoption of a baby and the care of family members (which I will call “care of others”)<sup>25</sup> from coverage for one’s own serious health condition (which I will call “self care”) and coverage for very short-term absences to care for others. The FMLA would continue to cover the birth or adoption of a baby and leave to care for family members, but only when the anticipated leave is longer than ten days in length. It would not cover short-term (fewer than ten days) absences for minor illnesses and injuries. The second part of my proposal is the enactment of a separate statute to deal with short-term absences for both the care of others and self care. Longer self-care issues are, I believe, adequately covered by the Americans with Disabilities Act (ADA), as amended by the ADA

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20. See Selmi, *supra* note 4, at 78-79 (discussing how the business community opposed the FMLA).

21. Professor Julie Suk does discuss the wisdom of separating family leave from medical leave, basing her proposal on the relative success of the European models. However, her article is primarily about whether America’s anti-discrimination model is preferable over the European model, which tends to perpetuate gender stereotypes. See Suk, *supra* note 16, at 4-6.

22. Robert J. Aalberts & Lorne H. Seidman, *The Family and Medical Leave Act: Does It Make Unreasonable Demands on Employers?*, 80 MARQ. L. REV. 135, 138-39 (1996) (discussing the fact that the FMLA is an “employer-hostile” piece of legislation); see also Sandra F. Sperino, *Chaos Theory: The Unintended Consequences of Expanding Individual Liability Under the Family and Medical Leave Act*, 9 EMP. RTS. & EMP. POL’Y J. 175, 180 (2005) (stating that Congress expressed that the purposes of the FMLA should be accomplished “in a manner that accommodates the legitimate interests of employers.”).

23. Certainly some publications written by lawyers who represent employers discuss this problem, but you do not see it discussed in the law review literature very much. See *infra* Part IV.A; but see Peter A. Susser, *The Employer Perspective on Paid Leave & the FMLA*, 15 WASH U. J.L. & POL’Y 169, 169-70 (2004); Aalberts & Seidman, *supra* note 22, at 138-40.

24. To be clear, although I am considering the perspective of the employer, my ultimate goal is to improve the FMLA for employees too. I am attempting to find a way to make the FMLA more palatable to businesses, and more helpful for employees. I believe that if businesses become less hostile to the statute, this will ultimately inure to the benefit of employees.

25. The Supreme Court calls this “family care.” *Coleman v. Court of Appeals of Md.*, 132 S. Ct. 1327, 1332 (2012).

Amendments Act of 2008.<sup>26</sup>

This proposal would accomplish something significant. It would curb the many abuses of the FMLA and greatly decrease the complexity of the statute. This would in turn decrease employers' hostility towards the FMLA. Much of the hostility towards the FMLA is related to the abuses of the self-care provision and the difficulty in determining whether someone meets the definition of serious health condition as well as the difficulty in tracking leave, especially when employees take leave on an intermittent basis.<sup>27</sup> It is also my hope that decreasing the hostility towards the statute will have positive spillover effects. If FMLA leave is not viewed negatively by employers, perhaps they would be more willing to support (or less willing to oppose) other reforms that could provide increased coverage, or even some form of income replacement.<sup>28</sup>

This article will proceed in five parts. Part II will provide an overview of the FMLA, its history and its provisions. Part III will discuss the primary criticisms of the statute, as well as some of the solutions proposed by commentators. Part IV will then provide my proposal—the logistics, the justifications, and the anticipated criticisms. Part V will conclude.

## II. AN OVERVIEW OF THE FMLA

### A. *The History of the FMLA*

“Congress passed the FMLA in February 3, 1993, and President Clinton promptly signed it [into law] two days later.”<sup>29</sup> It had been resurrected after eight years of lobbying and two vetoes by President George Bush,<sup>30</sup> but ultimately passed by a wide margin in both the House and the Senate.<sup>31</sup> The goal of the FMLA was to provide

26. See *infra* Part IV.C.1; ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2009) (codified at 42 U.S.C. §§ 12101-12213 (Supp. III 2010)).

27. See, e.g., Jessica Beckett-McWalter, *The Definition of “Serious Health Condition” Under the Family and Medical Leave Act*, 55 HASTINGS L.J. 451, 451-52, 459 (2003) (stating that employers and courts have found it difficult to interpret some of the Act's provisions).

28. Of course there are some who argue that the very reason employers fought against job-protected unpaid leave is because they were worried that it would be a foot in the door to further reforms such as paid leave. Susser, *supra* note 23, at 170.

29. Aalberts & Seidman, *supra* note 22, at 135-36.

30. Hayes, *supra* note 5, at 1516 (noting that in 1990 and 1992, the legislation made it successfully through both the House of Representatives and the Senate only to be vetoed by President Bush).

31. Lori Auray, *A Cost-Shifting Amendment to the Family and Medical Leave Act of 1993: How to Improve upon a Good Thing*, 3 TEX. J. WOMEN & L. 403, 404 (1994).

employees up to twelve weeks of job-protected leave for parental leave, for the care of family members, or for the worker's own illness.<sup>32</sup> The stated purposes of the Act are "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 interest in preserving family integrity. . . ."<sup>33</sup> As stated by President Clinton, "American workers . . . will no longer have to choose between the job they need and the family they love."<sup>34</sup>

There is a bit of a debate over whether it was both the care-of-others provisions and the self-care provisions that inspired the Act, or whether the self-care provisions were just an afterthought.<sup>35</sup> Much of the impetus appears to have been the desire to allow women to get pregnant and have babies while working without losing their jobs.<sup>36</sup> As many know, until the FMLA was passed, "[t]he United States was the only industrialized nation in the world that d[id] not have a national policy guaranteeing some type of" parenting leave.<sup>37</sup> This is despite the fact that, years earlier, Congress had passed the Pregnancy Discrimination Act ("PDA"), which amended Title VII of the Civil Rights Act of 1964 to provide protections for women who are pregnant or have recently given birth.<sup>38</sup> Specifically, the PDA states:

The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including

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32. Aalberts & Seidman, *supra* note 22, at 136.

33. 29 U.S.C. § 2601(b)(1) (2006).

34. Aalberts & Seidman, *supra* note 22, at 136 (citing Statement on Signing the Family Medical Leave Act of 1993, 29 WEEKLY COMP. PRES. DOC. 144, 144 (Feb. 8, 1993)).

35. See, e.g., Sabra Craig, *The Family and Medical Leave Act of 1993: A Survey of the Act's History, Purposes, Provisions, and Social Ramifications*, 44 DRAKE L. REV. 51, 53 (1995) (stating that medical leave "has taken a back seat to" maternity leave). In fact, the Supreme Court debated the impetus for the self-care provisions in the recent case of *Coleman v. Court of Appeals of Maryland*. 132 S. Ct. 1327, 1334 (2012).

36. See Craig, *supra* note 35, at 53; Barzilay, *supra* note 16, at 412; Peterson, *supra* note 12, at 253; Deborah J. Anthony, *The Hidden Harms of the Family and Medical Leave Act: Gender-Neutral versus Gender-Equal*, 16 AM. U. J. GENDER SOC. POL'Y & L. 459, 473 (2008).

37. Craig, *supra* note 35, at 52; Auray, *supra* note 31, at 404-05 ("Germany and Japan, countries often considered our greatest economic competitors, offer three months of paid family leave with guaranteed reinstatement."); Silbaugh, *supra* note 5, at 201.

38. Pregnancy Discrimination Act, Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified as amended at 42 U.S.C. § 2000e (2006)).

receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work<sup>39</sup>

The PDA proved inadequate to protect women who wanted time off to bond with and care for their babies for several reasons.<sup>40</sup> First of all, it only covers women during the period in which they are unable to work<sup>41</sup> (generally six weeks for a natural birth and eight weeks for a cesarean birth)<sup>42</sup> and thus would not cover a woman who wanted more time to bond with her baby. Second, it only requires “equal treatment” so an employer only has to provide leave to a pregnant woman if it would also provide leave to a similarly situated employee who must be off work for a medical reason for six to eight weeks.<sup>43</sup> Finally, even when an employer provided maternity leave, the employer sometimes would refuse to reinstate the employee once she returned from her leave.<sup>44</sup> It was this reality that contributed to the enactment of the FMLA.<sup>45</sup>

The first bills to protect women taking maternity leave were drafted in 1984 and 1985,<sup>46</sup> although it took years for it to come to fruition. The original bill included “eighteen weeks of parental leave every two years and twenty-six weeks for employee illness or disability every year,” rather than the twelve weeks for both kinds of leave that eventually became law.<sup>47</sup> It was early in the legislative history that the drafters decided to include men, despite pressure from early supporters who only wanted to offer it to women.<sup>48</sup> The concern with only offering leave to women is that it would likely cause “special treatment stigma,”<sup>49</sup> the reluctance of employers to hire women because they will be perceived as

39. 42 U.S.C. § 2000e(k)(2006).

40. See Craig, *supra* note 35, at 53; Porter, *supra* note 2, at 376.

41. Porter, *supra* note 2, at 376.

42. See Kelly, *supra* note 16, at 35.

43. Craig, *supra* note 35, at 53; Porter, *supra* note 2, at 376; Hayes, *supra* note 5, at 1517 (“The PDA was a step toward a universal maternity leave policy, but did not yet cover everyone.”).

44. Craig, *supra* note 35, at 55 (discussing one such story).

45. *Id.* at 55-56 (“Incited by the occurrence of such incidents, women’s organizations lobbied to introduce legislation to Congress which guaranteed women the right to reclaim their jobs after pregnancy.”).

46. *Id.* at 56.

47. Selmi, *supra* note 4, at 69; Grossman, *supra* note 4, at 36.

48. Selmi, *supra* note 4, at 70; Halverson, *supra* note 6, at 258 (“Though much of the language in Congress’s findings and purposes is gender neutral, the main target of the FMLA is females, particularly mothers.”).

49. I coined this term. Porter, *supra* note 2, at 359.



more expensive to employ.<sup>50</sup> No version of the bill ever contained a paid leave provision—the drafters knew it would never obtain majority support so it was considered a “non-starter” from the beginning.<sup>51</sup> One commentator stated that supporters of the FMLA advocates had “three expectations” for the statute.<sup>52</sup>

First, the statute was intended to ease the burden of balancing work and family issues. Second, the legislation would likely be a first step to a comprehensive family leave policy that would include paid leave . . . . Third, by extending the leave provisions to men, the statute was expected to break down some of the stereotypes regarding childcare . . .<sup>53</sup>

In addition to providing protection for family leave, Congress also wanted to provide relief to employees who faced serious health conditions or to allow them to care for family members with serious health conditions.<sup>54</sup> The House Reports are filled with stories of employees losing their jobs because of their own serious health conditions or because they were trying to balance their job responsibilities with the care of an ill family member.<sup>55</sup> However, it seems possible that Congress only included the self-care provisions in order to enhance the gender neutrality of the statute, thus reducing the stigma against women.<sup>56</sup> Although some would argue that the gender

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50. Selmi, *supra* note 4, at 70; Porter, *supra* note 2, at 359; Kelly, *supra* note 16, at 35 (“[t]he text of the statute emphasizes the gender neutrality of the new rights . . . and argu[es] that ‘employment standards that apply to one gender only have serious potential for encouraging employers to discriminate against employees and applicants for employment who are of that gender.’”); *id.* at 42 (“Because women are more likely than men to use parental leaves. . . the costs of compliance with the FMLA . . . rise with each woman of childbearing age.”); Bornstein, *supra* note 16, at 78; *see also* Grossman, *supra* note 4, at 42; Anthony, *supra* note 36, at 472 (stating that proponents of the FMLA were worried that if applied to only women, it would create stigma against women).

51. Selmi, *supra* note 4, at 71; *see also* Silbaugh, *supra* note 4, at 201; Peterson, *supra* note 4, at 256; Anthony, *supra* note 4, at 470.

52. Selmi, *supra* note 4, at 73.

53. *Id.*

54. Craig, *supra* note 35, at 57-58.

55. *Id.* *But see* Selmi, *supra* note 4, at 73 (stating that the legislative history did not contain much discussion on the serious health condition provision and that people did not think this was as important because there was sick leave available elsewhere).

