The Family and Medical Leave Act: Unlocking the Door to the "Key Employee" Exemption

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I. Introduction

On February 5, 1993, President Clinton signed the Family and Medical Leave Act ("FMLA") which was intended "to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity."\(^1\) Requiring employers of approximately half of the nation's workforce to provide leave of absence to employees,\(^2\) family and medical leave may be taken for any of the following reasons:\(^3\) (1) the birth of a son or daughter of the employee\(^4\) (2) "the placement of a son or daughter with the employee for adoption or foster care"\(^5\) (3) to provide care for the employee's son, daughter, spouse, or parent who has a serious health condition\(^6\) or (4) the serious health condition of the employee which prevents the employee from working.\(^7\) Employers

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2. See H.R. Rep. No. 103-8, at 60 (1993). An employee is eligible for the coverage if he has been employed for at least 12 months and for at least 1,250 hours during that time. See 29 U.S.C. § 2611(2)(A)(i-ii) (1995). In addition, the FMLA covers any employer engaged in commerce who employs 50 or more employees. See 29 U.S.C. § 2611(4)(A)(i).
are required to provide health insurance coverage during the leave.  

The FMLA requires that an employer restore an employee to his or her position or to an equivalent position with equivalent benefits, pay and other terms and conditions of employment. Section 104 of the statute allows employers, under certain circumstances, to deny such restoration to certain "key employees" to their prior positions if they are "among the highest paid [ten] percent" of employees. Such denial is necessary when the employer believes that reinstatement will cause "substantial and grievous economic injury" to his or her operations. Although there has been little, if any, case law addressing the issue of the "key employee" exemption since the FMLA's inception, section 104 has been described by many attorneys as a "nebulous area" that is ripe for disagreement and court interpretation. The application of the "key employee" exemption will inevitably be litigated and it will therefore be necessary to predict how a court should rule when such cases arise.

This Note will analyze the "key employee" exemption under the FMLA and highlight the ambiguities and inconsistencies in the statutory language. In addition, the author will demonstrate that the

9. See 29 U.S.C. § 2614 (a)(1)(A-B). "An equivalent position is one that is virtually identical to the employee's former position in terms of pay, benefits and working conditions, including privileges, prerequisites [sic] and status." The Family and Medical Leave Act of 1993, 29 C.F.R. § 825.215(a) (1995). However, restoration to an equivalent position "does not extend to . . . intangible, unmeasurable aspects of the job" such as loss of potential promotional opportunities and an increased likelihood of being subject to a future layoff. See 29 C.F.R. § 825.215(f). The Department of Labor was charged with issuing interim regulations, Implementation of the Family and Medical Leave Act of 1993; Proposed Rule, 58 Fed. Reg. 13,394 (1993) ("Proposed Rules"), which allowed for a period of comment from the public. See Family and Medical Leave Act; Interim Final Rule, 58 Fed. Reg. 31,794 (1993). On Jan. 6, 1995, the Department of Labor issued final regulations which are codified under The Family and Medical Leave Act of 1993, 29 C.F.R. § 825 (1995) ("Final Regulations"). While there were some significant changes affecting issues such as notifications to employers and employees as well as the broadening of certain definitions, the "key employee" provision was merely given further clarification. See Alice E. Conway, A Guide To Practical Knowledge of the FMLA and Its Complex New Final Regulations, 12 CORP. CONS. Q. 107, 110 (1995).
possible effects of the provision are seemingly inconsistent with the FMLA’s goals of balancing the demands of the workplace with the economic and social needs of the family.  

II. THE "KEY EMPLOYEE" EXEMPTION

A "key employee" is defined as a "salaried eligible employee who is among the highest paid [ten] percent of the employees employed by the employer within 75 miles of the [work] facility."  

While they are entitled to leave and a continuation of their health benefits during that time, the employer may refuse to reinstate a "key employee" to his or her prior position under certain circumstances. If reinstituting the employee would cause "substantial and grievous economic injury to the operations of the employer," then the employer is permitted to deny the employee restoration to the prior position.

The legislative history illustrates the rationale behind the exemption. While "[t]he essential purpose of the [FMLA] [was] to provide employees the security that comes from the knowledge that leave will be available if a family emergency arises," Congress did not want to completely overlook the daily operations of the employer. It realized that "in very critical, limited circumstances... the employee in question is crucial to the ongoing operation of the employer." Because this employee is "essential," it is pre-
sumed that he is receiving "top salary." In this situation, the employer should be able to deny reinstatement to the high-paid individual. The "key employee" exemption takes this employer concern into account.

Once the employee notifies the employer of the need to take leave, the employer is obligated to give written notice to the employee that he or she qualifies as a "key employee." In addition, "the employer must also fully inform the employee of the potential consequences with respect to reinstatement and maintenance of health benefits if the employer should determine that substantial and grievous economic injury to ... [its] operations will result ... [upon reinstatement]." If the employer has not determined whether the employee in question is a "key employee" and cannot notify the employee of his or her status immediately, it must be given in a reasonable time after being notified of the need for leave or the commencement of the leave. However, an employer's failure to notify in a timely manner will result in the loss of the right to deny restoration regardless of whether substantial and grievous economic injury will occur.

Upon a good faith determination that "substantial and grievous economic injury" to its operations will result if the "key employee" who has given notice of the need for leave is reinstated, the employer is required to notify the employee in writing of its intention to deny reinstatement at the end of the leave. The notice

21. See id. at 437.
23. Id.
24. See id.
25. See id.
26. See 29 C.F.R. § 825.219(b). The regulation assumes that an employer will be able to give notice of the intention to deny restoration prior to the employee starting leave. See id. "The employer must serve this notice either in person or by certified mail." Id. The required notice, Form WH-381, titled: Employer Response to Employee Request for Family and Medical Leave, states in part:

7(a). You [ ] are [ ] are not a "key employee" as described in § 825.218 of the FMLA regulations. If you are a "key employee," restoration to employment may be denied following FMLA leave on the grounds that such restoration will cause substantial and grievous economic injury to us.

