

Bringing Up Baby Under the FMLA: How the Federal Unpaid Maternity Leave System in the United States Will Not Carry to Term

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BRINGING UP BABY UNDER THE FMLA: HOW THE
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People desperately want to have successful families, to be good parents, to have a job and succeed at it. If you take one away to get the other, the country pays a grievous price and every life is diminished.

—Bill Clinton¹

1. *Investing in Our Families: The Case for Paid Family Leave in New York and the Nation*, A BETTER BALANCE 5 (May 2015), <http://www.abetterbalance.org/wp-content/uploads/2016/11/PFL2015.pdf> [<http://perma.cc/D36Q-EKCK>] [hereinafter *Investing in Our Families*].

INTRODUCTION

Although the global fertility rate has rapidly declined over time,² and is projected to continue to decline,³ nearly every country in the world still has some statutory provision for guaranteed paid maternity leave.⁴ Specifically, only two of 185 countries and territories studied by the International Labour Organization do not have such provisions: Papua New Guinea and the United States of America.⁵ It should be shocking that the United States is such an outlier when in almost all other respects it is usually on par with, if not ahead of, other nations. The fact that the United States is the only industrialized nation in the world without guaranteed paid maternity leave is deeply troubling, and poses problems beyond being a shameful statistic. In 2015, nearly four million babies were born in the United States,⁶ and between 2015–2050, the United States is projected to be one of the nine countries where “half of the world’s population growth is expected to be concentrated.”⁷

These statistics and projections illuminate the needs of both current and future parents who may wish to and will ultimately seek tangible maternity leave benefits. Fortunately, the United States does not completely lack some form of maternity leave provisions. The Family and Medical Leave Act of 1993 (FMLA)⁸ was enacted in February 1993 and provides the sole federal basis by which an employee may obtain job-protected leave to care for a child after birth.⁹ This provision, however, pales in comparison to the maternity leave policies found in other countries.¹⁰ The FMLA’s benefits err on the

2. U.N. Dep’t of Econ. & Soc. Affairs, Population Div., World Fertility Patterns 2015—Data Booklet 2 (2015), <http://www.un.org/en/development/desa/population/publications/pdf/fertility/world-fertility-patterns-2015.pdf> [<http://perma.cc/BU4D-ZU8Z>].

3. U.N. Dep’t of Econ. & Soc. Affairs, Population Div., World Population Prospects: The 2015 Revision 5 (2015), https://esa.un.org/unpd/wpp/publications/files/key_findings_wpp_2015.pdf [<http://perma.cc/JNV7-N9PL>] [hereinafter World Population Prospects].

4. See INTERNATIONAL LABOUR ORGANIZATION [ILO], MATERNITY AND PATERNITY AT WORK: LAW AND PRACTICE ACROSS THE WORLD 1–2 (2014), http://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/publication/wcms_242617.pdf [<http://perma.cc/YE4V-WPYC>].

5. *Id.* at 2, 15 n.4.

6. U.S. DEPT OF HEALTH & HUMAN SERV., NAT’L CTR. FOR HEALTH STATISTICS, BIRTHS IN THE UNITED STATES, 2015 1 (2016), <http://www.cdc.gov/nchs/data/databriefs/db258.pdf> [<http://perma.cc/2A4C-4SZ7>].

7. World Population Prospects, *supra* note 3, at 4.

8. Family and Medical Leave Act of 1993, Pub. L. No. 103-3, § 1, 107 Stat. 6 (1993).

9. Other federal legislation, such as the Pregnancy Discrimination Act of 1978, serves to ensure that “women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes” but does not in any way provide an additional source for benefits pertaining to maternity leave. 42 U.S.C.A. § 2000e(k) (Westlaw through Pub. L. No. 115-45).

10. Compare Family and Medical Leave Act of 1993 § 102(a)(1) (“an eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period”), *with*

side of near non-existence, and because over forty percent of employees do not satisfy the criteria for coverage and eligibility under its terms, what little maternity benefits the FMLA does offer are simply not available to nearly half of the American workforce.¹¹

This Note will examine current maternity leave laws both within the United States and internationally, and argues that there are major issues with the existing federal law in the United States that render such legislation ineffective. This Note will further argue that because paid maternity leave remains almost exclusively as a benefit employers can choose to provide, the federal government should not only adopt a paid maternity leave program, but also ensure that it is broader and more encompassing than current legislation.

