

April 2001

## Bridging the Gap between Work and Family: Accomplishing the Goals of the Family and Medical Leave Act of 1993

Emily A. Hayes

Follow this and additional works at: <https://scholarship.law.wm.edu/wmlr>



Part of the [Labor and Employment Law Commons](#)

---

### Repository Citation

Emily A. Hayes, *Bridging the Gap between Work and Family: Accomplishing the Goals of the Family and Medical Leave Act of 1993*, 42 Wm. & Mary L. Rev. 1507 (2001),  
<https://scholarship.law.wm.edu/wmlr/vol42/iss4/8>

## **NOTES**

### **BRIDGING THE GAP BETWEEN WORK AND FAMILY: ACCOMPLISHING THE GOALS OF THE FAMILY AND MEDICAL LEAVE ACT OF 1993**

Upon signing the Family and Medical Leave Act (FMLA) on February 8, 1993, President Clinton declared that "American workers will no longer have to choose between the job they need and the family they love."<sup>1</sup> Clinton's remarks reflected the legislative intent of the Act: that the FMLA would help American families and society deal with the issues that had arisen as more women, especially mothers, entered the work force. It would, in the words of the Act itself, allow employees "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."<sup>2</sup> Mothers and fathers would no longer have to be concerned about losing their jobs or their work status to take time off for the birth of a child; parents would no longer have to worry about who would care for a sick child, as they would be available to do it themselves.

The Act, however, has not proven to be quite the panacea that it was intended to be. As we enter the twenty-first century and the seventh year of the Act, it is evident that the FMLA is not achieving the goals expressed at the time of its passage. As case law, commentary, and experience demonstrate, change is needed in order to fulfill those goals. This could be accomplished through two primary means. First, the court system can effectuate congressional

---

1. Remarks on Signing the Family and Medical Leave Act of 1993, 1 PUB. PAPERS 49 (Feb. 5, 1993).

2. Family and Medical Leave Act, 29 U.S.C. § 2601(b)(1) (1994).

intent by construing the Act's provisions broadly. Second, in three main areas where aid through judicial interpretation is not possible, legislative action is needed: the provision of paid leave, an increased length of leave, and expanded coverage to include more employees and employers. Although legislation in each or any of these areas would be valuable, each solves a separate flaw of the Act, and so enactment of all three would, in concert, be invaluable. The provisions of early versions of the Act serve as a valuable guide in accomplishing these changes.

This Note concentrates primarily on the issues surrounding leave at the time of the birth or adoption of a child. These particular provisions have much in common with the other reasons for leave, including time off to care for a sick child or parent, especially in their requirements and guarantees. However, as this Note demonstrates, the time surrounding childbirth is crucial to both parents and child, and so it is imperative that all new parents profit from the guarantees of the FMLA during that period. This Note suggests ways to accomplish the goal of Congress at the time of enactment of the FMLA, to minimize work-family conflict for American parents.

Part I outlines the provisions of the FMLA. Part II describes the expectations surrounding the maternity and paternity leave aspects of the Act, both at the time of its enactment and at its original introduction in the mid-1980s, when it was developed primarily in response to the needs of new mothers. Through the use of legislative history, this section demonstrates that the FMLA was designed to make it easier for parents to spend time with their new children without fearing the loss of their jobs. Part III evaluates the extent to which those expectations have been met, based on reports of experience as well as scholarly commentary. Part IV proposes ways to bridge the gap between the original goals of the FMLA and its actual efficacy in the past seven years. It first examines the potential for and experience of judicial interpretation in promoting the goals of the FMLA, and then suggests legislative changes: paid leave, a longer period of leave, and extended coverage. Finally, Part V explains why there is a greater possibility that these expanded provisions will be passed now, when Congress was unable to do so originally. Although the FMLA has gone a long way toward meeting

its original goals, further change is needed in order to fully accomplish them.

## THE FMLA

### *Basic Provisions*

The Family and Medical Leave Act of 1993 provides "up to [twelve] weeks of unpaid leave per year under particular circumstances that are critical to the life of a family."<sup>3</sup> These circumstances are:

- (A) Because of the birth of a son or daughter of the employee and in order to care for such son or daughter.
- (B) Because of the placement of a son or daughter with the employee for adoption or foster care.
- (C) In order to care for the spouse, or a son, daughter, or parent, of the employee, if such spouse, son, daughter, or parent has a serious health condition.
- (D) Because of a serious health condition that makes the employee unable to perform the functions of the position of such employee.<sup>4</sup>

The guarantee does not apply to every employer or to every employee. Private sector employers are included if they have fifty or more employees, and all public agencies are included.<sup>5</sup> This is a broader threshold than that provided for Title VII.<sup>6</sup> For employees to be eligible, they must have worked at least 1250 hours for that employer in the last twelve month period,<sup>7</sup> which is an average of twenty-five hours a week. In addition, the employer must employ at least fifty people at worksites within seventy-five miles of the employee's worksite.<sup>8</sup> As a result, it is possible for an employee of

---

3. MICHAEL J. CANAN & WILLIAM D. MITCHELL, *EMPLOYEE FRINGE AND WELFARE BENEFIT PLANS* § 3.5, at 128 (1999).

4. 29 U.S.C. § 2612(a)(1)(A)-(D) (1994).

5. See *id.* § 2611(4)(A); CANAN & MITCHELL, *supra* note 3, § 3.5, at 129.

6. See CANAN & MITCHELL, *supra* note 3, § 3.5, at 130. Title VII prohibits discrimination in employment based on pregnancy. See 42 U.S.C. § 2000e(k)(1994).

7. See 29 U.S.C. § 2611(2)(A).

8. See *id.* § 2611(2)(B)(ii).

a eligible employer not to be covered by the Act. Eligibility is determined as of the time that the employee asks for leave.<sup>9</sup>

If both the employer and the employee are covered by the Act, the employer must provide twelve weeks of unpaid leave per year for any of the four reasons listed above.<sup>10</sup> Twelve weeks is the maximum amount of leave that employers can be required to provide; if the employer provides another leave program with better terms, such as paid leave, they cannot then be required to provide an additional twelve weeks of unpaid leave by the FMLA.<sup>11</sup> In order to trigger the benefits, the employee must give notice to the employer at least thirty days before the leave is to begin, or as soon as is practicable.<sup>12</sup> This is especially true with maternity or paternity leave, the nature of which usually allows employees to provide their employers with a general sense of when the leave will begin.

There are certain benefits that must be provided by the employer during the course of the leave, including continuing to provide the same medical benefits to the employee as he or she had at the time that the leave began.<sup>13</sup> In addition, the employer must provide opportunities for changes to benefit plans to the employee on leave in the same way that it does to other employees; however, the employer is not required to provide medical benefits in excess of what the employee was previously provided simply because he or she is on leave.<sup>14</sup> If the employee chooses not to return to work after the expiration of the leave, for reasons other than the recurrence of the serious health condition that was the original reason for the leave, the employer may recover the premiums paid on behalf of that employee during the period of the leave.<sup>15</sup>

Finally, at the end of the leave, the employee must either be restored to the position that he or she left or to an equivalent position, with "equivalent employment benefits, pay, and other terms and conditions of employment."<sup>16</sup> In addition to equivalent

---

9. See CANAN & MITCHELL, *supra* note 3, § 3.5, at 131.

10. See 29 U.S.C. § 2612(c); *supra* text accompanying note 4.

11. See CANAN & MITCHELL, *supra* note 3, § 3.5, at 138.

12. See 29 U.S.C. § 2612(e).

13. See *id.* § 2614(c)(1).

14. See 29 C.F.R. § 825.209(c)-(d) (1998).

15. See 29 U.S.C. § 2614(c)(2).

16. *Id.* § 2614(a)(1)(A)-(B).

pay and benefits, the new position must have the same duties and responsibilities as the previous one, as well as equivalent skills and authority.<sup>17</sup> It is a more stringent standard than mere general similarity to the previous position.<sup>18</sup>

### *Limitations*

In addition to the basic requirements, there is a "key employee" exception: the highest paid ten percent of employees are not necessarily guaranteed reinstatement of employment.<sup>19</sup> This exception excludes "a salaried eligible employee who is among the highest paid ten percent of the employees employed by the employer within seventy-five miles of the facility at which the employee is employed."<sup>20</sup> The employer may elect not to restore such employees to their previous position if doing so would cause "substantial and grievous economic injury to the operations of the employer" and the employer gives notice to the employee.<sup>21</sup>

Except in the case of personal medical leave, if a husband and wife are employed by the same employer, the required twelve weeks of leave is split between them.<sup>22</sup> This provision was intended to prevent discrimination against hiring married couples out of the fear that they will take too much leave.<sup>23</sup>

### *Enforcement*

There are two mutually exclusive ways in which employees may seek redress if their FMLA rights are violated by their employer. First, the employee can complain to the Wage and Hour Division of the Department of Labor, which can bring a cause of action against the employer.<sup>24</sup> The other alternative is for the employee to pursue a private cause of action against the employer charging a violation of section 2615, which prohibits employers from interfering with,

---

17. See 29 C.F.R. § 825.215.

18. See CANAN & MITCHELL, *supra* note 3, § 3.5, at 139.

19. See 29 U.S.C. § 2614(b).

20. *Id.* § 2614(b)(2).

21. *Id.* § 2614(b)(1).