(b) We [ ] have [ ] have not determined that restoring you to employment at the conclusion of FMLA leave will cause substantial and grievous economic harm to us.

must give reasons why substantial and economic injury will result, and must provide the employee a reasonable time to return to work (assuming leave has commenced) while taking into account the surrounding circumstances, such as the duration of the leave and necessity of the employee returning to work.\textsuperscript{27} If the employee on leave does not return to work after receiving notification of the employer’s intent to deny restoration, the employee is still entitled to health benefits and rights as a “key employee.”\textsuperscript{28} Unless the employee informs the employer that he or she no longer wishes to return to work or the leave period ends, the employee’s rights are still protected under the FMLA.\textsuperscript{29}

Even though the employer has sufficiently given notice to the employee that economic harm will result upon reinstatement, the employee can still request reinstatement at the end of the leave period despite the fact that the employee did not return to work after receiving notice of the employer’s intentions.\textsuperscript{30} The employer is then required to once again “determine whether there will be substantial and grievous economic injury from reinstatement, based on the facts at that time.”\textsuperscript{31} If harm will result at that time, the employer must then notify the employee of the “denial of restoration.”\textsuperscript{32}

III. AMBIGUITIES AND INCONSISTENCIES IN THE “KEY EMPLOYEE” EXEMPTION

Similar to other sections of the Family and Medical Leave Act, the “key employee” provision uses vague and ambiguous language.\textsuperscript{33} Moreover, the legislative history provides little guidance in defining and interpreting the different factors of the exemption.

\textsuperscript{27} See 29 C.F.R. § 825.219(b).
\textsuperscript{28} See 29 C.F.R. § 825.219(c).
\textsuperscript{29} See id.
\textsuperscript{30} See 29 C.F.R. § 825.219(d).
\textsuperscript{31} Id.
\textsuperscript{32} See id.
\textsuperscript{33} See Carol Ann Humiston, Emerging Issues Under the Family and Medical Leave Act, 43 Fed. Law. 35 (1996) (describing compliance with the FMLA as “a huge government ball of red tape”).
A. Substantial and Grievous Economic Injury

While the Department of Labor states certain factors when considering "substantial and grievous economic injury," "[a] precise test cannot be set for the level of hardship or injury to the employer which must be sustained." The regulations merely provide what would generally be considered sufficient to deny reinstatement. For example, the reinstatement of a "key employee" that would threaten the economic viability of the firm would be considered "substantial and grievous economic injury." In addition, "[a] lesser injury which causes substantial, long-term economic injury would also be sufficient." However, "[m]inor inconveniences and costs that the employer would experience in the normal course of doing business would certainly not constitute 'substantial and grievous economic injury.'"

In addition to an imprecise standard for the requisite level of injury needed, the legislative history gives differing views as to how the standard should be applied. "In addressing this provision, the Department [of Labor] considered two alternative interpretations: (1) That the employee's taking leave must cause substantial and grievous economic injury to the operations of the employer; and (2) that the employee's restoration to employment after taking leave must cause the substantial and grievous economic injury." Based on the plain meaning of the statutory language, it must be the restoration of the employee to employment, not whether the absence of the employee will cause "substantial and grievous injury." In making this determination, the employer:

[m]ay take into account its ability to replace on a temporary basis (or temporarily do without) the employee on FMLA leave. If permanent replacement is unavoidable, the cost of then reinstating the employee can be considered in evaluating whether substantial and grievous economic injury will occur from restoration;

34. See 29 C.F.R. § 825.218(c).
35. See id.
36. Id.
37. Id.
in other words, the effect on the operations of the company of reinstating the employee in an equivalent position.40

Contrary to this, the legislative history reveals inconsistencies on this factor.41 For example, the House and Senate Reports state, "[i]n measuring grievous economic harm, a factor to be considered is the cost of losing a key employee if the employee chooses to take the leave, notwithstanding the determination that restoration will be denied."42 This would indicate that the cost of the absence on the employer is also a consideration in denying reinstatement. Interestingly, the minority in the committee report and on the floor indicates much confusion as to whether the exemption should take into account the effect of reinstatement or the effect of the leave or both.43 In comments to the floor, Rep. Bill Goodling stated:

Note that the focus, strangely, is not on the impact of the employee's absence, but on the reinstatement . . . Maybe if he or she was making $500,000 a year, reinstatement might lead to grievous harm but when else?

I realize this is strange language that is in this bill, and it may have been structured this way in order to require the employer to continue to pay health insurance benefits for the employee, but that fact does not change the bill's focus on the effect of reinstatement. The Members may also have noticed that the language does not allow for any consideration of any factors other than economic, such as safety and health. What about the safety of the workplace?44

Yet comments by Rep. Roukema, a driving force behind the bill, indicate differently:

An employer may deny reinstatement to avoid serious economic harm from an employee's being out on leave. In addition, the substitute retains the key employee exemption, where the top employees may be denied reinstatement if their absence would cause substantial and grievous harm to an employer's operations. This provision is designed to ensure that employers do not expe-

41. See 58 Fed. Reg. at 31,805; Rigler, supra note 39, at 466 n.55.
42. 58 Fed. Reg. at 31,805.
43. See 58 Fed. Reg. at 31,805; Rigler, supra note 39, at 466 n.55.
rience financial difficulties when highly specialized or compensated essential workers request family or medical leave.\textsuperscript{45}