Part I will outline present paid maternity leave provisions within the United States. A clear dichotomy between federal and state laws will be shown; specifically, that federal law is extremely limited in scope and application, whereas some state laws, while variant, are broader and more far-reaching. Possible explanations for the emergence of these differences between both federal and state laws, and across state laws, will be explored.

Part II contains a comparative analysis involving a country and its respective paid maternity leave policies. The country studied—Canada—is arguably the closest match to the United States in terms of cultural, political, and economic similarities. However, a stark difference, as seen through Canada's robust paid leave policies, serves as inspiration and helps to lay a foundation for what a more comprehensive program in the United States could resemble.

Part III comprises a cost-benefit analysis and carefully considers how much the lack of guaranteed paid maternity leave in the United States truly costs its citizens. Regardless of the aspect of life or society that was analyzed—including economics, health, and social factors—positive benefits were either associated with or the direct result of having a more robust paid maternity leave program.

Part IV presents a conclusive argument that the United States should adopt a federal program that is broader in scope and application than the FMLA. This change would allow for across the board consistency and eliminate any confusion that is currently caused by various states having their own provisions. Furthermore, it will be argued that the practicability of enforcing this new program will be less challenging given the growing collective mindset of support for

INTERNATIONAL LABOUR ORGANIZATION, *supra* note 4, at 2–3 (noting various lengths of leave policies).

11. See U.S. DEPT OF LABOR, WAGE & HOUR DIV., FMLA IS WORKING, https://www.dol.gov/whd/fmla/survey/FMLA_Survey_factsheet.pdf [<http://perma.cc/LFX6-TZ9N>].

such an enhanced paid maternity leave program and the fact that the necessary infrastructure to implement this type of program already exists. Finally, and arguably most importantly, this new program will aim to eliminate the constitutional and anti-discrimination violations that currently afflict the FMLA's application. By having a more all-encompassing paid maternity leave program, the current problem of disparate access to the FMLA will be lessened, if not eliminated. So long as over forty percent of employed individuals, along with those who are unemployed, do not meet the FMLA's criteria for eligibility are disenfranchised by the FMLA, the pursuit of adequate solutions and alternatives will never cease.

I. CURRENT PAID MATERNITY LEAVE PROVISIONS—THE UNITED STATES OF AMERICA: AN UNEVEN LANDSCAPE

Presently, there are only a handful of legal sources for maternity leave in the United States. While there is merely one federal source—the FMLA—several states have adopted their own maternity leave provisions that are different not only from what is offered by the FMLA, but also from other states.¹² Upon comparison, the division between federal and state laws readily appears. The FMLA provides minimal benefits to very specific subsets of the nation's population,¹³ whereas some states laws, though inconsistent with one another in terms of specific benefits, provide expansive benefits to a greater number of parents.¹⁴ These differences illuminate both the direction in which federal and other states' maternity leave policies can go, as well as the feasibility of a more encompassing program.

A. Federal: Minimal Benefits and Limiting Laws

Upon being repeatedly brought to Congress every year beginning in 1984, the FMLA was finally “passed with bipartisan support” after nine years of fierce advocacy.¹⁵ Before the FMLA's enactment,

12. See Rita Rubin, *U.S. Dead Last Among Developed Countries When it Comes to Paid Maternity Leave*, FORBES (Apr. 6, 2016, 3:07 PM), <https://www.forbes.com/sites/ritarubin/2016/04/06/united-states-lags-behind-all-other-developed-countries-when-it-comes-to-paid-maternity-leave/#35212aca8f15> [http://perma.cc/QM3V-RXFW].

13. In the years following the FMLA's enactment, the Department of Labor, in its 1995 and 2000 Survey Reports, determined that “[a]n estimated 18.5 to 24.4 million [employees] work for covered establishments but are not eligible to take FMLA leave,” and another “estimated 30 to 37 million [employees] are not covered” at all. U.S. DEPT OF LABOR, WAGE & HOUR DIV., THE 2000 SURVEY REPORT, CHAPTER 3: USE OF THE FMLA, <https://www.dol.gov/whd/fmla/chapter3.htm> [http://perma.cc/RE7M-ES7Y].