56. Silbaugh, *supra* note 5, at 201. *But see* Coleman v. Court of Appeals of Md., 132 S.Ct. 1327, 1336 (2012) (stating that Congress made no specific findings and presented no evidence that the self-care provisions were necessary to avoid discrimination against women because of the family-care provisions). Another explanation for including the self-care provision was “to broaden the bill’s support base to include unions and senior citizens.” Silbaugh, *supra* note 5, at 201.

neutrality of the family leave provisions would be enough to reduce the stigma against women,<sup>57</sup> it seems likely that Congress knew or suspected that women would continue to be the primary leave takers of family leave<sup>58</sup> so the self-care provision was the only mechanism by which men would take leave in any appreciable amount.<sup>59</sup>

### B. *The FMLA Provisions*

The FMLA provides up to twelve weeks of unpaid leave per year in the following circumstances:

- 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 a 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.<sup>60</sup>

Not every employee is entitled to this benefit. Private sector<sup>61</sup> employers must employ at least fifty employees within a seventy-five

57. Barzilay, *supra* note 16, at 412 (“By promoting accommodation for parents within a gender-neutral framework, the FMLA has important potential to protect childbearing women’s ability to maintain labor force attachment, without further stigmatizing women as a subordinate class of workers.”).

58. Grossman, *supra* note 4, at 43 (stating that the hearings made clear that most supporters of the leave legislation were concerned with motherhood more than parenthood).

59. Selmi, *supra* note 4, at 67 (stating that, at the time the FMLA was implemented into law, there was nothing to indicate that men would start to take more family leave). As is turns out, most of the leave taken under the FMLA is for employees’ own serious health conditions and not family leave. *Id.*; Grossman, *supra* note 4, at 46 (stating that Congress knew that men would take leave more for their own health reasons than for parenting leave and Congress was right). *See generally* Coleman v. Court of Appeals of Md., 132 S.Ct. 1327, 1334-37 (2012) (debating this issue).

60. 29 U.S.C. §2612(a)(1)(A)-(D) (2006).

61. All public sector employers are covered by the statute as well. 29 U.S.C. § 2611(4)(A) (2006); *see also* Joseph Willis, *The Family and Medical Leave Act of 1993: A Progress Report*, 36 BRANDEIS J. FAM. L. 95, 97 (1997).

mile radius of the employee's worksite in order to be covered by the Act.<sup>62</sup> For employees to be eligible, they must have worked for at least one year and for at least 1,250 hours in the past twelve-month period,<sup>63</sup> which is an average of twenty-five hours per week.<sup>64</sup> Thus, many employees are not eligible for FMLA leave either because they have not worked long enough for their employer (and/or enough hours) or because their employer is too small to be covered by the Act. "Eligibility is determined as of the time that the employee asks for leave."<sup>65</sup>

Employers are entitled to require employees to substitute available paid leave for FMLA leave.<sup>66</sup> Thus if an employer has a short-term disability policy that provides for six weeks of income replacement, the employer can require that the six weeks of paid leave is part of the twelve weeks total, so if an employee wanted to be on leave for the full twelve weeks after the birth of her baby, she would get six weeks of paid leave and the other six weeks would be unpaid.<sup>67</sup> Thus, even if an employer has a more generous paid leave program than what the FMLA requires, the employer is not required to provide additional FMLA leave.<sup>68</sup>

An employee's primary obligation with respect to FMLA leave is to provide notice to the employer at least thirty days before the leave is to begin or as soon as is practicable.<sup>69</sup> This requirement is easy to meet in the case of the birth of a baby or a scheduled, non-emergency surgery, but becomes an often-controverted issue when an employee calls in to request leave the day the employee is taking it.<sup>70</sup> An employee is also required to provide the employer with medical certification, substantiating the need for the leave, when the leave is for the

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62. 29 U.S.C. § 2611 (2)(B)(ii) (2006).

63. *Id.* §(2)(A).

64. Hayes, *supra* note 5, at 1509.

65. *Id.* at 1510.

66. Halverson, *supra* note 6, at 258 ("In a personal health leave situation, the employee can elect, or the employer may require an employee, to use all accrued vacation and sick time as part of the FMLA extended leave . . ."); Susser, *supra* note 23, at 174.

67. See Kelly, *supra* note 16, at 54 (noting that many organizations provided disability benefits "for the first six to eight weeks of maternity leave" and then allowed the employee to take additional unpaid leave up to twelve weeks).

68. Hayes, *supra* note 5, at 1510. But see Kelly, *supra* note 16, at 55 (noting that some companies provide mothers with six to eight weeks of disability leave and then allow them to begin their FMLA leave, giving them eighteen weeks of leave).

69. 29 U.S.C. 2612(e)(2)(B) (2006); see also Beckett-McWalter, *supra* note 27, at 453 (stating that the 30 days notice provision does not apply in the case of a "medical emergency or other unforeseen events").

70. See generally Aalberts & Seidman, *supra* note 22, at 150-57.

employee's or a family member's serious health condition.<sup>71</sup>

The employer has two primary obligations once notice of FMLA leave has been received. The employer has to maintain the leave-taker's benefits including medical insurance, and must continue to pay the normal premiums that the employer covers.<sup>72</sup> The employer can, however, require the employee to pay his portion of the health insurance premium while he is on leave.<sup>73</sup> The other primary obligation of the employer is to restore the employee to the position she left or "to an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment."<sup>74</sup> Any equivalent position must have the same duties and responsibilities as the previous one and must require the same skills and authority.<sup>75</sup>

There are two limitations to the basic coverage outlined above. The first one is the "key employee" exception, whereby a "salaried eligible employee who is among the highest paid ten percent of the employees" does not have to be reinstated if doing so would cause "substantial and grievous economic injury to the operations of the employer" and the employer gives the key employee notice.<sup>76</sup> The other limitation concerns husbands and wives employed by the same employer.<sup>77</sup> Except in the case of personal medical leave, the required twelve weeks is split between the couple.<sup>78</sup> Thus, if the wife/mother takes off twelve weeks for the birth of the baby, the husband/father cannot take any leave to care for the baby.<sup>79</sup>

Employees who feel their FMLA rights have been violated can either file a complaint with the Wage and Hour Division of the Department of Labor, which has the authority to bring a cause of action against the employer, or the employee can pursue a private right of action against the employer, for "interfering with, denying, or restraining employees from exercising their rights under the Act, or from discriminating [or retaliating] against an employee for exercising those

71. 29 U.S.C. § 2613(a) (2006).

72. 29 U.S.C. § 2614(c)(1) (2006).

73. Susser, *supra* note 23, at 177 (stating that employees are responsible for their portion of the premiums when they are on leave).

74. 29 U.S.C. § 2614(a)(1)(A)-(B) (2006); *see also* Susser, *supra* note 23, at 173-74 (discussing this obligation).

75. 29 C.F.R. § 825.215 (2013); Hayes, *supra* note 5, at 1510-11.

76. 29 U.S.C. § 2614(b)(1)-(2) (2006).

77. 29 U.S.C. § 2612(f) (2006).

78. 29 U.S.C. § 2612(f) (2006); Hayes, *supra* note 5, at 1511.

79. *See* Hayes, *supra* note 5, at 1511.

rights.”<sup>80</sup>

There have been some expansions of FMLA leave; although they are fairly narrow and specific and not relevant to this project so I will discuss them very briefly. The first and only amendments to the statute were passed in 2008 and deal only with workers in the military and their family members.<sup>81</sup> The amendments created two types of new FMLA leave. The first military caregiver leave allows qualified employees to take up to twenty-six weeks of FMLA leave every twelve months to care for a service member who has medical needs if they are the spouse, child, parent or next of kin of a covered service member.<sup>82</sup> The other leave provided by the amendments allows eligible employees who are the spouse, child, or parent of a military member to take up to twelve weeks of leave every twelve months to address issues that arise when a service member is deployed.<sup>83</sup> Also, “in 2010 the [Department of Labor] issued an Administrative Interpretation that clarified that an employee may qualify for FMLA leave to care for the son or daughter of a same-sex partner.”<sup>84</sup>

### III. CRITICISMS AND PROPOSED SOLUTIONS

#### A. *The FMLA’s Critics*

The FMLA is criticized for several reasons.<sup>85</sup> In fact, the nicest

80. 29 U.S.C. §§ 2615, 2617 (2006); *see also* Sperino, *supra* note 22, at 180-81; Hayes, *supra* note 5, at 1511-12.

81. 29 U.S.C. § 2612(a)(1)(E) (Supp. 2013); Marcy Karin, *Time Off For Military Families: An Emerging Case Study in a Time of War . . . And The Tipping Point for Future Laws Supporting Work-Life Balance?*, 33 RUTGERS L. REC. 46, 49 (2009), available at [http://lawrecord.com/files/33\\_Rutgers\\_L\\_Rec\\_46.pdf](http://lawrecord.com/files/33_Rutgers_L_Rec_46.pdf).

82. 29 U.S.C. § 2612(a)(3) (Supp. 2013).

83. *Id.* § (a)(1)(E).

84. WAGE & HOUR DIV., U.S. DEP’T OF LABOR, ADMINISTRATOR’S INTERPRETATION NO. 2010-3, CLARIFICATION OF THE DEFINITION OF “SON OR DAUGHTER” UNDER SECTION 101(12) OF THE FAMILY AND MEDICAL LEAVE ACT (FMLA) AS IT APPLIES TO AN EMPLOYEE STANDING “IN LOCO PARENTIS” TO A CHILD (2010), available at [http://www.dol.gov/WHDOpinion/adminIntrprtn/FMLA/2010/FMLAAI2010\\_3.htm](http://www.dol.gov/WHDOpinion/adminIntrprtn/FMLA/2010/FMLAAI2010_3.htm); *see also* Robin R. Runge, *Redefining Leave from Work*, 19 GEO. J. ON POVERTY L. & POL’Y 445, 459-60 (2012) (discussing this interpretation).

85. One criticism not discussed in detail below is the fact that many employers simply do not comply with the FMLA provisions either by not providing leave at all (especially to fathers) or providing inadequate leave. *See generally*, Kelly, *supra* note 5, at 33-35 (discussing employers’ noncompliance with the FMLA and the possible reasons for that noncompliance); *id.* at 36 (stating that studies indicate that somewhere “between 28 and 44 percent of organizations are noncompliant”).

thing anyone has ever said about the FMLA is that it is a good start or that it is better than nothing.<sup>86</sup> And there are some who question whether it is better than nothing.<sup>87</sup> This sub-part will address the main criticisms of the statute.

### 1. The FMLA Does Not Protect a Large Percentage of Workers

Three limitations of the FMLA combine to create a reality where almost forty percent of the population is NOT entitled to FMLA leave.<sup>88</sup> First, only employers with fifty or more employees within a seventy-five mile radius are covered by the FMLA.<sup>89</sup> Second, the FMLA defines eligible employees to include only those who have worked more than one year for the company and have worked 1,250 or more hours in the past twelve months.<sup>90</sup> Even if an employee works for an employer large enough to be covered by the Act, if the employee works “multiple part-time jobs,” or works in a “high-turnover field,” the employee might never become eligible.<sup>91</sup> Some have also criticized the FMLA because the majority of those not covered are women.<sup>92</sup> The eligibility rules also have class and race implications.<sup>93</sup>

### 2. No Paid Leave

By far, the biggest criticism of the statute is that it does not provide

86. See, e.g., Auray, *supra* note 31, at 403 (“Although the FMLA is a positive first step toward solving the American work-family dilemma, the legislation does not go far enough.”); Grossman, *supra* note 4, at 45 (stating that “advocates believed an imperfect law to be better than no law”); Anthony, *supra* note 36, at 474 (stating that “any leave policy is better than none”).

87. See generally, Selmi, *supra* note 4, at 65-68; see also Michael Selmi, *The Limited Vision of the Family and Medical Leave Act*, 44 VILL. L. REV. 395, 396 (1999) (stating that the FMLA might have halted progress towards better family leave); *id.* (stating that the FMLA simply duplicated what was already given with respect to parental leave and thus only had an “unintended consequence” of providing additional sick leave).