22. See *id.* § 2612(f); CANAN & MITCHELL, *supra* note 3, § 3.5, at 139.

23. See S. REP. NO. 103-3, at 28 (1993), *reprinted in* 1993 U.S.C.C.A.N. 3, 30.

24. See 29 U.S.C. § 2617(b).

denying, or restraining employees from exercising their rights under the Act, or from discriminating against an employee for exercising those rights.<sup>25</sup> In either case, the employee may recover actual damages, liquidated damages, or equitable relief, as deemed appropriate by the court.<sup>26</sup>

### *Interaction with Other Statutes*

The FMLA works in concert with other statutes related to family and medical leave. At the time of its passage, at least thirty states had their own family leave statutes.<sup>27</sup> Most had guarantees substantially similar to those of the FMLA, including California's guarantee of sixteen weeks of leave over two years for the birth or adoption of a child or for the serious health condition of a spouse, child, or parent to employees of employers with more than fifty employees, and Vermont's guarantee of twelve weeks of family and medical leave per year, with employers of more than ten people obligated to provide such leave for pregnancy, and employers of more than fifteen employees obligated to provide the leave for family medical problems.<sup>28</sup> These statutes work in concert with the FMLA, depending on their individual provisions; the greater protection prevails.<sup>29</sup>

There are also a number of other federal statutes that deal with issues similar to the FMLA, and which often overlap with each other. The FMLA does not modify or affect any existing state or federal antidiscrimination law, including Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act (ADA), and

---

25. See *id.* § 2617(a); *id.* § 2615(a)(1)-(2).

26. See *id.* § 2617(a)(1)(A)-(B); *id.* § 2617(b)(2)-(3).

27. See S. REP. NO. 103-3, at 20 (1993), reprinted in 1993 U.S.C.C.A.N. 3, 22.

28. See *id.* Other states with family leave acts, as of 1993, included Alaska, Connecticut, Delaware, Florida, Georgia, Hawaii, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maine, Massachusetts, Minnesota, Montana, New Hampshire, New Jersey, North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, Washington, West Virginia and Wisconsin, as well as the District of Columbia and Puerto Rico. See *id.* Many of these acts were modeled after the version of the FMLA then pending in Congress at the time of their respective adoptions. See Donna Lenhoff & Claudia Withers, *Implementation of the Family and Medical Leave Act: Toward the Family-Friendly Workplace*, 3 AM. U. J. GENDER & L. 39, 42 (1994).

29. See 29 U.S.C. § 2651(b).

worker's compensation schemes.<sup>30</sup> Title VII prohibits discrimination in employment on the basis of race, color, religion, sex, and national origin.<sup>31</sup> The term "on the basis of sex" prohibits discrimination based on pregnancy.<sup>32</sup> Employers are not required, however, to provide leave for pregnancy unless they provide leave for other types of disabilities.<sup>33</sup> While the FMLA does address some of the same concerns as Title VII, Title VII is broader, as it applies to any employer with more than fifteen employees.<sup>34</sup> Moreover, there is not a requirement that the employee have been employed by the employer for a year before the guarantees apply.<sup>35</sup> Therefore, some employees not covered by the FMLA may be able to get relief under Title VII.<sup>36</sup>

The Americans with Disabilities Act (ADA) protects qualified individuals from discrimination on the basis of their disability by requiring reasonable accommodations in order to allow those qualified individuals to work in the general labor force.<sup>37</sup> The Act covers all employers who have employed fifteen or more employees for twenty workweeks within the last calendar year, and covers not only current employees but also applicants for jobs who meet the definition of a "qualified individual" under the Act.<sup>38</sup> The Supreme Court has determined that reproduction is a "major life activity" for purposes of the ADA.<sup>39</sup> As a result, although pregnancy is not protected as a disability under the ADA, complications from

30. See *id.* § 2651(a); CANAN & MITCHELL, *supra* note 3, at 149.

31. See 42 U.S.C. § 2000e-2(a) (1994).

32. See *id.* § 2000e(k).

33. See *id.*

34. See *id.* § 2000e(b).

35. See *id.* § 2000e(b), (f); Kathryn Frueh Patterson, *Discrimination in the Workplace: Are Men and Women Not Entitled to the Same Parental Leave Benefits Under Title VII?*, 47 SMU L. REV. 425, 447 (1994).

36. See Patterson, *supra* note 35, at 447.

37. See 42 U.S.C. §§ 12101-12117 (1994). Disability is defined as: "(A) a physical or mental impairment that substantially limits one or more of such major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." *Id.* § 12102(2).

38. See 42 U.S.C. §§ 12101-12117; Walter E. Zink, II & Jill Gradwohl Schroeder, *Evaluating the Interplay Among FMLA, ADA, and Workers' Comp Statutes Isn't Child's Play*, 66 DEF. COUNS. J. 79, 80-81 (1999).

39. *Bragdon v. Abbott*, 524 U.S. 624, 639 (1998).



pregnancy now likely will be.<sup>40</sup> This overlaps with the FMLA coverage of pregnancy-related medical problems. Because of the broader coverage of the ADA, with its minimal numerical requirements, the ADA protects the jobs of women who miss work as a result of pregnancy-related complications.<sup>41</sup>

While each of these provisions of the FMLA apply to leave taken for any of the provided reasons, Congress designed the Act with the special needs of new parents in mind. As the next section demonstrates, those considerations are reflected in the Act's legislative history.

### ORIGINAL EXPECTATIONS FOR THE FMLA

#### *Legislative History*

The legislative history of the FMLA reflects the congressional belief that reform was needed to meet the changing needs of American families because of the changing demographics of the workforce and society. The findings of the Act itself state:

- (1) the number of single-parent households and two-parent households in which the single parent or both parents work is increasing significantly;
- (2) it is important for the development of children and the family unit that fathers and mothers be able to participate in early childrearing . . .;
- (3) the lack of employment policies to accommodate working parents can force individuals to choose between job security and parenting.<sup>42</sup>

The demographic shift was described in strong language in the Senate Report:

The effect of these demographic changes has been far reaching. With men and women alike as wage earners, the crucial unpaid

---

40. See Melissa S. Wandersee, Comment, *The Far-Reaching Effects of Reproduction as a "Major Life Activity" Under the ADA: What Will This Expansion Mean to Employers and Their Insured?*, 3 J. SMALL & EMERGING BUS. L. 429, 439 (1999).

41. See *id.* at 430-31, 440.

42. 29 U.S.C. § 2601(a) (1994).

caretaking services traditionally performed by wives—care of young children, ill family members, aging parents—has become increasingly difficult for families to fulfill. When there is no one to provide such care, individuals can be permanently scarred as basic needs go unfulfilled. Families unable to perform their essential function are seriously undermined and weakened. Finally, when families fail, the community is left to grapple with the tragic consequences of emotionally and physically deprived children and adults.<sup>43</sup>

In 1990, seventy-four percent of women between the ages of twenty-five and forty-four were in the workforce, and, at that time, it was estimated that by 2005, half of the individuals entering the workforce would be women.<sup>44</sup> As a result of this shift, family roles changed: wives and mothers had new responsibilities in the workplace and were less likely to be available in the case of an emergency at home. The increased participation of women in the workforce caused special problems in the area of maternity leave: women had jobs to consider in addition to their time with their new child. At the same time, there was an increased acknowledgment of the role of fathers in the lives of their children, and a new inclination to allow men equal leave privileges for the arrival of a new child.<sup>45</sup>

"The FMLA responds to these changes by giving employees job security and health-insurance in situations when they must put their family needs before their job responsibilities. This is the underlying purpose of the law, and should inform all attempts to implement and interpret the FMLA."<sup>46</sup> Congressional proponents of the FMLA viewed the legislation as the way to address these weighty issues, touting the Act as "accomodat[ing] the important societal interest in assisting families."<sup>47</sup> The FMLA was Congress's way of balancing the employees' need for greater flexibility with the

---

43. S. REP. NO. 103-3, at 7 (1993), *reprinted in* 1993 U.S.C.C.A.N. 3, 9.

44. See Cristina Duarte, *The Family and Medical Leave Act of 1993: Paying the Price for an Imperfect Solution*, 32 U. LOUISVILLE J. FAM. L. 833, 834-35 (1994).

45. See Lenhoff & Withers, *supra* note 28, at 49.

46. *Id.* at 49 (footnote omitted).

47. S. REP. NO. 103-3, at 4, *reprinted in* 1993 U.S.C.C.A.N. at 6. Congress's approach to family leave was similar to the way that other labor abuses had been eradicated largely through federal legislation, including law covering child labor, minimum wage, Social Security, safety and health laws, pension and welfare benefits. See *id.*

concerns of employers.<sup>48</sup> "Family leave was the furthest thing from an overnight success."<sup>49</sup> Congress's recognition that a family leave law was necessary to combat the changing needs of family and American society did not evolve in a vacuum, nor did it evolve quickly. The 1993 Act was the product of the evolution of legislation first introduced to the Ninety-Ninth Congress in 1985 and which was reintroduced in each Congress subsequent.<sup>50</sup> Twice, 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.<sup>51</sup>

Before the FMLA, there was no comprehensive national system of family leave, although family leave had been an issue from the turn of the century as an increasing number of women began to work outside the home.<sup>52</sup> During the first half of the century, the issue gained and lost importance with the times; while many women were employed outside of the home during World War II, with the end of the war and the return of their husbands from abroad the issue took on less importance.<sup>53</sup> In contrast, the issue took on great importance in Europe following the War, as most European countries adopted national leave policies as a part of their social welfare systems.<sup>54</sup> In the United States, the idea of family leave regained strength with the feminist movement in the 1960s.<sup>55</sup>

---

48. See 29 U.S.C. § 2601(b)(1) (1994); 139 CONG. REC. S1255-56 (daily ed. Feb. 4, 1993) (statement of Sen. Dole). These concerns included the fear that the legislation would be too expensive, especially for small businesses. See *id.*; see also Kelly N. Honohan, Note, *Remedying the Liability Limitation Under the Family and Medical Leave Act*, 79 B.U. L. REV. 1043, 1045-47 (1999) (arguing that Congress struck the wrong balance in favor of the employers in making it too difficult for employees to recover damages, and thus created an ineffective deterrence mechanism).