14. See Rubin, *supra* note 12.

15. *History of the FMLA*, NAT'L P'SHIP FOR WOMEN & FAMILIES, <http://www.nationalpartnership.org/issues/work-family/history-of-the-fmla.html> [http://perma.cc/CB7Z-W6L6].

parents had little to no time off after a child's birth and feared losing their employment if they did attempt to take some kind of leave.¹⁶ In fact, the percentage of women who quit their jobs as their means of a leave arrangement following the birth of their first child was consistently well over half from 1961–1975.¹⁷ This percentage nearly halved in the years around the FMLA's enactment.¹⁸

A few years ago, on the twentieth anniversary of the FMLA's enactment, the Department of Labor “conclude[d] that the FMLA continues to make a positive impact on the lives of workers without imposing an undue burden upon employers.”¹⁹ The Department of Labor also concluded, despite the fact that “slightly more than half of all employees report[ed] . . . be[ing] eligible for the protections of the FMLA (59%),”²⁰ “[t]he FMLA is working.”²¹

Though the Department of Labor contends that the FMLA is effective, the fact that nearly half of the workforce is ineligible for its benefits suggests otherwise.²² Perhaps the strict eligibility requirements that the FMLA imposes for its potential recipients are the source of the FMLA's limited applicability to the workforce. In addition to the FMLA being applicable only to certain types of employers,²³ it requires that employees meet even more stringent eligibility requirements.²⁴ Specifically, the FMLA requires the following for an individual to be considered an eligible employee: (1) someone “who has been employed . . . for at least 12 months by the employer”; (2) has “at least 1,250 hours of service with such employer” during the past twelve months; and (3) is employed by an employer that employs fifty people within seventy-five miles of the eligible employee's work site.²⁵

16. Amy M. Abbott, *Does Sheryl Sandberg Remember Life Before the FMLA?*, THE BROADSIDE (2012), <http://www.the-broad-side.com/does-sheryl-sandberg-remember-life-before-the-fmla> [<http://perma.cc/D7GA-AHKH>].

17. The percentages were as follows: 62.8 (1961–65), 58.9 (1966–70) and 51.1 (1971–75). KRISTIN SMITH ET. AL., MATERNITY LEAVE AND EMPLOYMENT PATTERNS: 1961–1995, U.S. CENSUS BUREAU—CURRENT POPULATION REPS. 11 (2001), <https://www.census.gov/prod/2001pubs/p70-79.pdf> [<http://perma.cc/HD92-7DCV>].

18. The percentage of women who quit their jobs as their means of a leave arrangement following the birth of their first child was 26.9 between 1991–95. *Id.*

19. FMLA IS WORKING, *supra* note 11.

20. ABT ASSOCIATES INC., FAMILY AND MEDICAL LEAVE IN 2012: TECHNICAL REPORT I (2012), <https://www.dol.gov/asp/evaluation/fmla/FMLA-2012-Technical-Report.pdf> [<http://perma.cc/FQ7P-PQVB>].

21. FMLA IS WORKING, *supra* note 11.

22. *Id.*

23. The “FMLA applies to all public agencies, all public and private elementary and secondary schools, and companies” with at least fifty employees. *FMLA (Family & Medical Leave)*, U.S. DEP'T OF LABOR, <https://www.dol.gov/general/topic/benefits-leave/fmla> [<http://perma.cc/KC6V-26KH>].

24. See Family and Medical Leave Act of 1993, Pub. L. No. 103-3, § 101(2), 107 Stat. 6 (1993).

25. *Id.* § 101(2)(A)–(B).

Even if an individual is fortunate enough to qualify as an eligible employee under the FMLA's requirements, the benefits to be received are well below international standards.²⁶ Under its terms, the FMLA provides that "an eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period for one" of the stipulated purposes.²⁷ These purposes include "the birth of . . . [and subsequent need] to care for [a child]," "placement of a [child] with the employee for adoption or foster care," need "to care for [a] spouse, [child], or parent . . . if such [person] has a serious health condition," or finally, "a serious health condition that [leaves] the employee unable to perform the functions of [his/her] position."²⁸ Notably, there is absolutely no mention of a guaranteed financial benefit under the FMLA's terms.²⁹

Furthermore, because the FMLA is not structured solely for instances of maternity leave, but also for situations that require medical leave, some parents may receive even less than the meager twelve-week leave period to care for their new child.³⁰ This issue raises a challenging problem for some: whether to forego caring for a loved one who has a serious health condition in order to have more time with a new child, or vice versa.