88. Grossman, *supra* note 4, at 37-38; Porter, *supra* note 2, at 377-78. Some studies have the number at close to half of the workforce being ineligible for leave. Barzilay, *supra* note 16, at 413. See Silbaugh, *supra* note 5, at 193-94 (noting that many commentators complain about the coverage of the FMLA).

89. 29 U.S.C. § 2611 (2)(B)(ii). Many commentators have complained about this restriction. See, e.g., Craig, *supra* note 35, at 66.

90. 29 U.S.C. § 2611(2)(A).

91. Palazzari, *supra* note 10, at 454.

92. Young, *supra* note 5, at 140 (stating that this is because women are more likely to work for smaller employers who are not required to comply with the FMLA).

93. Bornstein, *supra* note 16, at 87 (“Employees in households with low family income levels, low levels of education, and those from Latino backgrounds are the least likely employees to work for covered employers”).

any paid leave.<sup>94</sup> Thus, there are many employees who are entitled to leave but cannot afford to take it.<sup>95</sup> Some have criticized the lack of paid leave because it discriminates based on class.<sup>96</sup> There are also indicators that the Act's lack of paid leave has a disproportionate effect on minorities.<sup>97</sup> The absence of paid leave in the FMLA "results in a disproportionate disadvantage for working-class parents, who tend to be less likely than their middle- and upper-class counterparts to be able to afford to take unpaid leave."<sup>98</sup> As stated by one commentator, "the unpaid leave provided by the FMLA is a symbolic benefit that they simply cannot afford to take."<sup>99</sup> One older study demonstrated that because "[s]eventy-seven percent of women work in lower-paying, non-professional jobs . . . they cannot afford to take unpaid leave even if it is desperately needed."<sup>100</sup> The "employees in the lowest paid jobs are also the least likely to have generous benefit packages" that would include paid sick time or vacation leave.<sup>101</sup>

### 3. The FMLA Does Not Ameliorate the Work/Family Conflict

Work/family scholars criticize the FMLA because it does not cover the type of routine absences that many parents are forced to take,<sup>102</sup> and thus does nothing to alleviate "the work/family conflict."<sup>103</sup> Here, I am referring to absences for minor illnesses; absences because a babysitter or nanny is sick and therefore the employee has no one to watch her children; absences for routine doctor, dentist, orthodontist appointments; and absences for parent-teacher conferences or other school-related

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94. Hayes, *supra* note 5, at 1532-33.

95. Selmi, *supra* note 4, at 75-76 (stating that the most frequent reason given by employees for not taking leave is the "inability to afford the leave").

96. Selmi, *supra* note 4, at 71; *see also* Young, *supra* note 5, at 141 ("Many have criticized the lack of wage replacement as creating a disparity between those who can and those who cannot afford to take an unpaid leave.").

97. Hayes, *supra* note 5, at 1525 (stating that most employees who could not afford to take FMLA leave when it was needed were "hourly workers, African Americans, or employees with some college education").

98. *Id.* at 1523.

99. Auray, *supra* note 31, 405.

100. Craig, *supra* note 35, at 74; Barzilay, *supra* note 16, at 414 ("By one account, seventy-seven percent, the vast majority of covered employees, cannot afford to make use of available leave.").

101. Hayes, *supra* note 5, at 1524.

102. Craig, *supra* note 35, at 60 ("While the FMLA provides leave in extraordinary circumstances, it is not structured to aid families with daily work-family conflicts.").

103. *See, e.g.*, Barzilay, *supra* note 16, at 413.

activities and performances.<sup>104</sup>

As many commentators have noted, the FMLA actually “provide[s] leave in . . . very limited circumstances.”<sup>105</sup> This makes the FMLA a pretty useless tool for alleviating the burden of work/family conflict.<sup>106</sup> As stated by one commentator, “[w]hile the FMLA is a step in the right direction in terms of recognizing the work/family conflict, its provisions are meager.”<sup>107</sup> Many scholars noted that “the benefits provided by the [FMLA] are more symbolic than they are real.”<sup>108</sup>

#### 4. FMLA Has Not Improved Gender Equality in the Workplace or at Home

Many hoped that the gender neutrality of the FMLA would cause more men to take paternity leave when a new child is born or adopted and would lead to more men taking leave to care for children or parents who have serious health conditions.<sup>109</sup> As stated by one commentator, Congress must have had this vision: “Employers would offer caretaking leave to men and women on equal terms, men and women would take leave and share the burden of caring for children, employers would perceive male and female employees as equally (un)attractive, and women would achieve equality both as parents and as workers.”<sup>110</sup> However, by almost all accounts, the FMLA has not led to an appreciable increase in the number of men taking leave, except for their own serious health conditions.<sup>111</sup> Those who take leave for family

104. See, e.g., Porter, *supra* note 19, at 793; Young, *supra* note 5, at 142-43 (noting that the FMLA fails to meet the needs of moderately sick children and it does not cover routine doctor’s appointments); Barzilay, *supra* note 16, at 413 (stating that a serious drawback of the FMLA is that “it does not protect workers who have ongoing, continuous family caregiving obligations”); *id.* (stating that the phrase “serious health condition excludes numerous childhood ailments, such as an ear infection or a common cold”).

105. See, e.g., Craig *supra* note 35, at 64.

106. See Craig, *supra* note 35, at 66; Bornstein, *supra* note 16, at 104 (“The [FMLA] provides a cramped solution to work-family problems.”).

107. Young, *supra* note 5, at 140.

108. See, e.g., Bornstein, *supra* note 16, at 81.

109. See, e.g., Selmi, *supra* note 4, at 73; Kelly, *supra* note 16, at 40 (“The FMLA can be viewed as an attempt to challenge these institutionalized gender norms by encouraging men to take family leaves.”).

110. Grossman, *supra* note 4, at 18.

111. Halverson, *supra* note 6, at 261 (“Most male leave takers . . . took FMLA leave for personal health reasons.”); Selmi, *supra* note 4, at 74-75 (stating that most leave taken is for self-care but when family leave is taken, women use much more of it than men do); Kelly, *supra* note 16, at 36 (stating that the FMLA has had “no discernible impact on men’s use of [paternity] leaves”); Auray, *supra* note 31, at 405 (stating that the early data indicate that the women-caregiver



reasons are much more likely to be women.<sup>112</sup> According to some scholars, because women's role as the primary caregiver is socially constructed, it is not possible to change these gender norms through governmental intervention.<sup>113</sup> Furthermore, because the leave is unpaid, many men will not take it because they usually make more than their wives.<sup>114</sup> Thus, because the FMLA did not account for the fact that men generally do not and will not take leave away from work for parenting, it has not meaningfully contributed to gender equality.<sup>115</sup>

### 5. Employers' Objections

Finally, even though Congress was mindful of the need to protect business interests,<sup>116</sup> employers complain that the statute is too broad, and too difficult and costly to administer.<sup>117</sup> Specifically, employers complain that the FMLA provides "too much coverage. . . that the notice requirements placed on employees are insufficient, that the FMLA's interaction with company sick-leave policies is unsatisfactory, that leave is taken in too small of increments, and that courts are too permissive in deciding what illnesses qualify under the Act."<sup>118</sup> These objections are discussed in detail below.<sup>119</sup>

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stereotype will be resistant to change); Grossman, *supra* note 4, at 18 (stating that there was no basis for Congress to assume that more men would take unpaid leave and that it has not come to fruition).

112. Halverson, *supra* note 6, at 260-61; Bornstein, *supra* note 16, at 87 ("Men were more likely to use the Act for personal illness, while women more often took leave to care for seriously ill family members."); Grossman, *supra* note 4, at 29 ("[W]omen almost always take time away from work for childbirth and new parenting, even if their employers *do not* guarantee that they will have a job to return to; and men rarely take time off for new parenting, even if their employers *do* guarantee job restoration."); Peterson, *supra* note 12, at 267.

113. See Nicole Buonocore Porter, *Embracing Caregiving and Respecting Choice: An Essay on the Debate Over Changing Gender Norms*, 41 SW. U. L. REV. 1, 30-38 (2011); Auray, *supra* note 31, at 410; Kelly, *supra* note 16, at 40 ("[N]oncompliance with the FMLA's paternity leave provisions may reflect the continued influence of a more traditional gender regime in some organizations.").

114. Young, *supra* note 5, at 143; Halverson, *supra* note 48, at 264-265 (arguing that one of the reasons that men do not take more FMLA leave is because it is unpaid and men cannot afford to take leave because the man often makes more than his wife).

115. Grossman, *supra* note 4, at 18-19.

116. Bornstein, *supra* note 16, at 90 ("The Act included 'necessary safeguards to meet the legitimate concerns of business to prevent abuse and give employers sufficient flexibility.'").

117. Susser, *supra* note 23, at 169-70 (stating that critics of the FMLA worried about the costs to implement and administer the statute).

118. Silbaugh, *supra* note 5, at 193.

119. See *infra* Part IV.A.

### B. Proposed Solutions

Over the years, scholars have recommended a plethora of solutions.<sup>120</sup> Many scholars have suggested that the FMLA should be expanded to cover a greater number of employees.<sup>121</sup> In fact, bills have been proposed that would lower the number of employees required to trigger coverage from fifty to twenty-five.<sup>122</sup> A bill recently proposed, the Family Leave Insurance Act of 2009, would make it easier to meet the eligibility requirements by requiring an employee to work only 625 hours in the last six months rather than 1,250 in the past year.<sup>123</sup> Some have proposed longer leave, noting that the United States offers the most meager family leave protection of all industrialized countries.<sup>124</sup> Others have suggested expanding the limited definition of family.<sup>125</sup> Scholars have also proposed expanding the reasons for which employees can take FMLA leave.<sup>126</sup> In fact, President Clinton had supported legislation shortly after the FMLA was passed that would require employers to provide an additional twenty-four hours of leave per year to allow employees to attend to their children's "educational needs, or for routine family medical purposes . . . ."<sup>127</sup>

Perhaps the most commonly made suggestion is that the FMLA

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120. Palazzari, *supra* note 10, at 462 (citing to many suggested reforms); Willis, *supra* note 63, at 106-08 (discussing some proposed reform efforts); Anthony, *supra* note 36, at 498 (stating that scholars have proposed lots of solutions, including paid leave, better coverage of minor illnesses, protecting leave to care for extended family members, and lengthier leave).

121. O'Leary, *supra* note 8, at 59-60. During his first-term campaign, President Obama advocated for expanding the FMLA to cover businesses with twenty-five or more employees, rather than the current requirement of fifty. Porter *supra* note 2, at 406 n.356; Young, *supra* note 5, at 153; Hayes, *supra* note 5, at 1508.

122. See, e.g., Hayes, *supra* note 5, at 1539 (President Clinton suggest that the FMLA be expanded to include employers with more than twenty-five employees). One recent bill defined employer to include any employer with two or more employees. H.R. 1723, 111th Cong. § 101(2)(B) (2009).

123. H.R. 1723, 111th Cong. § 101(1)(A) (2009); see also Porter, *supra* note 19, at 838-39 (discussing this bill).

124. Young, *supra* note 5, at 155; Hayes, *supra* note 5, at 1508; Halverson, *supra* note 6, at 275-76.

125. Bornstein, *supra* note 16, at 120-21 (proposing an expanded definition of family because "the appropriate role for government is to 'strengthen families, without regard to how they are structured.'). This was also proposed in the Family Leave Insurance Act of 2009. H.R. 1723, 111th Cong. § 103(a), (b)(3), (6) (2009) (expanding on the list of spouse, son or daughter, and parent to also include domestic partners, grandchildren, grandparents, or siblings); Cf. Kelly, *supra* note 16, at 36 (stating that the law's limited effects are related in part to a narrow definition of family).