Congresswoman Roukema’s statements indicate that the legislative intent behind the exemption is more concerned with the time period during which the employee is taking the leave and its effect on the employer, rather than the effect of restoration on the employer. This approach is further supported by the requirement that if the FMLA leave has commenced, the employer must provide the employee a reasonable time in which to return to work while taking into account factors “such as the length of the leave and the urgency of the need for the employee to return.”\textsuperscript{46} This would imply that it is the employee’s leave, not the restoration, which is causing the injury.\textsuperscript{47} Nevertheless, “[b]ased on the language of the Act itself and the overall sense of the legislative history,”\textsuperscript{48} the Department of Labor interpreted this section of the statute to require the employer to show that it is the restoration to employment that causes the injury in order to deny reinstatement to a “key employee.”\textsuperscript{49} To support its reasoning, the Department described a situation in which an employer hires a permanent replacement while the “key employee” is on leave.\textsuperscript{50} If restoring the “key employee” to the same position could cause “substantial and grievous economic injury” to the company, then the employer can deny restoration to the employee.\textsuperscript{51} While the Department supported this approach, its later statements leave this interpretation open to

\textsuperscript{45} 58 Fed. Reg. at 31,805. Congresswoman Roukema contradicts her own statement in an earlier debate in which she provides a hypothetical which signifies that the reinstatement, not the leave, is the proper consideration in determining substantial and grievous economic injury:

A highly compensated engineer at an architectural firm needs medical leave as a result of having a heart attack. However, at the time the engineer is taken ill, she is working on an important project that means a tremendous fee to the firm and any cessation of work on this project may result in the business losing its contract. The employer in this instance may allow the employee to go out on leave, but will not keep the job open for her return at the end of the leave period. Instead, the employer will hire another engineer to continue the work.


\textsuperscript{48} See Rigler, supra note 39, at 466 n.55.

\textsuperscript{49} See id.

\textsuperscript{50} See id.

\textsuperscript{51} See id. at 31,806.
controversy and possibly further clarification by Congress in the future.  

B. Notice

With respect to notice requirements, the FMLA requires that the employer make a "good faith determination, based on the facts available that substantial and grievous economic injury" will occur and that notice be provided to the employee.  

"Although it is possible that an employer might anticipate grievous injury in any circumstance in which a key employee departs for more than a given period, the requirement of contemporaneous notice indicates that Congress likely intended the exemption . . . to be applied on a case-by-case basis." Thus, employers are given a tremendous amount of discretion when assessing the potential injury that may result.

With respect to the good faith requirement, the lack of objectivity may give employers too much discretion in making a determination of economic harm. Moreover, what may be considered substantial economic harm to one employer may not be for another. Despite these differences, the legislative history indicates that it may be possible to establish some form of guidelines for employers to consider. For instance, in the Proposed Rules issued prior to the Act's inception, the Department of Labor considered whether standards should be drafted to implement the exemption or whether the employer's reasonable belief is sufficient.

With respect to timely notice, the Rules ask whether an employer should be obligated to give advanced notice of a worker's "key employee" status to which reinstatement could then be denied. This question implies that the employer has the ability to make such a determination in advance. But in order to justify the exemption,

52. See id. ("While this interpretation is the more supportable, the Department recognizes that such a test will be extremely difficult to meet.").


55. See id. at 28 n.8.


57. See id.

58. See id.

59. See The Family and Medical Leave Act of 1993, 29 C.F.R. § 825.219(b); Waks & Brewster, supra note 54, at 27.
the employer is also required to show that the company would sustain substantial and grievous economic injury if restoration was granted.\textsuperscript{60} According to the FMLA, this determination is supposed to be made contemporaneously with the request for leave.\textsuperscript{61} From the employer’s standpoint, however, contemporaneous notice may not only be difficult, but almost impossible to assess.\textsuperscript{62} For instance, “[a] highly paid employee’s restoration in one year might cause no such injury; [however] in a subsequent year, the same employee might be denied restoration if leave was taken, the employer replaced her and restoration would cause ‘substantial and grievous economic injury’ to the employer.”\textsuperscript{63} This may be especially true of start-up companies whose revenues may fluctuate greatly at first but level out over time. Given the inability to make such a determination, requiring notification would put an undue burden on the employer to provide information of which he may not be aware.\textsuperscript{64}

Another aspect of the notice requirement that will likely raise some controversy is the time in which the leave has already commenced and the employer notifies the employee that his reinstatement will cause the requisite injury. Under the Final Regulations, the employee then has the option to elect not to take the leave at all or return from the leave.\textsuperscript{65} However, there is no mention of how long the employee has to decide what he or she is going to do once the employer makes this determination.\textsuperscript{66} The regulation only focuses on the employer, stating that he or she must give the

\textsuperscript{60} See 29 C.F.R. § 825.218(a). “[O]ne of the major points of misunderstanding about FMLA is that employers think that because a person on leave earns one of the highest salaries at the company she can automatically be replaced.” Paul Bomberger, Leave Gives Business Empty Feeling; New Legislation Could Create as Many Problems as it Solves, Some Say, INTELLIGENCER J., Aug. 2, 1993, at 1. The employer must also “demonstrate severe economic injury.” See id.

\textsuperscript{61} See 29 C.F.R. § 825.219(a); Waks & Brewster, supra note 54, at 27.

\textsuperscript{62} See Rigler, supra note 39, at 467.

\textsuperscript{63} See Rigler, supra note 39, at 467.