49. RONALD D. ELVING, *CONFLICT AND COMPROMISE: HOW CONGRESS MAKES THE LAW* 11 (1995) (detailing the political progress of the FMLA from its original proposal in the mid-1980s to its enactment in 1993).

50. See *infra* notes 63-72 and accompanying text.

51. See *infra* notes 69-72 and accompanying text.

52. See ELVING, *supra* note 49, at 12.

53. See *id.*

54. See *id.* Interestingly, the first leave policies in Europe were passed before the First World War, by Germany in 1883 and Sweden in 1891. See Christopher J. Ruhm & Jacqueline L. Teague, *Parental Leave Policies in Europe and North America*, in GENDER AND FAMILY ISSUES IN THE WORKPLACE 133, 134 (Francine D. Blau & Ronald G. Ehrenberg eds., 1997). France passed a family leave law in 1928. See *id.*

55. See ELVING, *supra* note 49, at 12.

Discrimination on the basis of sex was made illegal as part of Title VII of the Civil Rights Act of 1964.<sup>56</sup> In 1978, that section was amended by the Pregnancy Discrimination Act (PDA),<sup>57</sup> which specifically extended Title VII to pregnant women.<sup>58</sup> However, while the PDA went a long way toward protecting the jobs of women during maternity leave, it was found to have some significant shortcomings, including requiring employers to provide pregnancy leave only if they offered other disability programs, and exempting all businesses with fewer than fifteen employees.<sup>59</sup> The PDA was a step toward a universal maternity leave policy, but did not yet cover everyone.

The campaign for the FMLA began to develop in 1984, after a U.S. District Court in California struck down a state statute that required companies to allow four months of leave for temporary disability related to pregnancy or childbirth, on the grounds that it violated federal antidiscrimination statutes because men could not take advantage of maternity leave.<sup>60</sup> In response, California Congressman Howard Berman raised the issue of a federal statute protecting women who, after returning from maternity leave, wished to return to the same job that they had left.<sup>61</sup> Berman gained several supporters of the issue in Congress, including Patricia Schroeder, who first introduced the bill in 1985. As the bill

---

56. See 42 U.S.C. § 2000e-2 (1994); Patterson, *supra* note 35, at 426.

57. 42 U.S.C. § 2000e(k); see H.R. REP. NO. 99-699, at 3 (1986).

58. See H.R. REP. NO. 95-948, at 4 (1978), reprinted in 1978 U.S.C.C.A.N. 4749, 4752. The PDA defines "sex" to include:

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 receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work.

42 U.S.C. § 2000e(k).

59. See H.R. REP. NO. 99-699, at 3; ELVING, *supra* note 49, at 22.

60. See ELVING, *supra* note 49, at 18-19. The case involved an employee of the California Federal Savings and Loan Association who had returned from a two-month maternity leave, only to find that her position had been given to someone else. See *id.* at 17.

61. See *id.* at 19-20. Berman met with representatives of women's organizations to form a plan of attack. The representatives included Donna Lenhoff, then-Associate Director for Legal Policy and Programs at the Women's Legal Defense Fund, and Wendy Williams and Susan Deller Ross, both professors of law at Georgetown University. See *id.* The three women were members of what Lenhoff termed "the PDA alumnae association," because they had all been involved in the effort to achieve passage of the Pregnancy Discrimination Act, in 1978. See *id.* at 20.

was reintroduced from 1985 until its ultimate success in 1993, it gained an increasing measure of support from members of Congress. Although many of the supporters were Democrats, there were a number of Republicans who supported the bill as well.<sup>62</sup>

Perhaps the most defining feature of the bill in its journey from inception to passage was its shifting terms, which reflected the attempts by its supporters to gain enough additional support for passage. A review of the changing terms reflects that, as time went on, the backers became increasingly willing to get whatever they could, so to speak, and then later build on that start to achieve their original goals. The Act was originally framed by the first group, led by Howard Berman and Donna Lenhoff, in 1984, who extensively debated how to best achieve protection of women's jobs during maternity leave.<sup>63</sup> Initially, Berman wanted to seek legislation that dealt only with pregnancy, which he felt would have a greater chance of success among pro-family groups and, ultimately, President Reagan. The coalition led by Lenhoff wanted a broader bill, one that would achieve Berman's goals of protection during maternity leave while also providing coverage for additional forms of family emergencies, as well as allowing for the possibility of leave for men.<sup>64</sup> In the end, the group agreed to support the broader Lenhoff approach.<sup>65</sup>

Introduced by Representative Schroeder, the Parental and Disability Leave Act of 1985 required all businesses to provide up to eighteen weeks of unpaid leave for mothers or fathers of newborn or adopted children.<sup>66</sup> The concept of paid leave had been abandoned early; although it was recognized that it would be difficult for people to take leave without income, Lenhoff's

---

62. See *Hearing on H.R. 1, The Family and Medical Leave Act Before the Subcomm. on Labor-Management Relations of the House Comm. on Educ. and Labor*, 103d Cong. 2-3 (1993) (statement of Marge Roukema, Republican Representative of New Jersey). In fact, at the House hearing on the bill in 1993, Republican Congresswoman Marge Roukema of New Jersey declared that the bill was an opportunity for bipartisanship, and that "the time has come when we should adopt this as a minimum labor standard for all the workers of America." *Id.*

63. See ELVING, *supra* note 49, at 23-32.

64. See *id.* at 23.

65. See *id.* at 32.

66. See H.R. 2020, 99th Cong. § 103 (1985); ELVING, *supra* note 49, at 42. The bill also included up to 26 weeks of unpaid leave for temporary disabilities that were not work related and to care for sick children. See H.R. 2020 § 102.

committee acknowledged that political reality prescribed a bill that involved additional expenditures by the government.<sup>67</sup>

The Parental and Medical Leave Act of 1986 introduced a small business exemption for businesses with fewer than fifteen employees, added a requirement that employees work at least 500 hours in the three months before their request for leave, and limited the amount of leave taken by an employee to thirty-six weeks over a two-year period.<sup>68</sup> The Senate bill introduced in 1989 reduced the number of weeks of leave for "family leave" to ten weeks, with fifteen for an employee's own illnesses, and increased the small business exemption.<sup>69</sup> This version of the bill was vetoed by President Bush in 1990.<sup>70</sup> The 1991 version set the small business exemption at fifty employees and established the minimum number of hours to be worked in the year before the leave at 1,250.<sup>71</sup> This version, too, succeeded in Congress and was vetoed by President Bush.<sup>72</sup> Finally, the Family and Medical Leave Act, which incorporated most of the provisions of the 1991 bill, was passed in 1993.<sup>73</sup>

Between the bill's first introduction and its final passage, its terms became increasingly restrictive, as the number of weeks of leave decreased and increasingly prohibitive small business exemptions and minimum hour requirements were added, decreasing the number of workers covered by the Act. The Act must return to those original terms in order to achieve the original goals. Although the terms changed dramatically during the journey from the Parental and Disability Leave Act of 1985 to the FMLA of 1993, the goals themselves, and the rhetoric supporting them, remained constant. The social needs were substantially similar; in 1989, Patricia Schroeder wrote that

67. See ELVING, *supra* note 49, at 42.

68. See S. 2278, 99th Cong. §§ 102-04 (1986); ELVING, *supra* note 49, at 66. The draft also extended the bill to cover leave taken to care for an ill family member. See ELVING, *supra* note 49, at 66.

69. See S. 345, 101st Cong. (1989).

70. See ELVING, *supra* note 49, at 195.

71. See S. 5, 102d Cong. §§ 101(2)(A)(II), (5)(A)(I) (1992); ELVING, *supra* note 49, at 210. This version introduced the "key employee" provision and the 30-day notice requirement. See ELVING, *supra* note 49, at 210.

72. See ELVING, *supra* note 49, at 250.

73. See *supra* note 1 and accompanying text.

[t]he changes in our country's demographics, family life, and economy make it imperative that our federal government provide leadership in family policy. A national family policy should have three basic goals: to acknowledge the rich diversity of American families; to protect the family's economic well-being; and to provide families with flexible ways to meet their economic and social needs.<sup>74</sup>

These needs were emphasized by scholars and politicians alike, as commentators emphasized the particular importance to new parents of a broad family leave policy.

### *Perspectives on Family Leave*

Feminist commentators were among the strongest proponents of family leave. The FMLA had the capacity to change societal perceptions of women: it could change the expectation that women would be the primary caregivers for children and take care of the home, while men would work outside of the home to support the family.<sup>75</sup> These perceptions were attributed in part to the environment of the workplace, because "[o]nce women enter the work force, both company policies and the workplace environment perpetuate the pattern on greater female than male involvement in parental leave and childcare."<sup>76</sup> As a result, the woman's career may be damaged to an extent disproportionate to her actual intent regarding staying home with her child.<sup>77</sup> Instead of establishing the difficult balance between career and family herself, the decision is predetermined for the woman. In response to these concerns, "[p]arental leave mark[ed] a turning point in women's career opportunities."<sup>78</sup>

---

74. Patricia Schroeder, *Is There a Role for the Federal Government in Work and the Family?*, 26 HARV. J. ON LEGIS. 299, 309 (1989).