126. See, e.g., Silbaugh, *supra* note 5, at 196.

127. Silbaugh, *supra* note 5, at 196.

should provide for paid rather than unpaid leave.<sup>128</sup> For instance, President Clinton directed the Secretary of Labor to allow states to offer paid leave to new parents using unemployment benefits.<sup>129</sup> This proposal ultimately failed.<sup>130</sup> But commentators have not given up on paid leave.<sup>131</sup> As stated by one commentator, paid leave “would be extremely beneficial for American families and society, and would be invaluable in increasing the effectiveness of the FMLA.”<sup>132</sup> Many commentators refer to the provision of replacement pay as the “most important change” that could be made to the FMLA.<sup>133</sup> Because the lack of paid leave discourages men’s use of family leave, some believe that providing paid leave might increase men’s use of FMLA leave.<sup>134</sup> As stated by one commentator: “Without a wage replacement provision, fathers cannot financially support their families and take advantage of leave provisions.”<sup>135</sup> Not surprisingly, the business community has vigorously opposed a paid leave mandate.<sup>136</sup>

One interesting proposed reform is a cost-sharing solution. Under this proposal, if a woman has a partner who is also employed and the couple decides to have a child, both partners’ employers should divide the cost of providing leave.<sup>137</sup> The employer of the non-pregnant partner would reimburse the birth mother’s employer for half of the actual costs associated with birth, which would include all medical costs related to

128. See, e.g., Young, *supra* note 5, at 153-54 (arguing for wage replacement for family leave); Porter, *supra* note 19, at 836-40 (proposing a paid leave program and discussing a bill proposed in Congress that would provide for paid leave); Hayes, *supra* note 5, at 1508, 1532.

129. Hayes, *supra* note 5, at 1533; Halverson, *supra* note 6, at 272.

130. Palazzari, *supra* note 10, at 462 (stating that the strategy to use unemployment funds was “ultimately made illegal by the Bush Administration”); Susser, *supra* note 23, at 185-86 (discussing the demise of Clinton’s proposed use of unemployment compensation funds to provide some compensation for FMLA leave).

131. In addition to scholarly proposals for paid leave, some states have implemented paid leave systems. See Susser, *supra* note 23, at 186-91 (discussing some state-initiated paid leave programs); Anthony, *supra* note 36, at 483 (discussing state paid leave programs).

132. Hayes, *supra* note 5, at 1537.

133. See, e.g., Palazzari, *supra* note 10, at 462.

134. See Kelly, *supra* note 16, at 36 (“The lack of pay provisions in the FMLA discourages men’s use of family leave . . . [because] there is often a greater loss of family income if men take a leave.”); Grossman, *supra* note 4, at 38 (stating that because husbands likely out-earn their wives, unpaid leave creates an incentive for a couple to choose maternal leave rather than paternal leave); Palazzari, *supra* note 10, at 432 (stating that providing paid leave would significantly increase FMLA usage by men who are still usually the primary breadwinners in their families).

135. Peterson, *supra* note 12, at 268.

136. See Suk, *supra* note 16, at 18 (stating that businesses oppose paid leave because they believe that it will encourage employees to look for opportunities to take leave and that the existing cost of FMLA leave is excessive).

137. Auray, *supra* note 31, at 413.

pregnancy as well as the costs associated with any leave taken by either partner.<sup>138</sup> This would allow the perceived higher cost of employing women to be exposed for what it is, which is a misallocation of the costs that women have been forced to internalize when a couple chooses to have a baby.<sup>139</sup> Thus, employers would come to view pregnancy and childbirth as a cost of employment rather than a cost of employing women.<sup>140</sup>

Another possible reform is to find ways to incentivize men to take leave so that the stigma suffered by women as the most frequent family leave-takers dissipates.<sup>141</sup> This reform has been attempted, with limited success in other countries, and I discuss elsewhere why I believe the attempt to change gender norms in this fashion is unrealistic.<sup>142</sup>

#### IV. CHANGING THE FMLA TO BENEFIT EMPLOYERS AND EMPLOYEES

##### A. *The FMLA from the Employer's Perspective*

The business community vigorously opposed the FMLA when it was first enacted, which is why it is such a compromise statute.<sup>143</sup> Although employers were concerned about the burden of temporarily reassigning the duties of an employee on a longer leave,<sup>144</sup> they were

138. *Id.* at 413.

139. *Id.* at 414.

140. *Id.*

141. See Barzilay, *supra* note 16, at 434; Ariel Meysam Ayanna, *Aggressive Parental Leave: A Statutory Proposal Toward Gender Equalization in the Workplace*, 9 U. PA. J. LAB. & EMP. 293, 297-98 (2007) (stating that legislation should attempt to change existing gender norms and that a mandatory leave-taking for men may be logical); Halverson, *supra* note 6, at 271-72 (suggesting this reform but ultimately rejecting it); Grossman, *supra* note 4, at 61 (stating that in order to achieve equality, men must be "affirmatively pressed into service" as caregiver and that, "at a minimum, the law should make paternity more enticing."); Selmi, *supra* note 89, at 410-11 (advocating for a proposal that would force or incentivize men to take more leave). See generally Lindsay R.B. Dickerson, Book Note, "Your Wife Should Handle It": *The Implicit Messages of the Family and Medical Leave Act*, 25 B.C. THIRD WORLD L.J. 429 (2005) (reviewing SUSAN J. DOUGLAS & MEREDITH W. MICHAELS, *THE MOMMY MYTH: THE IDEALIZATION OF MOTHERHOOD AND HOW IT HAS UNDERMINED WOMAN* (2004)) (arguing that the FMLA perpetuates the "mommy myth" norm in American society).

142. See Porter, *supra* note 113, at 30-38; see also Halverson, *supra* note 6, at 271 (stating that this attempt did not accomplish much in Sweden).

143. See Selmi, *supra* note 4, at 78-79; see also Lisa L. Tharpe, Comment, *Analysis of the Political Dynamics Surrounding the Enactment of the 1993 Family and Medical Leave Act*, 47 EMORY L.J. 379, 382-83 (1998); Bornstein, *supra* note 16, at 78 (noting that before the FMLA was passed, employers objected to the potentially devastating costs it would cause).

144. See, e.g., Tharpe, *supra* note 143, at 395 (stating that studies conducted before the FMLA

also concerned about the burden of administering the statute when an employee needs a short-term leave for his own serious health condition.<sup>145</sup> Employers quickly discovered that the FMLA is a very complex statute,<sup>146</sup> and much of that complexity surrounds issues of short-term leave, including whether the employee has a serious health condition, whether the employee gave adequate notice of the need to take leave, and how to handle intermittent leave.<sup>147</sup> Because most FMLA leave is taken by employees for their own short-term serious

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was passed indicated that the Act would be very costly to businesses because of the costs involved in recruiting and training new temporary replacement workers along with the decreased productivity of the replacement workers); *see also* Kelly, *supra* note 16, at 42 (“Costs associated with leaves include the lost productivity of the leave-taker and the costs of temporary replacement workers.”); Holly B. Tompson & Jon M. Werner, *The Family and Medical Leave Act: Assessing the Costs and Benefits of Use*, 1 EMP. RTS. & EMP. POL’Y J. 125, 126 (1997) (noting that employers objected FMLA on the ground that costs of training temporary replacement workers would be substantial). But studies show that it is less expensive to provide leave for an employee than to pay to replace that employee. *See* Auray, *supra* note 31, at 408; Bornstein, *supra* note 16, at 78 (stating that fears about costs have proven to be unwarranted). Furthermore, there is reason to believe that employers may see increased productivity and loyalty if workers feel secure in their ability to take leave without losing their jobs. *See* Auray, *supra* note 31, at 409; *see also* Hayes, *supra* note 5, at 1541 (noting that experience has shown that many of the negative effects predicted by the business community have failed to materialize and that most employers found the FMLA has not caused them to incur additional costs and tends to boost worker morale and productivity); Kelly, *supra* note 16, at 42 (stating that if leaves are not allowed, turnover costs will be higher because workers will quit to meet family obligations); Bornstein, *supra* note 16, at 79 (“[B]usinesses have reported lower absenteeism and higher employee morale . . . and have eliminated the costs associated with permanently replacing workers who needed leave.”).

145. *See* Tompson & Werner, *supra* note 146, at 144 (stating that employers responding to a survey indicated that they were most concerned with implementing the FMLA’s provisions regarding serious health conditions and intermittent leave and that they were less concerned with the problems of getting temporary help when an employee takes a longer leave). After the FMLA was passed, business organizations began calling for clarifications to the definition of “serious health condition” and what information is needed to confirm a health emergency. Hayes, *supra* note 5, at 1542; *see also* Silbaugh, *supra* note 5, at 204-05 (describing the proposed Family and Medical Leave Clarification Act); Tompson & Werner, *supra* note 144, at 149 (discussing proposed changes, which would include narrowing the definition of serious health condition and limiting the use of intermittent leave to half-day increments).

146. *See* Aalberts & Seidman, *supra* note 22, at 138; Halverson, *supra* note 6, at 267 (“[T]he FMLA is a complex law, which creates administrative burdens for some employers.”).

147. *See generally* Aalberts & Seidman, *supra* note 22 (discussing what constitutes “serious medical condition” and the FMLA’s employees’ notice requirement); Beckett-McWalter, *supra* note 27 (discussing judicial interpretations of “serious medical condition” under the FMLA). *See also* Selmi, *supra* note 4, at 76 (“Litigation involving the FMLA confirms the importance of the sick-leave provisions and the relative unimportance of the parental leave provisions. My review of eighty-four cases heard on appeal during the years 2000-01 indicated that . . . 72.6% [of the claims] involved individuals who were seeking, or who took, leave for their own illness. Just over fifteen percent of the cases involved leave that was related to the care of another, while only . . . 11.9% [of the cases] concerned care of a new child in the home.”).

health conditions,<sup>148</sup> rather than for family leave or leave to care for others,<sup>149</sup> the problem is exacerbated.

### 1. Abuses of FMLA Leave

When employees take leave for their own illnesses, it raises the potential for abuse and the accompanying suspicion of abuse; abuse that does not exist when someone is taking family leave for the birth of a baby.<sup>150</sup> Employers have long complained about the abuses of FMLA leave, believing the statute places them “at the mercy of unmotivated employees.”<sup>151</sup> One attorney stated that the FMLA is probably the most “employer-hostile piece of legislation there is” and that it “provides for all kinds of mischief.”<sup>152</sup> The abuses can be classified into three different categories: (1) feigning a serious health condition; (2) taking longer leave than necessary in order for the absence to fall under the definition of “serious health condition”; and (3) abuses of the intermittent leave provisions.<sup>153</sup>

#### a. Feigning a Serious Health Condition

Many of the legal challenges under the FMLA address the

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148. See, e.g., Bornstein, *supra* note 16, at 86 (highlighting one study which noted that 60% of employees took leave for their own health problems).

149. See Selmi, *supra* note 4, at 74 (stating that not much leave is used for childcare; most of it is used for sick leave by those who do not otherwise have access to sick leave). Early studies in 1996 and 2000 demonstrate that most leave is for personal illness and most of it is very short. See Grossman, *supra* note 4, at 53. One study indicated that only 16-18% of employees take FMLA leave for parental leave. Selmi, *supra* note 4, at 74. The same study showed that only 13.5% of male and 19.8% of female employees took family leave. Halverson, *supra* note 6, at 259.

150. See Suk, *supra* note 16, at 20.

151. See Aalberts & Seidman, *supra* note 22, at 138. I could fill up pages with the mostly law-firm sponsored blogs or newsletters discussing the abuses of FMLA leave. For just a sampling, see Franczek Radelet, *Is Your Employee Paying a Deception Service to Provide You a Fake Doctor's Note or FMLA Certification?*, FMLA INSIGHTS (July 16, 2013), <http://www.fmlainsights.com/abuse-of-fmla-leave/is-your-employee-paying-a-deception-service-to-provide-you-a-fake-doctors-note-or-fmla-certification/> (discussing employees hiring a company to provide fake information to employers for FMLA certifications); *Twenty Things You Need to Know About the FMLA*, POWELL TRACHTMAN, [www.powelltrachtman.com/CM/Publications/Twenty\\_Things\\_You.asp](http://www.powelltrachtman.com/CM/Publications/Twenty_Things_You.asp) (discussing the potential of employees abusing the FMLA by using FMLA leave when they do not really need it); W. Jonathan Martin, II, *Top Ten Tips for Curbing FMLA Abuse*, ACC (Apr. 1, 2011), [www.acc.com/legalresources/publications.topten/curbing-FMLA-Abuse.cfm](http://www.acc.com/legalresources/publications.topten/curbing-FMLA-Abuse.cfm) (discussing ways employers can avoid employee abuse of the FMLA).