\textsuperscript{64} See Family Leave Could Spark Litigation, 143 LAB. REL. REP. (BNA) 496, 497 (1993) (predicting that many employers will fail to give the required notice which will generate lawsuits and it will be difficult for employers to prove grievous injury at the time the employee requests return to work). The exception also requires the employer to offer a reasonable opportunity to return to work from the leave after giving the key employee notice. See § 825.219(b) (1995). This may also raise questions as to what is a “reasonable” time to allow the employee to return to work after notice. See Family Leave Could Spark Litigation, 143 LAB. REL. REP. (BNA) at 497.

\textsuperscript{65} See 29 C.F.R. § 825.219(b).

\textsuperscript{66} See Family Leave: It’s Now The Law, 8 TENN. EMP. L. UPDATE 1, 4 (1993).
employee a reasonable time to return. This is a subjective standard that can only be decided on a case-by-case basis. From the employee's standpoint, a reasonable time might be construed as a month or more. However, "[f]or many small businesses, the loss of a key employee for an extended period would result in significant hardship . . . ." If such a time period were forced upon the employer, this would defeat the purpose of the "key employee" designation.

IV. Effects of The Exemption on the Employer and Employee

A. The Top Ten Percent

Under the exemption, only those salaried employees in the top ten percent can be considered eligible for denial of restoration. By applying a numerical distinction without considering other factors related to the workplace, the ten percent provision may seem unfair to certain employees. For instance, "[i]nsignificant differences in [employee's salaries] might cause significant differences in FMLA protections." In addition, "[c]hanges in the employer's payroll might cause an individual to be in the top ten percent one year, but not the next." By referring only to salaried employees, the FMLA and the legislative history make no mention of those occupations in which an employee's salary is composed of salary as

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67. See 29 C.F.R. § 825.219 (b).
69. Id. The article gives the example of a vice president of operations of a company informing his or her employer that she will need leave both before and after the birth of her child due to medical complications. Assuming the employer has designated her as a key employee, the employer will not be required to reinstate her. See id.
72. Id. The author uses the example of an employee who earns merely 10 dollars more annually than another employee will face a drastically different decision to make regarding paid leave if the higher paid employee happened to fall in the top 10%. See id.
73. Id.
well as commission. "What about a highly compensated individual who receives no salary but a whopping income in commissions? The Act's literal language precludes any assertion that such an employee may be denied the full range of FMLA benefits." 

More importantly, applying the exemption only to those employees in the top-ten percent of the payment scale under-serves both the employer and employee. Specifically, the exemption "protects low- and mid-level workers, but leaves top employees vulnerable." It unjustifiably assumes that employees in the "highest-paid echelons of a company are the only valuable ones." In fact, in many companies the opposite is true. The most important employees to the existence of a company are not in the top ten percent of paid employees. While a top executive or CEO is typically the "brains" behind the company's management, in many companies the top ten percent salaried employees are possibly the least missed because "their work tends to be more oriented toward paperwork rather than hands-on production. 

In assessing an employee strictly on his or her economic value, the exemption does not consider other aspects of employee importance to an employer. For example, an employer could not deny leave to an employee who played an important part in completing a project with a very tight deadline. In addition, he or she would have no power to deny reinstatement to an employee who was privy to confidential information or "was simply irreplaceable on short notice because of his or her specialized expertise." 

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74. See id. While the statutory language is silent as to commissions, one can argue that a factor such as "incentive pay," which the regulations provide to determine which employees are among the highest paid ten percent, would include commissions. See 29 C.F.R. § 825.217(c)(1). Moreover, the regulations also provide that the key employee "must be among the highest paid 10 percent" of all the employees—both salaried and non-salaried. 29 C.F.R. § 825.217(c). This can also be construed as to include commission pay.

75. Id. See also Family Leave Could Spark Litigation, supra note 64, at 497 (questioning whether an employee earning only $10,000 in salary but commissions of $250,000 would qualify under the exemption).


78. See id.

79. See id.

80. See id. at 437.

81. See id.

82. See id.
The inability to deny leave to important employees other than those that are highly paid can create more than just financial loss to the employer. In occupational fields such as health care, managers might encounter situations in which granting an employee’s leave request may cause the employer financial as well as operational hardships.

For example, if a managerial employee takes an extended leave, a health care firm may need to temporarily move a manager from another department—or perhaps even another location—to cover the position. This may cause both the efficiency of operations and the level of patient care to suffer while concomitantly causing the total employment costs of the employer to rise.

Indeed, the exemption “does not even allow consideration of severe economic factors unless the employee is in the top [ten] percent and does not even recognize safety and health factors. [It] focuses simply on economic factors.”

Another questionable aspect of the exemption is that it applies only to the highest paid ten percent employees of a company within a seventy-five mile radius of that worksite. As is the case with many large publicly held companies, “[a]n employee may be among the most highly compensated employees at a remote facility and thereby subject to the exemption, even if the employee is not among the highest-paid [ten] percent of employees in the company.” With respect to a specific employer, “an employer with operations in widely dispersed areas could have different high-paid groups in each location.”

It is questionable whether Congress

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84. Wyld, supra note 83, at 67. Some of the costs that are described involve the use of one important employee to cover the leave of a key employee which will lead to other employee moves as well as the associated operational and financial costs. See Wyld, supra note 83, at 67.


intended the exemption to reach this class of employees. Whether or not an employee works at a company's headquarters, where “the 10 [percent] threshold would likely cover a much higher-paid group” or “at a manufacturing plant 100 miles away”, would greatly impact an employee's coverage. Thus, the exemption lacks uniformity not only across different companies, but within the individual company as well.

In many companies, the highest paid individuals are CEOs or high ranking officers who may spend very little time at one worksite and visit multiple locations on a regular basis. Should this employee be exempt from FMLA protection and if so, at which worksite should he or she be counted toward? Neither the statute nor the regulations address this type of situation.