75. See Angie K. Young, *Assessing the Family and Medical Leave Act in Terms of Gender Equality, Work/Family Balance, and the Needs of Children*, 5 MICH. J. GENDER & L. 113, 114-18 (1998).

76. *Id.* at 116.

77. See *id.* at 118.

78. *Id.* at 124.

Just as the perceptions and expectations of the workplace shaped the role of women in the home and on the job, perceptions shaped similar choices for men. Although many companies offered paternity leave before the FMLA, men were often reluctant to take advantage of the opportunity.<sup>79</sup> Martin Malin attributes this reluctance to three main reasons: unavailability, financing, and workplace hostility, each of which the FMLA had the potential to correct.<sup>80</sup> First, before the FMLA, even employers with paternity leave policies did not make them readily available, often hiding their existence.<sup>81</sup> Under the FMLA, this would no longer be a problem, so long as the employer and the employee are both eligible under the Act, because of FMLA posting requirements.<sup>82</sup> Second, while the problem of financing is not expressly solved by the FMLA, it does guarantee unpaid leave, either because of the birth of the child or to care for the mother if there are complications from childbirth.<sup>83</sup> With the FMLA, fathers have a greater chance of being able to use their own paid sick leave after the birth of their child than they had before.<sup>84</sup> Third, men seeking paternity leave often encountered hostility from their employers as well as from other employees.<sup>85</sup> The FMLA, however, prevents employers from prohibiting leave requests.<sup>86</sup>

Paternity leave is critical to establishing a bond between father and child early in life, a bond which challenges previous conceptions of the mother as the naturally better caretaker.<sup>87</sup> This limiting conception was harmful to both sexes, depriving men of the opportunity to participate equally in the lives of their children and serving as a source of discrimination against women.<sup>88</sup> The lack of paternity leave put fathers well behind mothers in bonding with

---

79. See Martin H. Malin, *Fathers and Parental Leave*, 72 TEX. L. REV. 1047, 1071-79 (1994).

80. See *id.* at 1071-89.

81. See *id.* at 1072.

82. See *id.* at 1081.

83. See *id.* at 1081-89.

84. See *id.* at 1082-89.

85. See *id.* at 1077-79.

86. See *id.* at 1089.

87. See Young, *supra* note 75, at 124; see also Malin, *supra* note 79, at 1054 (arguing that the idea of a natural maternal instinct is a product of mythology).

88. See Malin, *supra* note 79, at 1048. This discrimination was only reinforced by the status of parental leave mainly as maternity leave. See *id.* at 1048-49.



their children; postbirth leave needed to be available equally to both sexes.

The FMLA significantly achieved the goal of equal leave opportunities for fathers and mothers, as it does not distinguish between men and women.<sup>89</sup> Any shortcomings that it may have in the area of paternity leave are rooted in the same areas as its shortcomings for mothers. Because of the relative dearth of pre-FMLA paternity leave, however, it may be argued that the Act has done more for fathers in this area.

Since the Act has been in effect, its implications have become clearer, as has the extent to which the application of the Act actually reaches its goals. While it has provided tremendous benefits to working men and women, unfortunately it still falls short in several key areas.

#### ACHIEVEMENTS AND SHORTCOMINGS

The words of both the FMLA and its supporters heralded sweeping change, marking the Act as the turning point after which working parents would no longer have to worry about taking maternity or paternity leave. In the years since the Act was passed, it has achieved this goal in many respects. There are still many situations, however, in which the Act does not help, and those situations are largely the very ones that the Act was designed to remedy. "Instead of fulfilling the broad purposes outlined in the preamble and House Reports, the provisions of the Act provide leave in only very limited circumstances."<sup>90</sup> While the FMLA addresses many of the needs of working families, it falls short of accomplishing all of the goals set out in 1993 and earlier, and "[t]he leave provided is paltry in light of the psychological and developmental needs of family, and the social and political implications of ongoing work-family conflict."<sup>91</sup> Some of these shortcomings were predicted immediately at the time of passage, primarily in reaction to restrictions added during the bill's

---

89. *See id.* at 1061.

90. Sabra Craig, Note, *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, 64 (1995).

91. Nancy E. Dowd, *Family Values and Valuing Family: A Blueprint for Family Leave*, 30 *HARV. J. ON LEGIS.* 335, 336 (1993).

evolution, and some have become apparent through implementation.

Although the relative youth of the FMLA and its enforcement make it challenging to track long term difficulties in implementation, the criticisms and shortcomings of the Act are concentrated around several main provisions, including the unpaid leave and the twelve-week time period.<sup>92</sup> As mentioned before, the idea of paid leave was considered by the original framers of the Act in the mid-1980s, but was abandoned for political reasons.<sup>93</sup> Paid leave is, however, a key provision of European family leave acts often cited by supporters of the American bill.<sup>94</sup> Its absence from 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>95</sup>

This shortcoming was immediately recognized by commentators, who declared paid leave to be the next goal to be achieved. Ellen Bravo, the National Director of the 9 to 5 National Association of Working Women, declared that "[s]eventy-seven percent of women work in lower-paying non-professional jobs, which means they cannot afford to take unpaid leave even if it is desperately needed . . . . While passage of the act was an important first step . . . it will be a shadow benefit if people cannot afford to use it."<sup>96</sup>

While the obstacles posed by unpaid leave are problematic enough for new mothers, they are compounded by the problems

92. See Craig, *supra* note 90, at 73-75.

93. See *supra* note 67 and accompanying text.

94. See S.REP.NO. 103-3, at 19-20 (1993), reprinted in 1993 U.S.C.C.A.N. 3, 21-22; Craig, *supra* note 90, at 77-80. For example, Austria, Denmark, Finland, France, Italy, the Netherlands, Spain, and Sweden all mandate paid leave. See Cara A. McCaffrey & Austin Graff, Note, *European Union Directive on Parental Leave: Will the European Union Face the Same Problems as Those Faced by the United States Under the 1993 Family and Medical Leave Act?*, 17 HOFSTRA LAB. & EMP. L.J. 229, 244-51 (1999).

95. See Joseph P. Ritz, *New Family Leave Act Doesn't Help Everybody*, BUFF. NEWS, Aug. 7, 1993, at B9, available in 1993 WL 6105074. "The law divides people by class, helping those who can afford the three months without pay, and bypassing those who can't." *Id.* The FMLA "disproportionately excludes low-wage workers and women. Just 43% of workers earning less than \$20,000 per year (compared with 64% of workers earning \$50,000 and \$75,000 per year) and slightly more than half (56%) of American working women are eligible for FMLA protection." Wendy Chavkin, *What's a Mother to Do? Welfare, Work, and Family*, 89 AM. J. PUB. HEALTH 477, 477 (1999) (footnote omitted).

96. *Expand Family, Medical Leave Act Through Bargaining, Seminar Told*, Gov't Empl. Rel. Rep. (BNA), at 1557 (Nov. 29, 1993).

faced by new fathers who want to take time from work to spend time with their newborn child.<sup>97</sup> In the case of a new child, there is an overall increase in household expenses; very few parents can afford to take off more time without pay than is actually necessary.<sup>98</sup> In such cases, the guaranteed twelve weeks of leave is merely an empty promise.<sup>99</sup> Therefore, the FMLA reaches its original goals of family and job security only for those families who can afford to lose at least one income for a three-month period.<sup>100</sup> This group does not include many two income and single-parent households.<sup>101</sup> And while the Act does allow for the substitution of paid leave for unpaid leave, those employees in the lowest paid jobs are also the least likely to have generous benefits packages including amounts of accrued sick time and vacation leave sufficient to cover much of the twelve-week period.<sup>102</sup> The 1996 study of the Commission on Leave revealed that, among employees who needed but did not take leave, 63.9% did not take leave because they could

---

97. See Malin, *supra* note 79, at 1073.

The rarity of paid leave for fathers means that almost all working parents face one of two situations: initial paid leave available to the mother coupled with unpaid leave available to the father or unpaid leave available to both parents. In both cases, the absence of pay poses a major barrier to the father's ability to take leave.

*Id.*

98. See *id.* at 1073-74.

99. See Dowd, *supra* note 91, at 341.

[T]he lack of wage replacement profoundly affects the impact of family leave across divisions and intersections of gender, race, and class. The lack of wage replacement has the strongest effect along class lines. . . . But the lack of wage replacement strikes very broadly, given the predominance of dual-wage-earner families, and the essential contribution of both wage-earners to family income. For most dual-wage-earner families, family leave without wage replacement is a hollow right, at most an ultimate safeguard to prevent job loss, but hardly a support structure to ensure healthy family formation.

*Id.* (footnote omitted).

100. See Young, *supra* note 75, at 141.

101. See *id.*

102. See Karen Lee, *Work-life Proponents Cheer, Businesses Jeer FMLA Reg*, EMP. BENEFIT NEWS, Feb. 1, 2000, available in 2000 WL 10182481. At the same time, the "key employee" provision of the Act opens up the possibility of discrimination against the highly paid employees. See Young, *supra* note 75, at 143-44. While these employees, both men and women, tend to be financially better able to take unpaid leave, because there is a lesser guarantee that they will be reinstated to their former position after the leave, they are placed at a certain economic disadvantage. See *id.*

not afford it.<sup>103</sup> Most of those who could not afford it were hourly workers, African Americans, or employees with some college education.<sup>104</sup> The study also found that the employees most likely to receive some sort of wage replacement during the period of leave covered by the FMLA tended to be well-educated, salaried or unionized employees, and men were more likely than women to receive wage replacement.<sup>105</sup> These figures underscore the need for a provision for paid leave under the FMLA.