152. Aalberts & Seidman, *supra* note 22, at 138-39 (citations and internal quotations omitted).

153. See *supra* notes 146-47 and accompanying text; see also *infra* Part IV.A.1.a-c.

definition of a “serious health condition.”<sup>154</sup> Employers specifically complain about employees taking FMLA leave when they do not have a serious health condition, nor are they caring for a family member with a serious health condition.<sup>155</sup> As one business owner stated: “I think this law will allow a lot more people to get away with using phony illnesses to take leaves.”<sup>156</sup> There is some evidence that this business owner is correct. In one study, only 45% of “sick days” used by employees were actually because of personal illness; 27% were used for “family issues” and the others were taken because the employee felt entitled to a day off of work.<sup>157</sup> It is estimated that one-quarter to one-third of all “unscheduled absences are unrelated to any reasonable interpretation of the FMLA.”<sup>158</sup>

Part of the problem with employee abuse of the FMLA is that many employers erroneously believe that a serious health condition under the FMLA is very broadly defined and open ended.<sup>159</sup> Thus, many risk-averse employers will grant FMLA leave to any employee with a doctor’s note.<sup>160</sup> Although courts are applying the definition of “serious health condition” seriously<sup>161</sup> and maybe even stringently, if an employer wishes to avoid a possible lawsuit, especially if denial of leave leads to the termination of an employee, the employer might be willing to grant the FMLA leave or designate a prior absence as FMLA-protected in order to avoid litigation.<sup>162</sup> This causes the employer to be resentful of the FMLA, especially when the employer suspects that the reason for the leave is not legitimate.

### b. Taking Longer Leave Than Necessary

Many employees take longer leaves than necessary in order to make

154. See Aalberts & Seidman, *supra* note 22, at 143-50.

155. See *id.* at 139; see also Halverson, *supra* note 6, at 268-69 (stating that employers complain about the high costs caused by increases in short, incidental absences for employees’ own illnesses).

156. Craig, *supra* note 35, at 71 (internal quotations and citations omitted).

157. See Aalberts & Seidman, *supra* note 22, at 139.

158. *Id.*

159. See *id.* at 143-44.

160. This observation is based on my personal experience representing employers before my academic career. See also *id.* at 144.

161. See *id.* at 148; see also Bornstein, *supra* note 16, at 108 (stating that serious health conditions have been strictly construed by the courts).

162. See Halverson, *supra* note 6, at 268 (“Because companies are becoming more generous for fear of the consequences of noncompliance, a rising number of employees take leave that may not technically qualify as FMLA leave.”).

those leaves appear to comply with the FMLA.<sup>163</sup> Most illnesses or injuries only lasting one day would not be considered serious health conditions under the statute.<sup>164</sup> Under the regulations implementing the FMLA, a serious health condition is defined as something generally requiring three days of inability to go to work (or inability to attend daycare or school for children) and the continuing treatment of a health care provider.<sup>165</sup> When I was a practicing lawyer, I would often advise employers and their supervisors using the common example of an employee with a child who has an ear infection. I would advise that an employee who takes three days off of work and takes her child to the doctor for the initial appointment where the ear infection is diagnosed, as well as a follow-up appointment approximately two weeks later to make sure the infection has cleared, has probably met the “serious health condition” definition.<sup>166</sup> But here is the problem. As most parents know, children with ear infections often feel better after just a couple of doses of antibiotics and many doctors do not ask to see the child back in the office to make sure the infection has cleared. Thus, the FMLA encourages employees to do two inefficient things. It encourages employees to stay out of work longer than necessary,<sup>167</sup> even after the child is feeling better and could go back to daycare or school. And it

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163. I have advanced this argument before and it was based then, as it is now, on my experience as an employment law attorney at a large law firm and in-house counsel prior to my academic career. *See* Porter, *supra* note 19, at 848-49.

164. *See id.* at 849.

165. *See id.*

166. I based this advice on the regulations implementing the FMLA. As previously stated, serious health condition is defined as “an illness, injury, impairment or physical or mental condition that involves inpatient care . . . or continuing treatment by a health care provider.” 29 C.F.R. § 825.113 (2013). “Continuing treatment” is then defined as including “[a] period of incapacity of more than three consecutive, full calendar days” that also involves either treatment two or more times or a continuing course of treatment under the supervision of a doctor, which could include a course of antibiotics. 29 C.F.R. § 825.115 (2013); *see also* Silbaugh, *supra* note 5, at 206-07. I recognize, however, that others would not classify the scenario I described as a serious health condition. *See, e.g.*, *Seidle v. Provident Mut. Life Ins. Co.*, 871 F. Supp. 238, 242, 246 (E.D. Pa. 1994) (stating that an employee taking four days off because of a child’s ear infection is too minor to constitute a serious health condition); *see also* Silbaugh, *supra* note 5, at 197, 205-06 (suggesting that things like childhood ear infections would not be considered serious health conditions but also discussing one court that held that an ear infection was a serious health condition). I worked for a very risk-averse employer so the goal was to be fairly broad in granting FMLA leave so as to avoid litigation down the road. Interestingly, even the Department of Labor has vacillated in determining whether minor illnesses like the flu are serious health conditions. *See* Beckett-McWalter, *supra* note 27, at 457-58 (discussing some of the Department of Labor’s opinion letters regarding the flu).

167. *See* Beckett-McWalter, *supra* note 27, at 455-56 (stating that critics of the Department of Labor’s regulations defining serious health condition to include at least three days out of work were worried that this might encourage employees to take off more time than necessary).



encourages the inefficient use of medical resources by requiring parents to go for the follow up appointment to meet the “continuing treatment of a health care provider” standard.<sup>168</sup>

### c. Abuses of Intermittent Leave

If an employee has an ongoing or chronic serious health condition, the employee may be certified by her doctor as entitled to intermittent leave.<sup>169</sup> This allows the employee to take FMLA-protected leave in very small increments of time<sup>170</sup> based on the need for continuing medical treatment or the inability to work due to the chronic serious health condition. Once an employee has been certified for FMLA leave, the employee generally does not have to provide additional documentation each time the employee needs to use intermittent leave.<sup>171</sup> Thus, if an employee suffers from migraine headaches and gets certified for intermittent leave for her migraine headaches, she can simply call in to work on a day that she has a migraine headache without having to provide additional documentation. This, of course, is fraught with the potential for abuse.

## 2. Complying with the FMLA Is Complicated

The FMLA’s provisions are not simple to understand or implement.<sup>172</sup> Commentators and practitioners have complained that the FMLA is extremely complex and that it is a “nightmare” for employers trying to comply with its provisions.<sup>173</sup> After the FMLA was passed, many employers had to implement expensive systems to track FMLA leave.<sup>174</sup> One study revealed that a good portion of businesses found it

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168. See Porter, *supra* note 19, at 849; Anthony, *supra* note 36, at 480 (stating that the requirements for proving serious health condition might make employees go to the doctor more than necessary).

169. See 29 U.S.C. § 2612(b)(1) (2006). Intermittent leave is not automatically available for new baby care, unless the employer authorizes it. See *id.*

170. See 29 C.F.R. § 825.205(a)(1) (2013) (allowing the employer to use an “increment [of time] no greater than the shortest period of time that the employer uses to account for use of other forms of leave” but in any event, no greater than one hour).

171. See *id.* § 825.308. Generally, employers may request recertification no more often than every 30 days and must wait until the minimum duration of the condition expires. See *id.*

172. See Runge, *supra* note 86, at 474 (noting that employers regularly criticize the administrative and training costs of implementing the FMLA).

173. See Aalberts & Seidman, *supra* note 22, at 139.

174. Halverson, *supra* note 6, at 267.

difficult to quantify the significant costs of implementing the FMLA.<sup>175</sup> There are three primary aspects of the FMLA that confuse employers: (1) the definition of serious health condition; (2) the notice requirements; and (3) tracking intermittent leave.<sup>176</sup>

First of all, as discussed above, there is great confusion regarding the definition of “serious health condition.”<sup>177</sup> As stated by one commentator (quoting an employment attorney):

If you sat down to write something that would frustrate employers and make their lives difficult and absorb administrative attention of human resources people, you could not come up with anything that would do that much more than what we have. Many employers have problems ‘maneuvering through the gray areas of defining which serious medical conditions . . . are covered under FMLA.’<sup>178</sup>

The FMLA defines “serious health condition” as “an illness, injury, impairment, or physical or mental condition that involves inpatient care in a hospital, hospice, or [a] residential medical care facility or continuing treatment by a health care provider.”<sup>179</sup> Although the definition itself does not seem overly complicated, it is fairly vague, which has led to very detailed regulations to implement it.<sup>180</sup> Specifically, there is a great deal of litigation over what constitutes “continuing treatment” and who qualifies as a “health care provider.”<sup>181</sup>

In addition to the confusion regarding the definition of “serious health condition,” the procedure for certifying an employee with a serious health condition is also complicated and burdensome for both employers and employees.<sup>182</sup> The employee is required to submit medical certification of the serious health condition but if the employer wishes to challenge the employee’s reason for requesting leave, it can, at

175. *See id.* at 267-68.

176. *See supra* note 147 and accompanying text; *see also infra* notes 179-98 and accompanying text.

177. *See* Beckett-McWalter, *supra* note 27, at 454 (“The major sticking point in enforcing the Act has been determining whether an employee has a ‘serious health condition’ affording him the Act’s protection.”); Tompson & Werner, *supra* note 144, at 127 (stating that employers are concerned about the vagueness of the serious health condition provision).

178. Beckett-McWalter, *supra* note 27, at 459-60 (internal citation omitted).

179. 29 U.S.C. § 2611 (2006).

180. 29 C.F.R. §§ 825.100-803 (2013).

181. *See* Beckett-McWalter, *supra* note 27, at 455-56.

182. *See id.* at 453 (stating that the certification requirement is intended to avoid employees abusing their rights under the statute).

its own expense, obtain a second opinion from a health care provider it chooses, except the health care provider may not be employed by the employer on a regular basis.<sup>183</sup> If the second opinion differs from the certification by the employee's doctor, the employer may require the employee to obtain the opinion of a third health care provider designated or approved jointly by both the employer and the employee.<sup>184</sup>

The "notice" requirements of the FMLA are also confusing and are often litigated.<sup>185</sup> As discussed above, employees are required to give thirty days' notice if possible, or in the case of a sudden illness or injury, as soon as is practicable.<sup>186</sup> In many cases, employees call in at the last minute because they are sick or a family member is sick. Because employees do not have to use any magic language to request leave under the FMLA, managers "must be trained to understand the consequences of the explanations they receive" from employees who are requesting leave or calling in an absence.<sup>187</sup> When I was in-house counsel, I spent countless hours training supervisors and managers how to recognize when an employee's absence might qualify as FMLA protected.

Possibly the requirement that causes employers the most difficulty and confusion under the FMLA is tracking intermittent leave.<sup>188</sup> If an employee has an ongoing or chronic serious health condition, the employee's doctor may certify her as entitled to intermittent leave.<sup>189</sup> This allows the employee to take FMLA-protected leave in very small increments of time<sup>190</sup> based on the need for continuing medical treatment or the inability to work due to a chronic serious health condition. Intermittent leave can also be taken to care for a family member with a

183. See 29 U.S.C. §§ 2613(a), (c).

184. See *id.* § 2613(d)(1).

185. See generally Aalberts & Seidman, *supra* note 22, at 150-57; see also Radelet, *supra* note 151 (discussing the difficulty employers face regarding the inability to recognize when an employee has given notice of the need to take FMLA leave).