B. Substantial and Grievous Economic Injury

In determining “substantial and grievous economic injury,” Congress has created a subjective standard in which the harm is evaluated on a case-by-case basis. This is evident in the report by the House Committee on Education and Labor, which noted that, “[i]n measuring grievous economic harm, a factor to be considered is the cost of losing a key employee if the employee chooses to take the leave, notwithstanding the determination that restoration will be denied.” This discretion given to employers, however, “appears to be an invitation to litigation.” For example, the Proposed Rules ask whether an employer's reasonable belief of possible serious economic injury is sufficient to warrant denial of restoration. Assuming the employer reasonably believes that serious economic injury will occur, but circumstances actually turn out differently, should the employer be obligated to reinstate the former or regional sales representatives, for example, could be denied restoration of employment and benefits, even if their compensation falls in the middle of overall employee salaries.”

or regional sales representatives, for example, could be denied restoration of employment and benefits, even if their compensation falls in the middle of overall employee salaries.”

Waks & Brewster, supra note 87.

89. See Tievsky, supra note 88, at 20.


91. Waks & Brewster, supra note 87, at 27; See Mary Helen Gillespie, Editorial, Family Leave Law No Cure-all, BOSTON HERALD, Aug. 5, 1993, at 29 (referring to the key exemption as the “Lawsuits R Us” clause).

Once the requisite harm is shown, how long must it last? "It is unclear whether . . . [it] must be permanent, temporary, or exist for a particular amount of time before it will be found sufficiently 'substantial.'"94 The Rules also question the employer's obligations once the employee's position has been filled by a replacement, due to the threat of economic harm, where there is an equivalent position available.95 "Must the employee be restored to the equivalent position?"96 These and other questions are left unanswered in the final regulations. Without guidelines regarding such important decisions, employers will have to rely on "ad hoc judgments" when granting leave, exposing themselves to the constant threat of litigation.97 As a result, "[e]mployers surely will find themselves the target of lawsuits if they freely grant leave to new mothers but not to new fathers, or if their policies are perceived to be tougher on black employees than on white employees."98

The use of discretion in determining designation of "key employees" not only subjects the employer to possible litigation, but could hurt morale among the most highly paid employees.99 An employee who knows he will be denied reinstatement if he is to take FMLA leave will undoubtedly feel resentment toward the employer.100 Thus, applying an unannounced policy not only puts the employer on the defensive, but creates a sense of ill-will among employees.101

The same may be true of the requirement that the employer prove economic injury. As mentioned in the Final Regulations, a "precise test" does not exist to establish the requisite level of injury to the employer.102 It merely states that the standard is different from and more strict than the "undue hardship" test under the Americans with Disabilities Act ("ADA") because the former includes "substantial long-term injury" while the latter involves

93. See id.
96. Id.
97. See Waks & Brewster, supra note 87, at 27.
98. Waks & Brewster, supra note 87, at 27.
100. See Waks & Brewster, supra note 87, at 27.
101. See Waks & Brewster, supra note 87, at 27.
"significant difficulty or expense." Similar to the key employee exemption, however, the undue hardship test also takes into account the economic effect on the employer, by considering “[t]he impact of the accommodation upon the operation of the facility, including the impact on the ability of other employees to perform their duties and the impact on the facility’s ability to conduct business.”

Not only are “substantial” and “grievous” open to varied interpretation, but it may be impossible for an employer to assess the amount of injury that may be caused by an employee’s return to work. For instance, a significant drop in the value of a company’s stock might be considered “substantial and grievous economic injury” to some employers but merely a “predictable setback” to others.

Because economic harm focuses only on the effect and does not even consider the cause of the injury, the standard does not hold the company responsible for its own actions. For example, it would seem unfair to deny reinstatement to a highly compensated employee who takes family leave as a result of "negligent mismanagement decisions." By not taking into account the productivity of an employee, nor considering changing economic cycles within a particular company, the requisite standard of injury does not balance family needs with those of the workplace.

When considering the grievous injury test, it is important to remember that the FMLA itself only applies to companies of fifty


104. 29 C.F.R. § 1630.2(p)(2)(v). Some other factors also considered in determining whether an accommodation would impose undue hardship are

(i) The nature and net cost of the accommodation needed . . . ;
(ii) The overall financial resources of the facility or facilities involved . . . the number of persons employed . . . and the effect on expenses and resources;
(iii) The overall financial resources of the covered entity, the overall size of the business of the covered entity. . . ;
(iv) The type of operation or operations of the covered entity, including the composition, structure and functions of the workforce [involved] . . .

29 C.F.R. § 1630.2(p)(2)(i), (ii), (iii), (iv).

105. See Olsen, supra note 94.

106. See Olsen, supra note 94.

107. See Olsen, supra note 94. This might include decisions such as discontinuing a particular product or restructuring of the corporate entity.
employees or more.\textsuperscript{108} By requiring substantial and grievous harm, the test is a "very high hurdle for a business [because] [i]t [will] be extremely difficult for larger employers to prove that the return of a highly paid employee would have a negative impact on a business [employing fifty or more people]."\textsuperscript{109} Further, one can argue that the larger the company is, or the more people it employs, the less likely it will be that one high-paid individual's reinstatement will adversely affect the company.\textsuperscript{110} Under this reasoning, some have even questioned why the exception was placed in the FMLA at all.\textsuperscript{111} In fact, when combined with the Final Regulations, some attorneys feel that notification becomes "so onerous, that it will be almost impossible to qualify for the exemption."\textsuperscript{112} Ultimately, "[t]he issue likely will be settled only in the courts, which would force employers to ask how aggressively they want to pursue the exception - both a time-consuming and expensive process."\textsuperscript{113}

Another effect of the exemption is to create instability for existing workers.\textsuperscript{114} For instance, two employees in similar positions taking FMLA leave at the same time might not have the same level of job security.\textsuperscript{115}

The employer might seek replacements for both employees but be able to put only one replacement on the payroll by the time both leaves end. Restoring one employee plus continuing the employment of the replacement might not lead to 'substantial


\textsuperscript{110} For example, it seems extremely unlikely that the reinstatement of an executive earning a six-digit income at a Fortune 500 company would significantly impact the company's earnings, even at a satellite office.