Taking into account difficult value judgments like these, the long list of eligibility requirements, and the minimal benefits to be gained, the FMLA paints a less than idealistic image for the only federal provision for maternity leave in the United States. Roadblocks, especially those rooted in the misplaced economic assumption that paid maternity leave is detrimental to the economy, have continued to prevent expansions in, or changes to, the FMLA's benefits and

26. See Melissa Etehad & Jeremy C.F. Lin, *The world is getting better at paid maternity leave. The U.S. is not.*, WASH. POST (Aug. 13, 2016), https://www.washingtonpost.com/news/worldviews/wp/2016/08/13/the-world-is-getting-better-at-paid-maternity-leave-the-u-s-is-not/?utm_term=.8bdbbc8a51a3 [<http://perma.cc/ZQ8B-TQJM>] (criticizing "the United States [for] lag[ging] far behind other countries[, like Cuba and Mongolia,] in its policies for expectant mothers"); Rubin, *supra* note 12 (chiding "the United States [as being] woefully behind the rest of the world" "[w]hen it comes to paid leave for new parents").

27. Family and Medical Leave Act of 1993, § 102(a)(1).

28. *Id.* § 102(a)(1)(A)–(D).

29. It is interesting to note that although the FMLA itself does not in any way provide paid benefits, it still accounts for and stipulates how its provisions relate to employers who, on their own, elect to provide their employees with paid maternity leave. See *id.* § 102(c)–(d).

30. "[E]ligible employee[s] shall be entitled to a total of 12 workweeks of leave during any 12-month period for one or more of the [prescribed circumstances]," which include caring for an immediate family member if he/she has a serious health condition and if the employee has a serious health condition. *Id.* § 102(a)(1) (emphasis added).

terms.³¹ Unsurprisingly, “[i]t’s no wonder that [the] most forward momentum has been at the state level,” where initiatives for paid maternity leave have both gathered steam and taken off.³²

B. State: Emergence of Broader Benefits Demonstrates Dissatisfaction with Federal Provisions and Increased Support for More Expansive Ones

Although California was the first state to propose and enact legislation for a paid maternity leave program in 2002,³³ states choosing to adopt more comprehensive paid maternity leave laws has continued to be a modern phenomenon. Currently, there are more than two dozen states that have introduced legislation or have task forces that are actively pursuing legislation related to some form of paid family leave.³⁴ Furthermore, given that both major candidates in the most recent American presidential election announced their support for paid family leave,³⁵ it is highly likely that even more states will consider adopting some form of a paid maternity leave program in the near future. In fact, some supporters, like Ellen Bravo of the advocacy network *Family Values @ Work*, have already predicted such a shift in state policy.³⁶ Though support continues to grow, to date,

31. See Nita Ghei, *The Argument Against Paid Family Leave*, NEWSWEEK (Aug. 4, 2009, 8:00 PM), <http://www.newsweek.com/argument-against-paid-family-leave-78741> [<http://perma.cc/8WLG-64VE>] (arguing that “[m]andated paid family leave makes it more expensive to hire workers,” especially women, which will make employers less inclined to hire women, and in turn, keep more people unemployed); Nadja Popovich, *The US is still the only developed country that doesn’t guarantee paid maternity leave*, THE GUARDIAN (Dec. 3, 2014, 8:46 AM), <https://www.theguardian.com/us-news/2014/dec/03/-sp-america-only-developed-country-paid-maternity-leave> [<http://perma.cc/4SJK-8MKL>] (explaining some opponents to paid maternity leave claim such a program is “a financial burden” on businesses).

32. Popovich, *supra* note 31.

33. RONA LEVINE SHERRIFF, *BALANCING WORK AND FAMILY*, CAL. SENATE OFF. OF RES. 2 (2007), <http://paidfamilyleave.org/pdf/paidfamily07.pdf> [<http://perma.cc/DW34-CXLT>].

34. See *Work & Family Policy Database*, NAT’L P’SHIP FOR WOMEN & FAMILIES, http://www.nationalpartnership.org/issues/work-family/work-family-policy-database/search-results.html?state=&subject=paid-family-leave&active_year=2016&leg_type= [<http://perma.cc/RLL8-2UTT>] (identifying the following states: Arizona, California, Connecticut, Delaware, Florida, Georgia, Hawaii, Illinois, Indiana, Kentucky, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, New Hampshire, New Jersey, New Mexico, New York, Oklahoma, Rhode Island, Tennessee, Utah, Vermont, Virginia, Washington, and Washington, D.C.).