The twelve-week duration of the leave has also been widely criticized:

It seems doubtful that the goals of "balanc[ing] the demands of the workplace with the needs of families, . . . promot[ing] the stability and economic security of families, and promot[ing] national interests in preserving family integrity"—once present when mom stayed home and dad worked—will be accomplished by providing twelve weeks of unpaid leave in extraordinary situations.<sup>106</sup>

In the particular area of maternity leave, criticism centers mainly on the notion that twelve weeks is not enough time to allow adequate bonding between parents and child.<sup>107</sup> In fact, most European leave plans provide for more than six months of leave in the case of childbirth or adoption, a length of time recommended by many early-childhood experts.<sup>108</sup>

---

103. See DEPARTMENT OF LABOR, COMMISSION ON FAMILY AND MEDICAL LEAVE, *A Workable Balance: Report to Congress on Family and Medical Leave Policies, Executive Summary*, at <http://www.dol.gov/dol/esa/public/regs/compliance/whd/fmla/summary.htm> (last visited Oct. 18, 2000) [hereinafter *A Workable Balance*]. The Commission study was presented to Congress in May 1996. See *The Implementation of the Family and Medical Leave Act: Hearings Before the Subcomm. on Children and Families of the Senate Comm. on Labor and Human Resources*, 104th Cong. (1996) (statement of Christopher J. Dodd, U.S. Senator from Connecticut) [hereinafter Commission Report]. See generally Joseph Willis, Note, *The Family and Medical Leave Act of 1993: A Progress Report*, 36 BRANDEIS J. FAM. L. 95 (1997) (describing the Commission's report to Congress and its implications).

104. See *A Workable Balance*, *supra* note 103.

105. See *id.*

106. Craig, *supra* note 90, at 66 (footnote omitted) (citing the preamble to the Act).

107. See Dowd, *supra* note 91, at 348; Young, *supra* note 75, at 155.

108. See Dowd, *supra* note 91, at 341. For example, Austria provides leave from the end of maternity leave until the child turns two years old; Belgium and Denmark allow for a twelve-month leave, and France and Spain allow for a three-year leave. See McCaffrey &

Many mothers find that the twelve-week period is further shortened by time off taken for medical reasons during the pregnancy.<sup>109</sup> This has deeper implications than simple convenience:

[T]he structure of the time benefit has profound gender implications. Women and men are not similarly situated with respect to childbirth or lactation. . . . If the period of leave is limited to this childbirth recovery/early newborn period, and presumes one parent is on leave, then it is highly likely that the parent who will take leave will be the mother.<sup>110</sup>

This is exacerbated in those situations where both parents are employed by the same employer, and they must divide the twelve weeks between them.<sup>111</sup>

Coverage under the Act is also narrower than might be desired in order to protect all workers. According to the 1996 study of the Commission on Leave, only two-thirds of the U.S. labor force worked for employers covered by the FMLA.<sup>112</sup> This number is lower than expected because the Act was designed to cover a wide range of American workers.<sup>113</sup> The substantive promises of the FMLA are empty for employees of ineligible employers.

Given these shortcomings and criticisms, action must be taken to better accomplish the FMLA's goals. On a widespread level, this can be accomplished through the courts and through additional legislation.

### PROPOSALS FOR CHANGE

There are two primary and complementary ways in which the parental leave goals of the Act may be achieved. The first of these, and an appropriate initial approach, is judicial interpretation. The courts have interpreted the Act broadly to effectuate congressional

---

Graff, *supra* note 94, at 244-51.

109. See Young, *supra* note 75, at 142.

110. Dowd, *supra* note 91, at 348-49.

111. See Craig, *supra* note 90, at 74-75.

112. See *A Workable Balance*, *supra* note 103.

113. See *supra* notes 1-2 and accompanying text.

intent,<sup>114</sup> and this approach has been particularly useful in areas including the coverage of a range of pregnancy-related conditions, restoration to an equivalent position following the leave, and, with mixed results, the interaction of the FMLA with other statutes.

There are, however, certain areas that cannot be improved upon by the judiciary because of contradictory language in the Act. Those concerns must be addressed through the second approach, legislative action. Three primary changes are necessary to greatly advance the goals of the FMLA: provision of paid leave, a longer period of leave, and expanded coverage.

### *Judicial Assistance*

To a certain extent, the courts can and do help to achieve the goals of the FMLA using the current text. To accomplish this, "[d]efinitions under the Act are to be construed broadly, to effectuate the broad policies and intentions of Congress."<sup>115</sup> The courts have tended to construe the Act broadly, deciding in favor of employees when possible. In making these decisions in accordance with Congress's intent to help employees, the courts also consider the other objective of balancing business needs.

The plain language of the Act includes the birth of a son or daughter as an eligible circumstance for leave,<sup>116</sup> and there has been little question in the courts that the leave also applies to a wide range of pregnancy-related conditions, some of which qualify as serious medical conditions. For instance, in *Divizio v. Elmwood Care, Inc.*,<sup>117</sup> the plaintiff's FMLA leave included time taken before the birth of the child as a result of premature labor and extended after the child's birth, for a total of twelve weeks.<sup>118</sup> The prenatal leave also qualified as a serious medical condition, as does any

---

114. See, e.g., *Divizio v. Elmwood Care, Inc.*, No. 97 C 8365, 1998 WL 292982 (N.D. Ill. May 28, 1998) (holding that the plaintiff's FMLA leave included prenatal leave for premature labor, which qualified as a serious medical condition, and extended after the child's birth).

115. Catherine K. Ruckelshaus, *Selected Recent Developments Under the Family and Medical Leave Act*, in 615 PLI LITIG. & ADMIN. PRACTICE SERIES 471, 475 (1999).

116. See *supra* note 4 and accompanying text.

117. No. 97 C 8365, 1998 WL 292982 (N.D. Ill. May 28, 1998).

118. See *id.* at \*1; see also 29 C.F.R. § 825.112(c) (1998) (providing that "[c]ircumstances may require that FMLA leave begin before the actual date of birth of a child").

period of incapacity due to pregnancy.<sup>119</sup> The leave was covered under both provisions.<sup>120</sup> The courts have shown a willingness to broadly interpret what level of seriousness of prenatal conditions is necessary to trigger FMLA protection. For example, in *Atchley v. Nordam Group, Inc.*,<sup>121</sup> the plaintiff's prenatal leave time qualified as a serious medical condition that affected her job performance.<sup>122</sup>

FMLA leave is relatively useless without the guarantee that the employee will be able to return to the same or a substantially equivalent position, and the courts have been willing to construe "equivalent position" broadly in favor of the employee. In *Vargas v. Globetrotters Engineering Corp.*,<sup>123</sup> the plaintiff raised a triable issue of fact as to the existence of equivalent positions at the time of her intended return.<sup>124</sup> Following her maternity leave, the plaintiff was not offered a chance to return to her job because there were no positions available for which she was qualified based on her typing skills.<sup>125</sup> The company did retain another employee, however, with comparable typing skills, finding jobs for this new employee to do while waiting for a suitable position to become available.<sup>126</sup> This was sufficient to raise doubt whether the defendants had an equivalent position available for the plaintiff.<sup>127</sup>

In addition to construing the language of the statute broadly, courts may further the goals of the FMLA when considering its interaction with other statutes and leave policies. Congress intended that the FMLA establish minimum standards: states and employers are free to provide more protection, but may not provide

---

119. See 29 C.F.R. § 825.114(a)(2)(ii).

120. See *Divizio*, 1998 WL 292982, at \*2.

121. 180 F.3d 1143 (10th Cir. 1999).

122. See *id.* at 1150-51. The plaintiff suffered from Braxton-Hicks contractions, stress, swollen feet, and back pain. See *id.*; see also *Patterson v. Xerox Corp.*, 901 F. Supp. 274, 278 (N.D. Ill. 1995) (holding pregnancy-related back pain sufficient to establish a serious medical condition under the stricter standards of the ADA).

123. 4 F. Supp. 2d 780 (N.D. Ill. 1998).

124. See *id.* at 783-84.

125. See *id.* at 782.

126. See *id.*

127. See *id.* at 783-84. But see *Noyer v. Viacom, Inc.*, 22 F. Supp. 2d, 301, 306-07 (S.D.N.Y. 1998) (rejecting plaintiff's claim that her employer had failed to restore her to an equivalent position after her maternity leave because they failed to inform her of a decision which affected her position). The change must be more than "de minimis" and have a significant effect on the employee's job. See *id.* at 307.

less.<sup>128</sup> Courts can further this objective by holding that the FMLA provides at least the minimum standard. *O'Hara v. Mt. Vernon Board of Education*<sup>129</sup> took this approach where the court found a violation of the FMLA when the plaintiff teacher was not allowed to take her leave in accordance with her union's collective bargaining agreement (CBA).<sup>130</sup> There was a direct conflict between the provisions of the CBA and the FMLA about when she could return to work.<sup>131</sup> Because the two provisions were in direct conflict, the FMLA provision prevailed.<sup>132</sup> The FMLA was the federal minimum standard: although the CBA would have prevailed had it provided more favorable standards than the FMLA, the employee did not have to be bound by its lesser standards.

Courts have had mixed results, however, in furthering congressional intent through interpreting the interaction between leave policies. Alternative company policies are frequently involved in the calculation of the twelve-week leave period.<sup>133</sup> In *Cox v. Autozone, Inc.*,<sup>134</sup> the plaintiff took a thirteen-week paid maternity leave, as provided by the company, plus two weeks of unpaid leave, and then was demoted.<sup>135</sup> The court rejected the plaintiff's argument that she was entitled to twelve additional weeks, reading the statute as "a clear intent of Congress to protect only those workers who take 12 or fewer weeks of leave."<sup>136</sup> As a result, the plaintiff did not have a cause of action for reinstatement under the

128. See Lenhoff & Withers, *supra* note 28, at 50-51.

129. 16 F. Supp. 2d 868 (S.D. Ohio 1998).