\textsuperscript{112} Ruane, supra note 99; \textit{see also} Rick Desloge, \textit{Leave Act Could Leave Some Workers Out: May Not Cover Highest-Paid Employees, St. Louis Bus. J.}, June 28, 1993 at SB ("It's going to be tough for the employer to make the argument in all but the most obvious cases"); Stephen Alfred, \textit{An Overview of the Family and Medical Leave Act of 1993}, 24 Pub. Personnel Mgmt. 67, 70 (1995) ("As a practical matter, few public employers are likely to be able to meet this stringent standard").

\textsuperscript{113} Desloge, supra note 112, at SB.


\textsuperscript{115} \textit{See id.}
and grievous economic injury,' but restoring two employees and maintaining the replacement might.\textsuperscript{116}

In using this standard, it seems unfair to allow the employer to deny restoration to one of the employees simply due to financial circumstances.\textsuperscript{117}

The economic impact of leave on the employee could seriously affect a family's planning of care for a child or elderly parent.\textsuperscript{118} An employee will not know whether or not he falls within the top ten percent of paid workers or whether or not the employer will replace him if he were to take leave.\textsuperscript{119} Consequently, the employee will be forced to seek information about the employer's finances in considering whether or not his return would cause economic harm.\textsuperscript{120} The employer may not appreciate disclosing this traditionally confidential information. By consulting the employer with respect to his payroll status, the employee will be forced to disclose private matters such as possible pregnancy, family care or illness.\textsuperscript{121}

Another party that may be affected by the establishment of economic injury is the replacement worker. "The employer might assume that any benefit gained by permanently replacing a temporarily absent employee will be outweighed by the litigation risks associated with the employer's obligation to establish 'substantial and grievous economic injury' to justify the replacement."\textsuperscript{122} Thus, an opportunity to hire a possible replacement will be forgone. In addition, the "key employees" may be so concerned with the possibility that they may be denied their job upon return from leave, that they may decide not to take advantage of their entitlements at all regardless of whether it results in damage to the employer.\textsuperscript{123} This may ultimately translate into fewer "rank-and-file" employees exer-

\textsuperscript{116} Id.
\textsuperscript{117} See id.
\textsuperscript{118} See id. at 468.
\textsuperscript{119} See id.
\textsuperscript{120} See Rigler, supra note 114 at 468.
\textsuperscript{121} See Rigler, supra note 114 at 468.
\textsuperscript{122} Rigler, supra note 114 at 468; see Nancy R. Daspit, The Family and Medical Leave Act of 1993: A Great Idea But a "Rube Goldberg" Solution?, 43 Emory L.J. 1351, 1396 (1994) ("Without more information, employers may be afraid to exercise this option even if they are justified in denying reinstatement to a key employee."); FMLA Regulations- Part III, 2 Wis. Empl. Ltr. 1 (1993) (LEXIS, News, Arcnwls Library, Wisconsin Employment Law Letter & Sept 1993) (arguing that "the risk involved in denying restoration to a key employee will most likely outweigh any potential benefit to the company").
\textsuperscript{123} See Rigler, supra note 114, at 468 n.60.
cising their FMLA rights,\textsuperscript{124} as "[t]hose employees may see the supervisor's reluctance to take FMLA leave as a subtle message that they should behave similarly."\textsuperscript{125}

\section*{C. The Affect on Women and Older Employees}

Although the FMLA offers both men and women the right to take unpaid leave, one of its aims is to close the gender gap that continues to exist in the workplace.\textsuperscript{126} Critics of the "key employee" provision, however, argue that it promotes gender inequalities, having a dual effect on the careers of working women.\textsuperscript{127}

First of all, women who are in this pay range will be forced to choose between family and job security, which will further stunt female advancement up the corporate ladder. Second, career wives whose husbands are in the top ten percent of their company's pay scale will be the spouses to take leave because of the unwillingness to jeopardize the job security of their highly compensated husbands.\textsuperscript{128}

The "key employee" exemption forces women to decide between work and family, a problem that the FMLA was enacted to solve.\textsuperscript{129} Historically, women have struggled to achieve the highest pay scales and currently there are many less women than men in the highest paid positions within most companies.\textsuperscript{130} By forcing this limited group of women to choose between work and family, the exemption inevitably will "perpetuate gender inequality in the workplace."\textsuperscript{131}

Women in the top ten percent pay scale will be affected more than men in the same pay range because the burden of tending to

\begin{itemize}
\item \textsuperscript{124} See Rigler, \textit{supra} note 114, at 468 n.60.
\item \textsuperscript{125} Rigler, \textit{supra} note 114, at 468.
\item \textsuperscript{128} Id.
\item \textsuperscript{130} See Deborah L. Rhode, \textit{Occupational Inequality}, 88 DUKE L.J. 1207, 1210 (1988) ("For example, in the late 1980s, females were still only half as likely as males to be partners in law firms, held only eight percent of state and federal judgeships, and occupied only two percent of corporate executive positions in Fortune 500 companies.").
\item \textsuperscript{131} Olsen, \textit{supra} note 127, at 1016.
\end{itemize}
the family falls primarily on women. Specifically, "[b]ecause women exclusively bear the burden of childbearing and predominantly play the main role in childbearing, this exception disproportionately forces women approaching top management positions to choose between their careers and family responsibilities." While highly paid women have achieved economic success, they no longer have the job guarantee they would have had if they had taken leave as a lower paid employee. Consequently, the female employee must now make a decision between her family and her job. In effect, this creates a disincentive for females in the workplace to have children.