186. See 29 U.S.C. § 2612(e). See also Beckett-McWalter, *supra* note 27, at 453 (stating that the 30 days notice provision does not apply in the case of a medical emergency or an unforeseen medical issue).

187. See Aalberts & Seidman, *supra* note 22, at 152-53.

188. See Bornstein, *supra* note 16, at 85-86 ("Businesses cited employees taking intermittent leave . . . as one of the more difficult problems. Although only 11.5 percent of employees took leave intermittently, 39.2 percent of employers cited this as posing an administrative difficulty."); Susser, *supra* note 23, at 169-70 (noting that employers complained about the difficulty in administering the statute, including the intermittent leave provisions).

189. See 29 U.S.C. § 2612(b)(1). Intermittent leave is not automatically available for new baby care, unless the employer authorizes it. See *id.*

190. See 29 C.F.R. § 825.205(a)(1) (2013) (allowing the employer to use an "increment [of time] no greater than the shortest period of time that the employer uses to account for use of other forms of leave" but in any event, no greater than one hour).

serious health condition.<sup>191</sup> For example, if a child has asthma, and the asthma is classified as a serious health condition (which it most likely would be), then the parent can take intermittent leave to take the child to the doctor or to take care of the child if the child needs to stay home from daycare or school because of the asthma. Some of these absences might be very short in length and the employer is required to account for the absences in the smallest increment the employer uses to account for other types of leave, or in any event, no longer than one hour.<sup>192</sup> Thus, if an employer tracks other kinds of leave in half-hour increments, and an employee is at a doctor's appointment for one and a half hours, the employer has to subtract one and a half hours of leave from an allotment of twelve weeks. This creates a record-keeping nightmare for most employers.<sup>193</sup> Furthermore, the FMLA allows the employer to designate the year used to track the twelve weeks of FMLA leave in any method they choose—the calendar year, the fiscal or some other static twelve-month period, a period of twelve months measured forward from the employee's first FMLA leave, or a rolling twelve-month period measured backwards from the date an employee uses any FMLA leave.<sup>194</sup> In my experience, most employers choose to use the rolling twelve month period,<sup>195</sup> so the employer has to keep track of how much leave the employee has taken for all reasons combined (leave to care for a new baby, leave to care for an ill family member, and leave for the employee's own serious health condition) in the past twelve months. If the employee is taking the leave in hours or even fractions of hours, it makes record keeping difficult for the employer. For all of these reasons, employers often complain about the difficulty administering the intermittent leave provisions of the FMLA, perhaps more than anything else.<sup>196</sup>

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191. *See id.* § 825.202(b)(1).

192. *See id.* § 825.205(a)(1).

193. *See Suk, supra* note 16, at 20 (stating that keeping track of intermittent leave for episodic conditions is costly for employers, even when the leave is legitimate).

194. *See* 29 C.F.R. § 825.200(b).

195. In fact, most lawyers will recommend to the employer that they should use the rolling back period. *See, e.g., Martin, supra* note 151 (recommending that employers use a rolling back year for determining FMLA leave to help avoid employee abuses).

196. *See Willis, supra* note 61, at 100 (stating that only 60% employers found it easy to manage their employees' intermittent leave); Tompson & Werner, *supra* note 144, at 127 (“[T]he biggest problem from the perspective of employers may be that of intermittent leave.”); Radelet, *supra* note 151 (suggesting that the FMLA should be reformed to not allow intermittent leave to be taken in small increments); Suk, *supra* note 16, at 20-21 (“When a significant percentage of employees in a given workplace have medical certifications on file for intermittent leave, keeping track of the leave taken can become time-consuming . . . and . . . costly for employers.”).

B. *A Proposal to Sever the Care-of-Others Provisions from the Self-Care Provision and Short-Term Absences*

In order to ameliorate both the abuses of and the complications caused by the FMLA, I propose a two-part solution that I believe is unique<sup>197</sup> and might even be considered radical.<sup>198</sup> First, the “self-care” provisions would be severed from the FMLA, leaving the FMLA with only the “care-of-others” provisions. Second, Congress should enact a statute that provides for up to ten days of unpaid absences that can be used for any reason. My proposed name for the additional statute is the Short-Term Absences Act (STAA). Unlike the FMLA, which is required to be tracked in the smallest increment employers use to keep track of leave, employers would be able to track absences under this proposed ten days of unpaid leave in half-day increments. The FMLA would keep the word “Medical,” because it would still cover leaves of absence needed because of the long-term medical issues of family members.

Thus, the FMLA would still cover the first three enumerated reasons employees qualify for FMLA leave:

- 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.

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197. Although I believe this proposal is unique, the history of the FMLA reveals that Congress originally had the care-of-others provisions separate from self-care leave. See Grossman, *supra* note 4, at 36 (“The first bill introduced guaranteed eighteen weeks of parental leave every two years and twenty-six weeks for employee illness or disability every year.”). Furthermore, Julie Suk discusses disaggregating medical leave from family leave, based on the European model. See Suk, *supra* note 16, at 5.

198. Although I believe this proposal is a bit unusual, it is not the most radical proposal for handling employees’ leaves of absence. For instance, in 1987, Stephen Sugarman proposed a new mandatory employee benefit that would cover and provide income maintenance for employees who are off work for temporary periods, ranging from one day up to six months, for almost any reason, including: disability, leisure (vacation and holidays), and unemployment. See Stephen D. Sugarman, *Short Term Paid Leave: A New Approach to Social Insurance and Employee Benefits*, 75 CALIF. L. REV. 465, 465 (1987). Much more recently, Robin Runge proposed a “federal job-guaranteed, paid leave legislation that would require all employers employing fifteen or more employees to provide a minimum of two weeks of paid leave from work each year to all . . . employees who have worked for that employer for a minimum of sixty days. . . . The legislation would not require that an employee provide a reason for taking the leave. . . .” Runge, *supra* note 86, at 477.

- c) In order to care for the spouse, or a son, daughter, or a parent, of the employee, if such spouse, son, daughter, or parent has a serious health condition.<sup>199</sup>

The FMLA would still provide up to twelve weeks for the three reasons listed above; however, it would no longer cover very short-term absences (fewer than 10 days) for any of these reasons nor would the FMLA cover leave for an employee's own serious health condition (whether the leave needed was long-term or short-term). The FMLA would still require certifications to document the serious health condition of a family member or the arrival of a new baby, although I do not envision as many debates about these longer leaves because any illness or injury that is serious enough to require more than ten days of leave is unlikely to be challenged under the serious health condition provision. Instead, it is most often very short-term absences that are challenged under the FMLA.<sup>200</sup> Self-care issues would be covered most often by the Short-Term Absences Act or more serious medical issues should qualify as a disability under the Americans with Disabilities Act (ADA) as amended in 2008.<sup>201</sup> As will be discussed below, leaves of absences are an appropriate accommodation under the ADA.<sup>202</sup>

Significantly, the Short-Term Absences Act would be different from our current system in several respects. First of all, I have used the word "absences" instead of "leave" to move away from the mindset that routine absences have anything in common with longer leaves to care for a new baby or to care for a seriously ill family member. Second, the absences under the STAA would not be limited to reasons allowed under the current FMLA.<sup>203</sup> Although most employees will use the absences because of their own illnesses or the medical needs of their family members, the absences could also be used to attend parent/teacher conferences or a child's school performance, for bereavement, for routine doctor or dentist appointments of the employee or employee's family members, for jury duty or to take care of legal needs or obligations,<sup>204</sup> or simply because the employee feels the need for a

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199. 29 U.S.C. §§ 2612(a)(1)(A)-(C) (2006).

200. See *supra* notes 150-58 and accompanying text.

201. See *infra* Part IV.C.1.

202. See *infra* Part IV.C.1.

203. For a similar, but broader proposal, see Runge, *supra* note 84, at 477-80 (proposing federal paid legislation that would allow employees to take up to two weeks of paid time off for any reason).

204. See *id.* at 455 (discussing how low-wage workers often need time off work to deal with a domestic violence issue or to appear in court as a victim or witness).

“mental health” day.<sup>205</sup> Third, although employees would still be required to give “notice” (meaning they would still have to call in to tell their supervisor that they were going to be absent), because all short-term absences except vacation<sup>206</sup> would be subsumed into the Short-Term Absences Act, employers would no longer grapple with the issue of whether the communication provided was sufficient to put the employer on notice that the employee was requesting FMLA leave.

As for coverage of the STAA, I recommend following the lead of the proposed Healthy Families Act, which would apply to all employers with fifteen or more employees and would apply to all employees who work part-time (at least fifteen hours per week) and who have worked for the employer for at least sixty days.<sup>207</sup>

Although I think there are many other reforms needed to the FMLA, including longer leave, some form of paid leave, and broader coverage of the FMLA, those reforms are beyond the scope of this paper. The goal of this proposal is to ameliorate some of the hostility towards the FMLA and once that hostility has dissipated, employers will hopefully be less opposed to other reforms.

### C. *Defending My Proposal*

Admittedly a little strange,<sup>208</sup> there are several reasons why this

205. Others have proposed providing leaves that are available without having to meet some stringent criteria. See *id.* at 477 (“The legislation would not require that an employee provide a reason for taking the leave to the employer; rather, a list of examples of the types of reasons for which an employee may take leave will be included in educational posters and in trainings about the [proposed] paid leave law.”). See also Shiu & Wildman, *supra* note 19, at 120-21 (“[A]n ideal job-protected, paid leave would provide not only time off from work for family-related reasons, but also time away from the job for the pursuit of other life endeavors such as education, rest, or rejuvenation that would make a worker more productive.”).

206. I envision that the absences under the STAA would encompass almost every kind of leave or absences that employers offer. For instance, many employers (although, as discussed above, certainly not all) have a set number of days for “sick leave.” Some employers also have “personal leave.” Most employers offer “bereavement leave,” which is often accompanied by a strict definition regarding whose death the employee may formally grieve. Some employers also have days allowed for the observance of religious ceremonies or holidays that do not fall on the normal company holidays. Finally, many, if not most, employers offer some paid vacation time. The STAA would cover all of these absences except the vacation days and employers could still require advance approval if an employee is requesting the use of vacation days.

207. See H.R. 1876, 112th Cong. §§ 4, 5(a)(3) (2011); see also Runge, *supra* note 84, at 476 (discussing the coverage of the Healthy Families Act).

208. See Suk, *supra* note 16, at 23-24 (stating that Americans are very attached to keeping family leave and medical leave together but she would support having short-term medical leave separated from leave for childbirth and newborn care in order to allow family leave to be debated on its merits without the potential abuse and costs of medical leave muddying the debate). Julie Suk,

proposal is not only workable, but also sensible and worthwhile. I will first discuss the benefits of severing the longer-term care-of-others from the self-care and short-term absences. I will then defend my proposal for the Short-Term Absences Act.

### 1. Severing Care-of-Others from Self-Care and Short-Term Absences

The first justification for severing the care-of-others from self-care and short-term absences is because the FMLA was primarily concerned with providing protection for women who become pregnant and have children while employed and who are often charged with the caregiving responsibilities for the family.<sup>209</sup> In other words, isolating the care-of-others provisions makes sense because Congress was first and foremost concerned with workers having the ability to care for their families when needed.<sup>210</sup> Both the preamble to the Act and the legislative history evidence a concern for the need to accommodate parents without forcing them to choose between job security and parenting.<sup>211</sup> Michael Selmi notes that there was not much legislative history discussing the serious health condition provision and that advocates believed that provision to be less important because many employees already had sick leave available to them.<sup>212</sup> And yet, the statute has become mostly a sick

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however, does not address long-term leave for an employee's own serious health conditions nor does she address long-term family leave that is not for childbirth but instead is used for caring for a sick family member. *See id.* It is unclear to me how she would propose handling those types of leave.

209. *See Selmi, supra* note 16, at 73; Craig, *supra* note 35, at 63; Hayes, *supra* note 5, at 1508 (noting that the FMLA was originally developed in response to the needs of new mothers); Halverson, *supra* note 6, at 270 (noting that one of the purposes of the FMLA is to protect women's right to take maternity leave); Peterson, *supra* note 12, at 253 (stating that the acknowledgement that parental leave policies in the workplace were inadequate to meet the needs of working women was the major impetus for the passage of the FMLA); *id.* at 263-64 (stating that the Act was drafted first to accommodate the tension between work and family, and second, to help with family responsibilities and emergencies).