130. See *id.* at 892.

131. See *id.* Section 2618(e) of the FMLA provides special provisions for educational institutions, and provides that a school district may refuse to let a teacher return to work during the academic year if the return would take place less than three weeks before the end of the academic year. See *id.* at 892 n.29. The plaintiff's CBA allowed the school to refuse to allow return during the academic year if leave began after January 1. See *id.* at 892.

132. See *id.*

133. The FMLA allows for the substitution of other leave, if the employer so desires, and also provides that, while an employer may provide a more generous leave policy, they do not then have to provide an additional twelve weeks of FMLA leave. See 29 U.S.C. § 2612(d) (1994).

134. 990 F. Supp. 1369 (M.D. Ala. 1998).

135. See *id.* at 1371; see also *Neal v. Children's Habilitation Ctr.*, No. 97 C 7711, 1999 WL 706117, at \*2 (N.D. Ill. Sept. 10, 1999) (determining that the twelve-week guarantee is for the twelve-month period beginning with the first request for leave).

136. *Cox*, 990 F. Supp. at 1380.



FMLA because she had received benefits in excess of the statute.<sup>137</sup> This interpretation in effect robbed the employee of recourse for her demotion because she was required to substitute other leave for that provided by the FMLA. To give effect to the FMLA as a minimum standard rather than a maximum, the court could have decided this differently: allow the employee to enforce the rights that she would have had under the FMLA had the employer not offered the other leave policy. There is no reason that an employee should have to forfeit alternative protections of the Act simply because she takes advantage of a single, more beneficial provision of another program.

In conjunction with construing the Act's provisions broadly to help employees, courts tend to balance the needs of businesses with the needs of the employees under the Act. In accordance with the stated objectives of the Act, this legitimate balancing allows room for valid business judgment.<sup>138</sup> Rather than damaging the efficacy of the Act, this approach prevents employees from using the Act to cover grievances that were not included in its protections. The Act should be used to protect the jobs of those men and women who take leave to care for their growing families, and not as a stopgap by anyone who may lose his or her job at a time that coincides with the leave.

An example of this balancing can be seen in *Ilhardt v. Sara Lee Corp.*,<sup>139</sup> where the plaintiff, an in-house attorney at the defendant corporation, was discharged while on maternity leave as part of a companywide reduction, despite having been given the impression prior to beginning the leave that she would be allowed to return.<sup>140</sup> Her employer, however, argued that her job had been terminated before she began her leave, and that she had been allowed to continue work only until her leave started; thus her termination was not a result of her maternity leave.<sup>141</sup> The court noted that she

---

137. See *id.* at 1381.

138. See 29 U.S.C. § 2601 (defining the FMLA as a balancing act to provide employees with a reasonable leave without ignoring the reasonable "demands of the workplace"); *supra* note 48 and accompanying text; see also *Cox*, 990 F. Supp. at 1373 (considering this balance as a factor in deciding whether an employer must provide an additional 12 weeks of leave in excess of the leave policy already in place).

139. 118 F.3d 1151 (7th Cir. 1997).

140. See *id.* at 1153-54.

141. See *id.*

would not have been reinstated under the Act, as the duty to reinstate "cease[s] at the time the employee is laid off" and, according to the facts, she had been laid off before her leave began.<sup>142</sup> Given this difference over the nature of the end of her employment, the court decided on the facts that she had been allowed to continue work only until her maternity leave began with the understanding that her job would end at that time.

Similarly, in *Muska v. AT&T Corp.*,<sup>143</sup> the plaintiff was terminated because of her work performance, and the termination coincided with the beginning of her pregnancy-related leave.<sup>144</sup> She was then denied leave and reinstatement, which the court found that she was not entitled to, as "[t]he FMLA does not require . . . the employer to provide the employee 'any right, benefit, or position of employment other than any right, benefit or position to which the employee would have been entitled had the employee not taken the leave.'"<sup>145</sup>

As demonstrated by a review of the judicial history of the FMLA to date, courts have the latitude to broaden the scope of the FMLA in certain areas important to new parents, including the coverage of pregnancy-related conditions, the definition of "equivalent position," and the interaction of the FMLA with other leave policies. There are areas, however, in which the courts have virtually no power to fulfill the broad purposes of the Act, including the availability of paid leave, the length of leave provided by the FMLA, and the fifty-employee coverage requirement. These provisions are defined too explicitly in both the Act and the regulations to be interpreted in any other way by the courts, and therefore any changes to those areas must be accomplished by Congress.

---

142. *Id.* at 1157 (quoting 29 C.F.R. § 825.216(a)(1) (1998)). The company did not have to reinstate her primarily because the FMLA had not yet gone into effect at the time that she began her maternity leave. *See id.*

143. No. 96 C 5952, 1998 WL 544407 (N.D. Ill. Aug. 25, 1998).

144. *See id.* at \*3-4.

145. *Id.* at \*10 (quoting 29 U.S.C. § 2614(a)(3)(B) (1994)). *But see* Atchley v. Nordam Group, Inc., 180 F.3d 1143, 1151 (10th Cir. 1999) (rejecting defendant's argument that it did not have to reinstate the plaintiff because she was not entitled to additional benefits that she would not have had if she had not been on leave, because she was the only person affected by the company's "re-structuring" and the defendant hired another person to fill a similar position).

*Legislative Changes*

In light of these shortcomings, there are several steps that Congress should take to accomplish the original goals of the FMLA. The ideal reworking of the Act would incorporate the provisions included in early versions but discarded as the Act evolved from its original to its final version. These provisions include paid leave, which was never actually included in any version of the Act due to strategic considerations,<sup>146</sup> a longer leave period and greater inclusion of employers and employees, which were incorporated into early drafts of the FMLA.<sup>147</sup> Each of these proposed revisions would serve a particular purpose in achieving the original goals.

*Paid Leave*

The Commission on Leave found that the absence of paid leave was the most prevalent reason why employees did not take FMLA leave.<sup>148</sup> The need for paid leave had been recognized by President Clinton as well.<sup>149</sup> The particular shape of this paid leave, as well as the source of the funds, has not yet been determined, but is being considered by the Department of Labor.

In his May 23, 1999 commencement address at Grambling University, President Clinton declared:

I'm proud that the first bill I signed as President was the Family and Medical Leave Act, and since 1993, millions of Americans have used it to take up to 12 weeks of unpaid leave to care for a newborn or a sick relative without losing their jobs. . .

But to be truthful, the current law just meets a fraction of the need. Too many people, too many family obligations aren't covered at all.<sup>150</sup>

---

146. See *supra* note 67 and accompanying text.

147. See *supra* notes 66, 68-71 and accompanying text.

148. See *supra* note 103 and accompanying text.

149. See *infra* notes 150-51 and accompanying text.

150. Commencement Address at Grambling State University in Grambling, Louisiana, 1 PUB. PAPERS 836, 838 (May 23, 1999).

To meet that need, President Clinton issued an executive order that all federal employees could take up to twelve weeks of paid sick leave to care for an ill parent or child, directed the Secretary of Labor to allow states to offer paid leave to new mothers and fathers using funds from unemployment insurance systems, and challenged Congress to help.<sup>151</sup>

Now that paid leave has been proposed, the question of how to implement it remains. Former President Clinton instructed the Department of Labor to draft rules to allow the states to give unemployment benefits to those taking leave following the birth of a child or an adoption under the FMLA.<sup>152</sup> The proposal, called the Birth and Adoption Unemployment Compensation Rule (BAA-UC), encourages individual states to reinterpret their eligibility guidelines for the receipt of unemployment funds.<sup>153</sup> These schemes would include every person covered under the state's unemployment compensation law, thus coverage would necessarily be more inclusive than the FMLA itself.<sup>154</sup> BAA-UC would be limited, however, to parents taking leave following the birth or adoption of

---

151. See *id.*; Memorandum on New Tools to Help Parents Balance Work and Family, 1 PUB. PAPERS 841, 841-42 (May 24, 1999); Charles Babington, *Clinton Expands Family Leave Act*, CHI. SUN-TIMES, May 24, 1999, at 22, available in 1999 WL 6540469.

The need for FMLA improvements was also recognized by the Democratic presidential candidates. Al Gore declared at a June 1999 campaign stop that "[w]e need to expand the Family and Medical Leave Act." Zachary Coile, *California is Campaign Cash Cow: With His Eye on the Presidency, Gore Opens His Hand to the Golden State—Again and Again*, S.F. EXAMINER, June 24, 1999, at A17, available in 1999 WL 6874636; James Gerstenzang, *Gore Calls for Programs to Help Working Families*, L.A. TIMES, Oct. 6, 1999, at A11; see also Zachary Coile, *Gore Shows Stamina in L.A. Meeting: 1 Day After N.H., He's in State, Patiently Answering Questions*, S.F. EXAMINER, Feb. 3, 2000, at A1, available in 2000 WL 6158853 (naming expansion of the FMLA as one of Gore's "calls for programs aimed at benefiting low- and mid- income families"). Bill Bradley also expressed his support for paid family leave. See Sandra Sobieraj, *Bradley Proposes Relief for Working Parents*, APWIRES, Oct. 7, 1999, available in WESTLAW, USNEWS database; *The Top Contenders on the Issues: A New California*, S.F. EXAMINER, Jan. 23, 2000, at A14, available in 2000 WL 6158475. FMLA expansion also proved to be an issue in senate races. See Stewart M. Powell, *Hillary Clinton Readies for Tough Senate Fight*, TIMES UNION (Albany, N.Y.), Feb. 6, 2000, at A1, available in 2000 WL 6728905.