As a result of the exemption, a woman's higher salary may be completely offset by the lack of job security. She may not know whether or not she presently is, or will be in the top ten percent of paid employees in the future. "Therefore, a woman who wants to start a family may hesitate to pursue the 'fast track' up the corporate ladder if she will lose her ability to take FMLA leave." This insecurity may ultimately have the effect of slowing down female advancement in general. Indeed, "the problem of reconciling work with parenting is a woman's greatest problem with respect to eliminating discrimination." Instead of protecting the interests of those most affected by FMLA leave, women are the victims of the exemption because "[t]hey work hard to break the 'glass ceiling' and when they do they are penalized for it."
The second effect of the exemption is to discourage men from taking a more active role in family caretaking.\textsuperscript{140} Husbands of working women who fall within the top ten percent of paid employees will choose not to take advantage of their FMLA entitlements because of the "unwillingness to jeopardize the job security and economic security of their family."\textsuperscript{141} Consequently, the wife will take leave because her restoration is guaranteed while her husband's is not, assuming she is also not a "key employee."\textsuperscript{142} Not only does a woman sacrifice job security, but forcing her to take leave may result in a lost opportunity for career advancement.\textsuperscript{143} "As a result, women remain clustered in inferior positions [and] . . . become frustrated and opt for different employment, confirm[ing] the adverse stereotypes that had worked against their advancement in the first instance."\textsuperscript{144} Thus, because the exemption forces women to take leave if their husbands are paid among the highest ten percent, it does not result in increasing male participation in childbearing, one of the goals of the Act.\textsuperscript{145} By forcing women rather than men to take leave, Congress is indirectly telling women that male occupation is more important than female occupation and if a conflict arises, the woman should be more concerned with raising the family and leave her job.\textsuperscript{146}

In addition to negatively impacting women, the "key employee" provision may also discriminate against older employees. As is the case in most companies, the highest paid employees are older, more experienced, and have served their respective companies for many

\textsuperscript{140} See Olsen, \textit{supra} note 127, at 1017. S. \textsc{Rep.} No. 3, 103d Cong. at 29 (1993).

\textsuperscript{141} See Olsen, \textit{supra} note 127, at 1017. \textit{See also} J.D. Moore Jr., \textit{Law Heralds Changes \ldots For Some Benefits to Affect Half of Workers}, \textsc{Kan. Cty Star}, July 21, 1993, at B1 (claiming that many of those in the highest 10\% of paid employees will not request leave "because they tend to be highly motivated executives who probably couldn't stand to be out of the office for three months").

\textsuperscript{142} See Olsen, \textit{supra} note 127, at 1017; \textit{see also} Rhode, \textit{supra} note 130 at 1210 (revealing, based on studies, that "at the highest levels of professional status and financial achievement, significant disparities [between men and women] have remained").


\textsuperscript{144} Olsen, \textit{supra} note 127, at 1018.

\textsuperscript{145} \textit{See supra} notes 139-141 and accompanying text.

\textsuperscript{146} \textit{See generally} Wright-Carozza, \textit{supra} note 143, at 555 (suggesting that Congress, through the FMLA, assumes that women place a higher priority on pregnancy and maternity rather than their occupation).
Moreover, many employers believe that older employees are more likely to need medical treatment than their younger counterparts. Based on these two factors, the exemption will most likely fall disproportionately upon older employees. If high-salaried, older employees or their spouses become ill, employers might be able to use the leave as a pretext to deny reinstatement. As a result, the exemption may be an invitation to a claim of age discrimination under the Age Discrimination in Employment Act ("ADEA"). For example, a disgruntled "key employee" who is denied restoration and is forty years or older might contest the employer's rights under the FMLA, as well as file a claim for age discrimination under the ADEA. A court may find that the "key employee's" restoration would in fact cause "substantial and grievous economic injury" and therefore find the employer's denial of restoration justified. Based on this ruling, the question that then arises is whether this would bar the employee from then claiming that the employer's justification was merely a pretext for discrimination under the ADEA. The employer will inevitably argue that the finding of sufficient economic injury is justified as a "reasonable factor other than age" to refute the claim of age discrimination.

147. See Charles B. Craver, The Application of the Age Discrimination in Employment Act to Persons Over Seventy, 58 GEO. WASH. L. REV. 52, 69 ("[C]ompensation levels tend to be directly related to years of employment ... "). In addition, it is more likely that employees 40 or older are more highly paid than other employees. See id. at 92.

148. See DIANE ARTHUR, RECRUITING, INTERVIEWING, SELECTING & ORIENTING NEW EMPLOYEES 8 (2d ed. 1991). Consistent with this theory, they also believe that "[p]ension, health insurance, and life insurance costs increase as the worker ages." Craver, supra note 147, at 55. Despite these stereotypical notions, many have argued that they are inaccurate. See ARTHUR, at 8. "Older workers ... have fewer avoidable absences than do younger workers and good attendance records overall ... Older workers exhibit less stress on the job, have a lower rate of illegal drug use, and have a lower rate of admission to psychiatric facilities." Id.