210. *See Coleman v. Court of Appeals of Md.*, 132 S. Ct. 1327, 1340 (2012) ("Indeed, the FMLA was originally envisioned as a way to guarantee—without singling out women or pregnancy—that pregnant women would not lose their jobs when they gave birth. The self-care provision achieves that aim.").

211. *See* 29 U.S.C. § 2601(a) (2006); Craig, *supra* note 35, at 63; Peterson, *supra* note 12, at 265 ("The drafters emphasized the importance of parental participation in child-rearing and of family involvement in providing care for seriously ill spouses, children, and parents. Congress recognized the dilemma facing workers due to the lack of employment policies to assist working parents and inadequate job security for employees needing leave to care for their own serious illnesses or those of family members."). In fact, the first attempt at a family leave statute was called the "Parental Disability Leave Act." *See* Anthony, *supra* note 36, at 469.

212. *See Selmi, supra* note 4, at 73. Of course, that turned out to not be true as employers are



leave statute rather than a parental leave statute.<sup>213</sup> Thus, severing the self-care and short-term absences brings the FMLA back to the statute originally envisioned by Congress.

More importantly, however, severing the care-of-others provisions will hopefully garner renewed support for family leave. It is indisputable that most of the criticisms of and challenges under the FMLA deal with short-term absences, and most often with employees using the FMLA for self-care.<sup>214</sup> Although I will discuss handling the abuses and confusion regarding short-term absences below, I see a benefit in allowing the FMLA to stand alone. Once the care-of-others provisions are separated from the short-term and self-care provisions, employers will be able to see how manageable the FMLA really is. Studies show that employers see very little detrimental impact when their employees use FMLA leave for parental leave or to care for family members long-term.<sup>215</sup> Thus, severing the provisions will allow the FMLA to be perceived by employers as a much more manageable statute, and this will hopefully allow new reforms to be considered.<sup>216</sup>

Finally, as stated above, the FMLA does not need to cover an employee's own long-term illnesses for two reasons: (1) long-term illnesses, injuries, and impairments will now be covered by the ADA, and (2) the ADA requires employers to provide a leave of absence as a reasonable accommodation for an employee's disability.

Prior to the ADA being amended in 2008, the courts had taken a very restrictive approach to defining who has a disability under the ADA.<sup>217</sup> Thus, employees with all kinds of long-term health impairments, diseases, or illnesses were found not disabled under the ADA.<sup>218</sup> However, Congress sought to overrule these restrictive judicial

"less likely to offer . . . sick leave to blue collar and service employees." *See id.* at 77.

213. *See id.* at 76-77.

214. *See supra* notes 150-58 and accompanying text; *see also* Suk, *supra* note 16, at 19 ("It appears that employers' most serious complaint about the FMLA arises in opposition to intermittent leave, most often taken to care for an employee's own illness, rather than to care for babies or other family members."); *id.* at 21 (stating that the potential for abuse with sick leave is not present with family leave); Runge, *supra* note 84, at 454 (stating that the serious health condition provision is the one most frequently litigated); Willis, *supra* note 61 at 102, 104 (stating that the most often litigated issue in FMLA cases is what constitutes a serious health condition).

215. *See* Hayes, *supra* note 5, at 1541; Grossman, *supra* note 4, at 52.

216. *See* Suk, *supra* note 16, at 17 ("The most serious problem for family leave is that it is caught in the firestorm of complaints about costly medical leave."). In fact, Julie Suk points to Sweden's example of allowing reforms to the medical leave provisions while still having very generous family leave because the provisions are separate. *See id.* at 39-40.

217. *See* Nicole Buonocore Porter, *Martinizing Title I of the Americans with Disabilities Act*, 47 GA. L. REV. 527, 541 (2013).

218. *See id.* (stating that conditions like cancer, epilepsy, diabetes, multiple sclerosis, and HIV

decisions when it passed the ADA Amendments Act of 2008. There are several provisions in the Amendments that have made it much easier for individuals to prove they meet the ADA's definition of "disability."<sup>219</sup> First, the Amendments make clear that courts should not use demanding standards when determining whether someone has a disability.<sup>220</sup> The Amendments state that the definition of disability "shall be construed in favor of broad coverage of individuals under this Act, to the maximum extent permitted by the terms of this Act."<sup>221</sup> Second, the Amendments make it much easier for an employee to prove that an impairment substantially limits a major life activity,<sup>222</sup> and the Amendments also expand the list of major life activities.<sup>223</sup> Finally, the Amendments dictate that when determining whether someone has a disability, employers and courts should view that person in their unmitigated state, meaning without the consideration of assistive devices like medication that might ameliorate the effects of the disability.<sup>224</sup> Thus, by virtually all accounts, it will be much easier for an individual to prove that he has a disability.<sup>225</sup> Impairments like cancer or diabetes, which might not have been considered disabilities before the Amendments now will be. Thus, instead of needing to rely on the FMLA to cover absences related to diseases such as cancer or diabetes, employees will now be protected by the ADA.

Although the ADA does not contain an affirmative obligation for employers to provide a job-protected leave of absence like the FMLA does, it does require employers to provide "reasonable accommodations" to employees with disabilities,<sup>226</sup> and one such accommodation is a leave of absence.<sup>227</sup> If an employee with a disability needs a leave of absence,

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were found to not be disabilities).

219. *See id.* at 542.

220. *See* ADA Amendments Act of 2008, Pub. L. No. 110-335, § 2(b)(4), 22 Stat. 3553, 3554 (2008).

221. *Id.* § 4(a)(4)(A).

222. *See id.* §§ 2(b)(5), 4(a)(4)(C).

223. *See id.* § 4(a)(2)(A).

224. *See id.* § 4(a)(4)(E).

225. *See* Porter, *supra* note 217, at 542.

226. *See* 42 U.S.C. § 12112(b)(5)(A).

227. Although the ADA does not specifically mention "leave of absence" in its non-exhaustive list of accommodations, it does mention "part time or modified work schedules." *See id.* § 12111(9). Furthermore, the EEOC has issued guidance stating that a leave of absence is an appropriate accommodation unless the employer can prove that providing the leave will cause an undue hardship. *See* Equal Emp't Opportunity Comm'n, *Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act* (Oct. 17, 2002), available at <http://www.eeoc.gov/policy/docs/accommodation.html#leave> [hereinafter *EEOC Guidance*].

the employer will most often be required to provide one, and in some cases, even a longer leave than the twelve weeks allowed under the FMLA.<sup>228</sup> Furthermore, it makes sense to sever the care-of-others provisions in the FMLA from the self-care provisions because the ADA protects an employee's own medical conditions but does not required employers to provide family leave.<sup>229</sup> Even though the ADA prohibits discrimination against an employee because of the employee's association with a person with a disability, the employee is not entitled to any type of accommodation to allow the employee to care for the individual with a disability.<sup>230</sup> Finally, the confusing overlap between the provisions of the FMLA and the ADA<sup>231</sup> could be ameliorated by having the FMLA deal only with the care of others and the ADA continuing to handle long-term, self-care issues.

## 2. Defending the Short-Term Absences Act

Several arguments serve to justify the Short-Term Absences Act. I will first discuss the reasons the STAA benefits employers and then the reasons the STAA benefits employees.

### a. STAA Will Benefit Employers

One of the main reasons the proposed Short-Term Absences Act is justified is because it would curb the many abuses of the FMLA.<sup>232</sup> First, many employees take longer leaves than necessary in order to make those leaves appear to comply with the FMLA.<sup>233</sup> Most illnesses

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228. See Peggy R. Mastroianni & David K. Fram, *The Family and Medical Leave Act and the Americans with Disabilities Act: Areas of Contrast and Overlap*, 9 LAB. LAW 553, 556 (1993); Michael Newman & Faith Isenhath, *The Interplay Between the Americans with Disabilities Act and the Family and Medical Leave Act Regarding Workplace Leave*, 56 FED. LAW. 16, 16-17 (2009); *EEOC Guidance*, *supra* note 227 (stating that an employer cannot deny an employee additional leave after FMLA leave has been exhausted unless the additional leave would cause an undue hardship).

229. See Mastroianni & Fram, *supra* note 228, at 559.

230. See 42 USC § 12112(b)(4); see also Mastroianni & Fram, *supra* note 228, at 559.

231. See generally Mastroianni & Fram, *supra* note 228 (discussing the confusion between the two statutes). See also Newman & Isenhath, *supra* note 228 at 17 (stating that the overlap between the ADA and the FMLA creates confusion for employers and their lawyers).

232. Professor Sugarman makes a similar argument with regard to his pre-FMLA proposal for short-term paid leave that is available without reason. He argues that anytime an employer has eligibility criteria in order to allow employees to access benefits, there is always a risk that the system will generate abuse by employees. See Sugarman, *supra* note 198, at 471-72.

233. I have advanced this argument before and it was based then, as it is now, on my experience as an employment law attorney at a large law firm and in-house counsel prior to my

or injuries lasting only one day would not be considered serious health conditions under the statute. As discussed earlier, because the definition of serious health condition requires three days of absences, employees are encouraged to extend the length of their leave in order to meet the definition of serious health condition.<sup>234</sup> This obviously harms employers.

Second, making the short-term leave available without reason has the benefit of avoiding the difficulty employers face in trying to determine whether employees meet the very specific requirements of the statute and its regulations.<sup>235</sup> Not only does this difficulty occur under the current FMLA,<sup>236</sup> but it also occurs when employers are trying to determine eligibility under other leave policies. In my experience, human resources personnel appreciate having some of the hard decisions taken out of their hands. It is for this reason that I have, in prior work, argued in favor of having a bright line rule that does not involve employer discretion when deciding whether to provide a reasonable accommodation under the ADA,<sup>237</sup> and for a universal accommodation mandate that would apply to all employees.<sup>238</sup>

Third, the STAA would lead to a dramatic decrease in record keeping<sup>239</sup> without increasing costs for most employers. Many employers already provide sick leave and bereavement leave. Some employers provide personal leave. Some states require employers to provide leave to victims of domestic violence to obtain the legal and

academic career. See Porter, *supra* note 19, at 848-49.

234. See *supra* notes 165-68 and accompanying text.

235. See Sugarman, *supra* note 198, at 468 (stating that it is more efficient to eliminate the bureaucracies involved in making many different eligibility decisions).

236. Even when scholars recommend an expansion of the FMLA's protections, they often simultaneously warn against opening up the statute for abuse. See Willis, *supra* note 61, at 107 (discussing the possible abuse that might arise from his proposal to allow FMLA leave to be taken for an expanded list of family members). But if the STAA covers absences regardless of the reason for the absence, the concern about abuse disappears.

237. See Nicole B. Porter, *Reasonable Burdens: Resolving the Conflict Between Disabled Employees and Their Coworkers*, 34 FLA. ST. U. L. REV. 313, 345 (2007) (arguing that a bright-line rule, regarding when to accommodate an employee with a disability if that accommodation affects other employees, benefits employers because it will allow them to avoid making confusing and litigation-risky decisions).

238. Nicole Buonocore Porter, *Mutual Marginalization: Individuals with Disabilities and Workers with Caregiving Responsibilities*, FLA. L. REV. (forthcoming 2014) (manuscript at 33), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2215882](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2215882) (stating that one benefit of a universal accommodation mandate, which would allow all employees to request accommodations to their work schedules, is that it would alleviate some of the difficult decision making employers face when deciding who deserves accommodations and who does not).

239. Employers often complain about the record keeping costs for the FMLA. See Tompson & Werner, *supra* note 144, at 132-33.

safety help needed.<sup>240</sup> Implementing many of these leave systems requires a great deal of record keeping by human resources professionals.<sup>241</sup> This is especially true with respect to the FMLA and other leaves that might have very specific and stringent eligibility factors.<sup>242</sup> Record keeping is made even more difficult when an employer is required to provide intermittent leave in very small increments of time.<sup>243</sup> Because the STAA will require employers to give leave in half-day increments without scrutinizing the reason for the leave, employers only need to be able to count to 20 (10 days of absences in half-day increments).