152. See Robert Pear, *Dispute Over Plan to Use Jobless Aid For Parental Leave*, N.Y. TIMES, Nov. 8, 1999, at A1. This idea is similar to the Canadian system, which used unemployment insurance to provide paid family and medical leave. See Lenhoff & Withers, *supra* note 28, at 54.

153. Birth and Adoption Unemployment Compensation, 64 Fed. Reg. 67,972, 67,975 (1999) (to be codified at 20 C.F.R. pt. 604) (proposed Dec. 3, 1999).

154. See *id.*

a child, and would not cover other forms of FMLA leave.<sup>155</sup> The model regulation suggested by the Department of Labor provides compensation for twelve weeks of leave following birth or adoption. Leave taken in the time immediately preceding the birth or adoption would not be compensated, which diverges from FMLA leave under which prebirth time may be covered as medical leave.<sup>156</sup> The twelve-week time period is designed to align the compensation with FMLA leave.<sup>157</sup>

By using state unemployment funds as the source of the paid leave, the Department of Labor effectively avoids additional federal expenditures<sup>158</sup> by utilizing funds from a preexisting source, rather than tapping taxpayers for additional revenue. Although it is a practical solution, the use of unemployment funds to provide paid leave to new parents has several potential shortcomings. The first shortcoming is a lack of uniformity among the states. A key goal of the FMLA is to provide a federal minimum applicable to all states.<sup>159</sup> The DOL regulation provides for the possibility that all states would provide paid leave, but does not mandate that policy. Before the 1993 enactment of the FMLA, many states had comparable family leave provisions, but the FMLA supplemented them, bringing those states with lesser standards into line with others.<sup>160</sup> This lack of uniformity is inevitable, however, if unemployment funds are used as the source of the wage replacement, because states are responsible for establishing their unemployment qualifications.<sup>161</sup> One provision of the proposed rule

---

155. *See id.* In its proposed regulation, the Department of Labor noted:

The initial time period during which a new child is introduced into a home, and how that child's care will be assimilated into the working lives of the parents, is critical. It is during this period that secure emotional bonds are formed between children and their parents. . . . Addressing these needs is fundamental to helping families flourish and is also connected to sustaining a stable workforce.

*Id.* at 67,973-74.

156. *See id.* at 67,977.

157. *See id.* at 67,978.

158. Public aversion to additional government expenditures was one of the political factors considered by the original framers of the FMLA when they chose not to include paid leave in the draft of the original bill. *See supra* note 67 and accompanying text.

159. *See supra* notes 28-29 and accompanying text.

160. *See* Lenhoff & Withers, *supra* note 28, at 50-51 (discussing the adoption of the FMLA as a minimum labor standard).

161. *See* Birth and Adoption Unemployment Compensation, 64 Fed. Reg. at 67,972.

that potentially alleviates this inconsistency problem is the three-year review: as soon as at least four states have adopted the plan for a minimum of three years, the DOL would call for a review of the effectiveness of the program, as well as its impact on employers.<sup>162</sup> This opens the possibility of a reworking of the system. As of January 2000, five states—Massachusetts, New Hampshire, Vermont, Maryland, and Washington—had introduced legislation to use unemployment funds to support paid family leave.<sup>163</sup>

The BAA-UC proposal may be criticized as an inappropriate use of unemployment funds, as well as a potential burden on small businesses.<sup>164</sup> The U.S. Chamber of Commerce has been one of the outspoken critics of the proposal, claiming that parents taking leave under the FMLA are “employees. . . . Unemployment insurance is intended for people who are out of work but are looking for work.”<sup>165</sup> Some also fear that using the unemployment funds will undermine the unemployment system as a whole; while currently there are fund surpluses as a result of a strong economy and low unemployment levels, that situation may change and the funds may be needed for those looking for work.<sup>166</sup>

The BAA-UC plan does have substantial advantages which, at least in the planning stage, appear to outweigh the potential disadvantages. First, it is consistent with current uses of unemployment funds: states are given “[a] great deal of discretion . . . to determine what is meant by ‘unemployed.’”<sup>167</sup> Current uses for unemployment funds include money to pay jurors, sick workers, or those receiving job training.<sup>168</sup> Second, the plan is a cost-effective

162. See *id.* at 67,974.

163. See Andrea Foster, *New Parents Could Get Paid Leave*, NAT'L L.J., Jan. 17, 2000, at B1, available in WESTLAW, NLJ File.

164. See Lee, *supra* note 102.

165. *Id.*; see also Foster, *supra* note 163, at B1 (noting that opponents of the BAA-UC claim that it violates the intent of unemployment insurance).

166. See *State Groups Weigh in Against Family Leave Proposal*, CONGRESS DAILY, Dec. 14, 1999, available in 1999 WL 28417550; see also Robert Hunter, *Why Rob Unemployed for Paid Leave?*, DETROIT NEWS, Jan. 28, 2000, at A11, available in 2000 WL 3465397 (“It’s an insurance policy against unemployment. Right now, unemployment is low. But we all know this can change.”).

167. Foster, *supra* note 163, at B1 (quoting Donna Lenhoff).

168. See *id.*

way to provide paid leave to new parents.<sup>169</sup> In using an existing pool of funds, the proposal may well be the most practicable approach, rather than calling for the payment of additional taxes by workers and employers to establish a separate FMLA fund, an approach likely more costly for all parties than the current proposal. Accurate predictions of costs are difficult, but the experimental period provided for by the BAA-UC would provide a rough indication.

Another method of providing paid leave was recently adopted in California. Effective January 1, 2000, California law requires that employers who provide sick leave for employees must allow the employees to use accrued sick leave while using FMLA leave.<sup>170</sup> Although this proposal does not require a new source of revenue to fund paid leave, it does not provide much help for those workers in jobs that do not provide sick leave, the group that is most likely to need financial assistance during the leave period.

Another potential model for paid leave is the European system. Each member of the European Union has its own leave program and provisions.<sup>171</sup> As of 1995, wage replacement rates under those programs equaled at least fifty percent of the employee's salary, and in many cases exceeded eighty percent.<sup>172</sup> The funds come mostly from social insurance, and in some countries are also partially funded by employers.<sup>173</sup> The advantages of this type of program are that it applies to all workers covered by the FMLA. Unlike the California model, it is not limited to employees who are already eligible for paid sick leave. There is also no doubt that the funds are earmarked for another source. The other side of that advantage, however, is the necessity of having a separate pool of funds to draw from. As a result, the most notable drawback to a similar source of funds for American purposes is that it requires an additional source of funds from the government and/or employers. This reluctance to

---

169. See Francine Knowles, *Illinois Unlikely to Pass Paid Leave: Advocates*, CHI. SUN-TIMES, Feb. 8, 2000, at 46, available in 2000 WL 6667452.

170. See A.B. 109, 1999 Ca. Legis. Serv. 164 (West); see also John A. Ricca & Elizabeth A. Franklin, *The Family and Medical Leave Act and the California Family Rights Act: A View From the Trenches in 1999*, in 615 PLI LITIG. & ADMIN. PRAC. SERVICE, 523, 525 (1999).

171. See Ruhm & Teague, *supra* note 54, at 135.

172. See *id.*

173. See *id.* Belgium, Germany, Italy, and the United Kingdom are among the countries which require employer contributions. See *id.*

provide additional money has been and remains the major roadblock to the enactment of a program of paid leave. At the heart of this problem is the basic dichotomy involving the roles of social programs in Europe and the United States. Although post-WWII European governments have come to support a wide range of social programs, the United States has largely resisted this full-scale involvement of the government in the lives of its people. The European model, while useful as a guide, may not fit with American society.

However paid leave might be enacted, it would be extremely beneficial for American families and society, and would be invaluable in increasing the effectiveness of the FMLA.<sup>174</sup>

The FMLA should include some system of wage replacement to further both gender equality and the right of every worker to participate in both work and family. . . . By offering a reasonable amount of wage replacement, employers can take some of the traditional burden off of men to work longer hours as "provider" and "breadwinner" during the critical period immediately after the birth of a child.<sup>175</sup>

Wage replacement during leave would make it possible for parents from a wider spectrum of socioeconomic classes to take advantage of the protections of the Act.<sup>176</sup> Parental leave and a guaranteed job to return to are empty promises when the parent cannot afford to live during the twelve weeks away from work. Wage replacement would prevent the FMLA from becoming a strictly middle and upper-class privilege.

After considering the current Department of Labor plan, the California model, and the European model, it appears that the current proposed regulations are the most appropriate way of accomplishing paid leave in current American society. Like any new program, of course, experience will show the true effectiveness of the program and allow for necessary fine-tuning.

174. See Dowd, *supra* note 91, at 346-47; Young, *supra* note 75, at 155-57.

175. Young, *supra* note 75, at 154.

176. See Elizabeth Sherman, *Resolving a Problem not Swiftly but Soundly*, BOSTON GLOBE, Jan. 23, 2000, at G3, available in 2000 WL 3311366 ("[F]or most families, unpaid leave is tantamount to no leave at all.").