151. Conversely, if a court found that the key employee's restoration would not cause "substantial and grievous economic injury," the employer's decision to terminate would be deemed wrongful and the court would not address the issue of alleged age discrimination. 152. See 29 U.S.C. § 623(f)(1) (1995). Since the Act expressly endorses the use of reasonable non-age factors, reliance on a neutral cost criterion would be deemed legitimate absent evidence of a pretext to target older workers. In terms of policy, the employer might
However, the courts are split as to the approach to take in determining liability.153

Upon closer examination, there are two other observations that can be made. First, it appears that "key employees" in their "thirties" are even more disproportionately affected by the exemption than their "forty-plus" counterparts. For example, a thirty eight year old’s salary may be almost equivalent to a forty-one year old’s salary. Unlike the older employee, the thirty eight year old employee is not protected under the ADEA. Therefore, the employee in his or her “thirties” would not have the same recourse as an employee in his or her “forties.” This also supports the notion that women will also be disproportionately affected by the exemption because most women who seek FMLA protection based on maternity leave will be younger than forty and therefore not protected under the ADEA.154

V. A More Flexible Standard

As shown above, the “key employee” exemption creates many difficulties for not only the employer, but the employee as well. If its purpose is to protect the economic viability of the employer while at the same time coexisting with family concerns, Congress
should consider changing parts of the exemption that contradict this goal and clarify ambiguities before controversies arise.\textsuperscript{155}

One consideration would be to eliminate the "key employee" exception completely.\textsuperscript{156} The effect would be to restore any employee on leave "to the 'same' or 'equivalent' position, regardless of [one's] rate of compensation."\textsuperscript{157} While employers may argue that it will take away some of their leverage when employees make decisions regarding family leave,\textsuperscript{158} the current exception is written in such a way that it only applies in very limited circumstances. Evidence that the exception is not a necessary part of the FMLA is its absence in Title II which deals with federal civil service employees.\textsuperscript{159} Neither the legislative history nor the statute itself has explained why it should only apply to the private and state and local government sectors.\textsuperscript{160} Further evidence of its unimportance is that there has not been one case involving the "key employee" exception since the Act's inception over five years ago.

Another possible solution would be to eliminate the top paid ten percent distinction of the exemption and simply allow the employer to exempt an "indispensable" employee, regardless of their salary, whose absence would either cause serious harm to the employer's operation or substantial risk to the health and safety of other employees or the public.\textsuperscript{161} This would provide the employer with


\textsuperscript{156} See id. One congressman, Rep. Johnston, has even downplayed the importance of the exception by describing the clause as "originally put in to pacify opponents of the bill and . . . left in inadvertently, even though the bill had widespread support." See Kathy Hensley Trumbull, Congressmen’s Bill Proves to Couple that System Works, SUN-SENTINEL, Mar. 24, 1993, at 2B.


\textsuperscript{160} See id.

\textsuperscript{161} See Janet Quist, \textit{Clinton Signs Family and Medical Leave Act,} NATION’S CITIES WEEKLY, Feb. 8, 1993, at 1, 2 (1993). Some states have actually enacted legislation to eliminate the top ten percent provision. For example, the Texas Commerce Bank has decided that all of its employees, even the most highly paid, will be covered by the Act. See L.M. Sixel, \textit{Family Leave Goes Into Effect Today: 60% of Workers Won’t Be Covered,} HOUSTON CHRONICLE, Aug. 5, 1993, available in 1993 WL 9566655. This possibility had previously
more flexibility, especially in the case of new or mid-size businesses that may lack financial stability where the loss of an important employee may greatly impact a company's existence. Unlike the current exemption, this broader discretion given to employers in denying reinstatement considers the safety and health of fellow employees and the public.162

By eliminating the top ten percent provision, women will no longer be concerned with the potential loss of job security by taking family leave and it will be “equally economically prudent” for a husband or wife to take leave.163 In addition, the focus of the exemption will no longer be on older employees. In this way, the FMLA’s goals of balancing job security and family values will be met.

Rather than rewriting the exemption, Congress may consider issuing guidelines more narrowly defining “substantial and grievous” economic injury.164 While it must be evaluated individually, minimum standards can be established based on industry or company size.165 Applying specific numerical standards would help ensure compliance under the statute as well as reduce employer dis-

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162. See 139 CONG. REC. H396, 437 (daily ed. Feb. 3, 1993) (statement of Rep. Goodling). In response to Rep. Goodling’s proposal, Rep. Ford argued against eliminating the top ten percent distinction because “the employer could [then] always challenge the right to take leave, [and] this amendment would significantly undermine, if not eliminate, the peace of mind that the legislation was intended to give the employees in the first place” which was “the security that comes from the knowledge that leave will be available if a family emergency arises.” Id.

163. See Olsen, supra note 157, at 1018.


165. For example, for companies employing 50 to 100 workers, Congress might require that the employee in question earn at least a six figure salary to be considered “key” and the harm incurred must affect company earnings by at least two percent.
cretion in determining who would qualify and the level of harm necessary to deny reinstatement.

VI. CONCLUSION

The current “key employee” exemption to the Family and Medical Leave Act incorporates vague and ambiguous terminology. Specifically, the requirement that the employer show “substantial and grievous economic injury” is ambiguous and provides little guidance to employers in making a sufficient determination of harm. In applying the exemption to the highest paid ten percent of workers, it will generally tend to fall disproportionately on older employees. In particular, it discriminates against female employees by forcing women to choose between their own job security and the security of their families. Based on these factors, it is clear that the exemption is inconsistent with the goals of the Family and Medical Leave Act. Therefore, the “key employee” exemption should be eliminated or revised to better suit the goals of the FMLA as well as the concerns of family households and employers alike.

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