#### b. STAA Benefits Employees

Although I have considered the employer's perspective in devising this proposal, I also want to make the FMLA better for employees. There are a few reasons why the STAA would benefit employees, especially when compared to what employees are entitled to under the FMLA. First, when Congress failed to cover routine illnesses in the FMLA, it assumed that minor ailments would be covered by routine sick leave policies.<sup>244</sup> Not only do many employees not have access to sick leave,<sup>245</sup> but most sick leave policies cannot be used to care for other family members.<sup>246</sup> Thus, the short-term leave statute I am proposing

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240. See generally Nicole Buonocore Porter, *Victimizing the Abused?: Is Termination the Solution When Domestic Violence Comes to Work?*, 12 MICH. J. GENDER & L. 275, 290-92 (2006) (introducing local legislation that provides remedies to victims of domestic violence); Cf. Runge, *supra* note 84, at 455 (emphasizing the problem with the fact that the FMLA does not cover absences when women have to miss work because of their status as a domestic violence victim).

241. See Runge, *supra* note 84, at 480 (discussing the benefits of not having employers have to hire and train professionals to make sure that that employees are entitled to take the FMLA leave requested).

242. See *id.* ("Without a list of qualifying reasons for taking leave or qualifying medical conditions, employers will not need to expend time or money to check up on their employees.").

243. See 29 C.F.R. § 825.205(a)(1) (2013) (requiring an employer to use an increment of time no greater than the shortest period of time that the employer uses to account for use of other forms of leave, and in any event, no longer than one hour); see also *supra* note 188-96 and accompanying text (discussing employers' complaints about intermittent leave).

244. See Bornstein, *supra* note 16, at 108; Beckett-McWalter, *supra* note 27, at 454.

245. See Bornstein, *supra* note 16, at 108; see also Porter, *supra* note 2, at 410 n.378 (discussing employers who have very strict, no-fault attendance policies, which do not allow for any sick leave at all unless it meets the stringent requirements of the FMLA); Runge, *supra* note 84, at 469 (noting that not only do many employees not have access to sick leave, but they are also more often low-wage workers); Anthony, *supra* note 36, at 475 (stating that only 50% of all private sector workers and only 25% of low-wage workers have access to sick leave).

246. See Bornstein, *supra* note 16, at 108; see also Anthony, *supra* note 36, at 476 (stating that less than 33% of workers have access to paid leave to care for sick children).

would cover the types of routine illnesses that prevent employees from going to work, but might not always be considered serious health conditions.<sup>247</sup> There are many benefits to protecting employees from termination during these types of short-term absences.<sup>248</sup> First, employees should never be put in the position where they have to choose between losing a job and neglecting to care for their loved ones, especially minor children.<sup>249</sup> Elsewhere I have discussed the horrific stories of mothers who have had to choose between termination if they stayed home with their kids or leaving their children alone, with disastrous results.<sup>250</sup> Second, society benefits when parents take care of their children through routine check-ups, immunizations, and keeping sick children (and adults) home when they are contagious.<sup>251</sup> Third, sick leave might benefit children in school, in addition to the health benefits.<sup>252</sup> Others have proposed an expansive interpretation of the FMLA that would allow that statute to cover routine illnesses,<sup>253</sup> but for reasons discussed above, I believe it is better to separate the long-term from the short-term and to ease the complicated structure of determining serious health conditions under the FMLA.

Second, having these absences available for any reason also avoids infringing on employees' privacy.<sup>254</sup> As stated by one commentator, it is "arguably irrelevant to an employer why an employee needs to leave

247. See Silbaugh, *supra* note 5, at 197; see also Anthony, *supra* note 36, at 480 (stating that many employees do not have access to leave for minor illnesses or medical check-ups).

248. See Porter, *supra* note 19, at 847-48 (discussing the social benefits of paid sick leave).

249. See *id.*

250. In one case, a mother left her two children, 9 and 1, alone because the babysitter did not arrive on time and she faced termination if she did not report to work. While she was gone, someone deliberately set fire to her apartment and the children died. See Nina Bernstein, *Daily Choice Turned Deadly: Children Left on Their Own*, N.Y. TIMES, Oct. 19, 2003, <http://www.nytimes.com/2003/10/19/nyregion/daily-choice-turned-deadly-children-left-on-their-own.html>. In a similar case, a toddler fell from a balcony and died because his mother had to work. See *id.*

251. See Porter, *supra* note 19, at 848.

252. One study indicated that students who scored in the bottom 25% had parents who were more likely to lack paid leave. See Anthony, *supra* note 36, at 482.

253. See Silbaugh, *supra* note 5, at 197. In fact, President Clinton had advocated for an amendment to the FMLA that would allow for 24 hours of unpaid leave for routine medical appointments and for parents to attend their children's school activities. See Anthony, *supra* note 36, at 482.

254. See Bornstein, *supra* note 16, at 104-07 (discussing the invasion of employee's privacy when employers make inquiries to determine who is deserving of FMLA benefits); Runge, *supra* note 84, at 478 (discussing the benefits of allowing an employee to keep the reason for her need for leave private); Sugarman, *supra* note 198, at 470-71 (stating that many sick leave policies invade employees' privacy by requiring them to disclose personal health information when they would prefer to keep it private).

from work; there is no reason to place an employer in the position of a parent, forced to check up on and second-guess an employee's choices unless it is to reinforce and encourage certain values and behaviors."<sup>255</sup>

Third, and perhaps most importantly, providing employees 10 days of absences without eligibility rules avoids the problem of special treatment stigma. As I have argued elsewhere, special treatment stigma manifests itself in two ways—employers refusing to hire those who need special treatment in the workplace (in the case of the FMLA, mostly women) and co-workers being resentful of employees who get special treatment in the workplace.<sup>256</sup> Because the absences under STAA would be available to *all* employees for *any* reason, the special treatment stigma would disappear.<sup>257</sup>

One point about unpaid leave: even though I am advocating for unpaid leave, if an employer already offers some paid leave for sick days or personal days, the employer should be required to continue to do so. Thus, if an employer provides five days of paid sick leave, and three days of paid personal leave, it should be required to provide eight of the ten days allowed under the STAA with pay. There have been prior proposals advocating for seven days of paid sick leave.<sup>258</sup> To my mind, what was important about those proposals was not the pay as much as the job-protected absences. As discussed above, no one should be forced to choose between caring for a loved one and keeping one's job. What these employees who are faced with this choice need most is not pay for that missing day (although that certainly would help) but protection from termination.<sup>259</sup> Obviously, I would prefer paid absences but, in an attempt to get buy-in from the business community, I think it is more realistic to advocate for unpaid absences, except to the extent that those absences would have been paid for under company policy.<sup>260</sup>

255. Runge, *supra* note 84, at 474; *see also* Sugarman, *supra* note 198, at 468 (stating that if you take away eligibility decisions, employers no longer have to waste time and effort policing employees).

256. *See generally* Porter, *supra* note 238, at 9-16.

257. *See id.* at 33 (stating that the main benefit of a universal accommodation mandate is to alleviate special treatment stigma because all employees would be entitled to workplace accommodations).

258. *See* Porter, *supra* note 19, at 849-50; Runge, *supra* note 84, at 476.

259. *See* Porter, *supra* note 2, at 408-09 (discussing a proposal of protecting against termination for mandatory caregiving tasks).

260. Employers are also against paid leave, because they believe that it will give employees an incentive to try to invent reasons to take FMLA leave. *See* Suk, *supra* note 16, at 18. Anecdotally, part of my reason for not insisting on paid absences is because of my experience as in-house counsel for a large manufacturing company. As is likely true with many employers who have stringent attendance policies, the hourly employees subjected to these policies would work very hard to have

### D. Addressing the Anticipated Criticisms

One potential criticism of my proposal is that if the self-care provision of the FMLA is removed and women continue to take the vast majority of family leave, they will suffer from special treatment stigma because they will be seen by their employers as more expensive to employ.<sup>261</sup> At the time of the FMLA's passage, opponents of the FMLA were worried that it would mean more inequality for women because employers would know that women would be taking most of the leaves.<sup>262</sup> But as others have stated, I believe that just because a statute that has the potential to help women might cause employers to be more reluctant to hire women does not mean we should not enact the statute—it simply means we should be more vigilant in enforcing our anti-discrimination laws.<sup>263</sup> Most importantly, family leave is simply a matter of priority. Employers spend a great deal of money on workers compensation benefits and military leave benefits, both of which cost more than providing unpaid leave and both of which benefit men more than women.<sup>264</sup> As I have argued before, the proper raising of children and the care of adult family members should also be one of our nation's top priorities.<sup>265</sup> If family care is prioritized, the stigma women face for being the primary caregivers should dissipate.

The other major criticism is likely to come from the business community, who will balk at either the expense or the unfairness of allowing employees to take ten days of absences under the STAA for any reason.<sup>266</sup> I have a few responses to this business concern. The first response is the one work/family advocates have been making for years—

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absences excused as FMLA leave, but would take those absences under many dubious circumstances. It appeared to me that the main concern of the employees was keeping their jobs under the stringent, no-fault attendance policy. But because they were willing to take the absences despite the lack of pay and when the circumstances demonstrated that those absences could have been avoided, I assume the lack of pay was not a strong enough incentive to keep the employees from taking the day off. Obviously, if the leave is going to be lengthy, rather than a day here and there, the lack of pay makes a huge difference, but it appeared to me that the difference between ten days of pay and nine days of pay in a two-week pay period was not a big enough difference to cause an employee to forego a necessary or desired day off.

261. See, e.g., Barzilay, *supra* note 16, at 433; see also Anthony, *supra* note 36, at 471.

262. See Anthony, *supra* note 36, at 471.

263. See *id.* Furthermore, looking to Europe as an example, Julie Suk points out that it is possible for laws to rely on gender stereotypes (that women will more often take leave) and still boost women's continued employment and reduce pay inequality. See Suk, *supra* note 16, at 67.

264. See Anthony, *supra* note 36, at 478-79.

265. See Porter, *supra* note 2, at 387-90.

266. See, e.g., Runge, *supra* note 84, at 481 (discussing this criticism of a paid mandatory leave statute).



family friendly benefits ultimately save money in lowering the costs of attrition and improving employee morale and loyalty.<sup>267</sup> Second, in many cases, the expense will not be much greater than the status quo because employers are already offering a potpourri of days off—this proposal simply consolidates those days off. Third, any increased cost will likely be offset by decreased record keeping expenses. Because there is no need to police the days off, and no need to have human resources personnel making difficult eligibility decisions, employers should see a decrease in the cost of implementing the FMLA and other leave policies.

## V. CONCLUSION

Twenty years ago, President Clinton signed into law the FMLA, the first statute in the United States that provided leaves of absence for the birth of a baby and other family and medical reasons. Despite the promise of the FMLA, it has, by almost all accounts, accomplished very little. Although there are numerous complaints of the FMLA and even more proposed solutions, the goal of this paper was to analyze the FMLA's flaws from an employer's perspective and to propose a solution that would eliminate some of those flaws, while also making the FMLA more useful for employees. Employers' biggest complaint about the FMLA is that implementing short-term and intermittent leaves for serious health conditions is both confusing and prone to employee abuse. My two-part solution proposes severing the long-term care-of-others provisions from the short-term and self-care leaves and implementing a new statute, the Short-Term Absences Act, that would provide employees up to ten days of unpaid absences to use for any reason, including but not limited to, short-term self-care and short-term care-of-others. I believe that this proposal will eliminate employee abuse, eliminate the complications involved in implementing leave, and ultimately decrease the hostility employers feel towards the FMLA. This will, in turn, hopefully open up the doors for future reform to the FMLA that can actually make it more than simply a symbolic statute.

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267. See, e.g., Porter, *supra* note 19, at 814 (discussing studies that argue in favor of the benefits and sustainability of family-friendly measures). This has proven true with respect to the FMLA. See sources cited *supra* note 144.