*Longer Period of Leave*

While paid leave serves some of the unmet need of those taking parental leave following the birth or adoption of a child, a longer leave period after childbirth would be equally beneficial for both child and parents. The two proposals are entirely distinguishable and designed to meet separate needs. Without paid leave, a longer leave period will inherit the existing disadvantage of applying only to those employees who can afford to take the leave. At the same time, paid leave, while opening up the feasibility of FMLA leave to more people, will not fully meet the emotional needs of the family by allowing the parents to spend enough time with their new child. The reasons for a longer leave period go beyond economics to the basic psychological needs of the child during the first days and weeks of his or her life. That period of time is unique and proper handling of it has been found to be essential to the development of the parent-child bond.<sup>177</sup>

If the FMLA were revised to offer both mothers and fathers six months of paid parental leave each, such revision would encourage men to take more leave and also encourage both parents to take the leave simultaneously for at least part of the leave. A leave that allows both parents time to adjust to a newborn may be crucial to involving fathers in the period immediately after the birth of a child.<sup>178</sup>

The original proposed Parental and Disability Leave Act of 1985 included up to eighteen weeks of leave for mothers or fathers of newborn children, and up to an additional twenty-six weeks of leave per year for other reasons covered under the Act.<sup>179</sup> This amount of leave was reduced in subsequent versions of the Act to thirty-six weeks of leave per two-year period for any reason covered under the

---

177. See *id.* Sherman notes that "[t]he American Academy of Pediatrics has warned that an infant's physical, cognitive, and social development depend on the establishment of a strong attachment to a parent or to a primary caregiver during the first crucial year of life." *Id.*

178. Young, *supra* note 75, at 155; see also Dowd, *supra* note 91, at 350 (encouraging longer leave periods for both parents).

179. See *supra* note 66 and accompanying text.

Act,<sup>180</sup> and then to the twelve weeks ultimately included under the Act.<sup>181</sup>

The amount of time guaranteed under the Act is just a minimum; individual employers are free to provide a longer period of leave if they choose. When an employee receives a leave greater than twelve weeks from their employer, however, they subsequently lose coverage under the Act.<sup>182</sup> This potentially results in stripping the employee of protections that may not be provided in a parallel way by the employer. Thus, this situation creates a tradeoff and a no-win situation for the employee: choose the longer time off and run the risk of not being restored to an equivalent position, or restrict her leave to twelve weeks and retain the other protections of the Act.

Unlike the debate over how to enact paid leave, there is little question as to how a longer leave period will be accomplished. A simple expansion of the provision already in effect can be passed by Congress, a relatively simple transition.

### *Increased Coverage*

As valuable as longer, paid leave would be, these changes have one glaring shortcoming: they benefit only those employees and employers already covered under the Act. Along with his proposals to provide paid leave, President Clinton suggested that the FMLA be expanded to include employers with more than twenty-five employees.<sup>183</sup> To ensure that parental leave is available to a greater number of American workers, the small business exemption should be changed.

Under the FMLA, businesses with fewer than fifty employees, within a seventy-five mile radius of the worksite, are exempt from the provisions of the Act. This was a relatively late addition to the legislation: a small business exemption was not added until the

---

180. This provision was included in the 1986 version of the bill. See *supra* note 68 and accompanying text.

181. See 29 U.S.C. § 2612(a)(1) (1994).

182. See *supra* note 11 and accompanying text.

183. See Joyce Howard Price, *Clinton Proposes Grants to Study Parental Time Off: Seeks Ideas on Funding Paid Leave*, WASH. TIMES, Feb. 13, 2000, at C5, available in 2000 WL 4148287.

second version of the bill, and that exemption was only for businesses with fewer than fifteen employees.<sup>184</sup> The 1989 House Bill provided for an immediate exemption for businesses with fewer than fifty employees, and that number was to be decreased to thirty-five employees three years after enactment; the Senate version provided for an exemption for businesses with fewer than twenty employees.<sup>185</sup> The fifty-employee threshold was adopted in 1991.<sup>186</sup>

The approach taken by the House in 1989 is instructive, and considers the practical needs of the employers as well as the employees. The graduated approach—with the number of employees qualifying as a small business decreasing with time—allows midsize businesses time to adjust to the Act's requirements. It is likely that the smaller the business, the greater the burden of compliance with the FMLA. An expansion of the coverage to more businesses could now be taken with less than three years advance notice because businesses have been on notice since the Act was enacted.

Any change, of course, would have to be balanced with the needs of affected businesses. In response to former President Clinton's proposals, the same employers' groups who opposed the original Act raised criticisms once again.<sup>187</sup> Studies, like the 1996 Commission on Leave report, have shown, however, that employers actually see little detrimental impact when their employees become eligible under the FMLA.<sup>188</sup> In fact, only about two percent of eligible employees took part in the Act's first one-and-a-half-years of existence.<sup>189</sup> In this sense, the Act is a sort of "911" for working families, a necessity to be used when circumstances make it necessary.<sup>190</sup>

---

184. See *supra* note 68 and accompanying text.

185. See *supra* note 69 and accompanying text.

186. See *supra* note 71 and accompanying text.

187. See Editorial, *Employee Benefits*, INDIANAPOLIS STAR, Aug. 7, 1999, at A14, available in LEXIS, News Group File.

188. See *A Workable Balance*, *supra* note 103.

189. See *id.*

190. See Commission Report, *supra* note 103, at 5.

## LIKELIHOOD OF SUCCESS

Although Congress was unable to pass these proposed provisions in 1993, or in any of their previous attempts, there are several reasons why passage is more likely now. Several years of experience under the FMLA has shown the negligible negative impact that the Act has had on businesses. In addition the renewed recognition by lawmakers and lobbyists of the need for revised provisions suggests the time is ripe for action.

Business groups, especially those representing small businesses, were among the most vocal opponents of the original FMLA.<sup>191</sup> Although the same groups continue to express distrust for proposed changes,<sup>192</sup> experience has shown that many of the negative impacts predicted by those organizations have failed to materialize.<sup>193</sup> Most covered employers have found that FMLA administration is relatively easy, that it has not caused them to incur any additional costs, and that it tends to boost worker morale and productivity.<sup>194</sup> Some employers even experienced cost savings due to improved retention rates.<sup>195</sup> In relation to the proposal for an expanded period of time, the 1996 study of the Commission on Leave revealed that the median FMLA leave taken was ten days long, and that only about a quarter of the leave taken is for the birth or adoption of a child.<sup>196</sup> These numbers indicate the potential impact of the expanded leave time. Median leave length is unlikely to increase dramatically, because the length of leave is determined by the condition for which it is taken. In addition, the study found that the percentage of eligible employees using their FMLA leave was only about two percent.<sup>197</sup> These experiences, as well as the tendency of the courts to consider the needs of the business when making decisions, indicate that businesses, regardless of size, would not be harmed by the proposed changes.

---

191. See ELVING, *supra* note 49, at 12-13.

192. See *supra* notes 164-65 and accompanying text.

193. See *A Workable Balance*, *supra* note 103.

194. See *id.*

195. See *id.*

196. See *id.*

197. See *id.*

Many business organizations have been calling for clarifications to provisions not at issue here, including the definition of "serious health condition" and what information is needed to confirm a health emergency.<sup>198</sup> Perhaps businesses would be more willing to accept these proposed changes if they received their desired clarifications in return.

There has also recently been a renewed recognition among both lawmakers and lobbyists of the need to revise the FMLA. Former President Clinton made his proposals,<sup>199</sup> and changes to the Act were a timely election issue.<sup>200</sup> Even House Republican Conference Chairman J.C. Watts, in opposing the particularities of the Department of Labor proposal, stated that "the law is not giving working families the benefits that were promised them."<sup>201</sup> There seems to be widespread acknowledgment of the need for change.

In addition, the National Partnership for Women and Families, led by General Counsel Donna Lenhoff, announced its "Campaign for Family Leave Income."<sup>202</sup> The campaign is an attempt to achieve wage replacement for all leave covered under the FMLA.<sup>203</sup> In Massachusetts, several women's and labor groups have joined together to form the Family and Medical Leave Campaign, lobbying the state legislature to, among other things, allow the use of unemployment funds to subsidize FMLA leave.<sup>204</sup> This grassroots effort is being considered and emulated in several other states.<sup>205</sup>

While it is difficult to predict with accuracy the fate of the as-yet unproposed bill, it appears that chances for passage are better than they were in 1993. Over seven years of experience with the current provisions revealed that they are not detrimental to business health, and so the next step can now be taken.

---

198. See *Employee Benefits*, *supra* note 187, at A14.

199. See *supra* notes 151-55 and accompanying text.

200. See *supra* note 151.

201. Price, *supra* note 183, at C5.

202. See *General News Events*, WASH. DAYBOOK, June 10, 1999, available in 1999 WL 14142699.

203. See *id.*

204. See Juliet F. Brudney, *Plans to Improve Leave Act Gain Momentum*, BOSTON GLOBE, July 25, 1999, at G4, available in 1999 WL 6073860.

205. See *id.*

## CONCLUSION

In the time since its passage, the Family and Medical Leave Act of 1993 has provided for great progress. An increased number of American employees are able to take maternity and paternity leave with a guarantee that they will be able to return to their jobs when the leave ends. The original goals of the Act—to provide leave free from worry to allow new parents to care for their children—have not been achieved completely. In order to reach those goals, the court system must continue to interpret the Act broadly, in favor of increased opportunities for employees. In areas where there is no potential for judicial interpretation, however, Congress must take action. In the pregnancy and maternity and paternity leave context, the three most important legislative changes are the provision of paid leave, a longer leave period, and expanded coverage. The legislative history reveals that these provisions were the original intention of the Act's proponents, and it is now time to finish what the Act started.

*Emily A. Hayes*