35. See Megan A. Sholar, *Donald Trump and Hillary Clinton both support paid family leave. That’s a breakthrough*, WASH. POST (Sept. 22, 2016), https://www.washingtonpost.com/news/monkey-cage/wp/2016/09/22/donald-trump-and-hillary-clinton-both-support-paid-family-leave-thats-a-breakthrough/?utm_term=.cd4b9999e4ad [<http://perma.cc/9XJF-G33R>].

36. See Clare O’Connor, *As NY And SF Pass Paid Family Leave, These 20 States Could Be Next*, FORBES (Apr. 6, 2016, 2:43 PM), <https://www.forbes.com/sites/clareoconnor>

there are only a handful of states that have fully adopted broader paid maternity leave provisions: California, New Jersey, Rhode Island, and New York.³⁷

1. California

In 2002, California passed legislation that extended disability compensation to individuals who take time off from work to care for a sick family member or to bond with a new child, and subsequently, in 2004, it became the first state to enact and provide paid family leave benefits.³⁸ Even though California's policy, like the FMLA, serves to provide leave for instances of both pregnancy/bonding with a new child and caring for a sick family member, there is a stunning difference in how eligible employees choose to use their leave. While only twenty-one percent of those claiming leave under the FMLA did so because of a pregnancy or to care for a child,³⁹ nearly ninety percent of leave claims under California's policy were used to bond with a new child.⁴⁰ Additionally, because fifty-five percent of leave claims under the FMLA were used for an employee's own illness,⁴¹ the ineffectiveness of the FMLA as a maternity leave program is striking.

Though the allotted length of leave is shorter than what is provided by the FMLA,⁴² in all other respects, California's policy is still more comprehensive. First, the eligibility requirements are much less stringent than that of the FMLA. Rather than being employed

/2016/04/06/as-ny-and-sf-pass-paid-family-leave-these-20-states-could-be-next/#62eFa460343a [http://perma.cc/N2E9-4A4S] (quoting Bravo as stating that "[t]here'll be more states with campaigns [for paid family leave laws] brewing in 2017 and 2018, given the prominence of this issue in the national election.").

37. *State Family and Medical Leave Laws*, NAT'L CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/research/labor-and-employment/state-family-and-medical-leave-laws.aspx> [http://perma.cc/6MYJ-CCDE]. Although Washington's legislature approved a state-run paid family leave program in 2007, it has yet to take effect. However, as recently as last year, the U.S. Department of Labor awarded Washington a federal grant to research how its policy can finally be implemented. See News Release, U.S. Dep't of Labor, *Department awards \$1.55M to study paid family, medical leave implementation* (Sept. 29, 2015), <https://www.dol.gov/opa/media/press/wb/WB20151927.htm> [http://perma.cc/MT9C-BXX2]; PREGNANCY & PARENTAL LEAVE, WASH. STATE DEPT OF LABOR & INDUS., <http://lni.wa.gov/WorkplaceRights/LeaveBenefits/FamilyCare/Maternity/default.asp> [http://perma.cc/N93Y-HDTJ].

38. PAID FAMILY LEAVE: TEN YEARS OF ASSISTING CALIFORNIANS IN NEED, STATE OF CAL. EMP. DEV. DEPT 1 (2014), http://www.edd.ca.gov/disability/pdf/Paid_Family_Leave_10_Year_Anniversary_Report.pdf [http://perma.cc/V88Z-6UUP] [hereinafter PAID FAMILY LEAVE].

39. ABT ASSOCIATES INC., *supra* note 20, at ii.

40. SHERRIFF, *supra* note 33, at 5.

41. ABT ASSOCIATES INC., *supra* note 20, at ii.

42. PAID FAMILY LEAVE, *supra* note 38, at 1.

by an employer with a minimum number of employees, and having worked for a set number of months and hours for at least twelve months, eligibility under California's policy requires only a handful of easily attainable factors. These eligibility factors include the following: that the individual making a claim (1) "[b]e unable to do [his/her] regular . . . work for at least eight days" to care for a child or sick family member, (2) "[b]e employed or actively looking for work," (3) "[h]ave lost wages" in order to provide care, (4) "[h]ave earned at least \$300 from which [disability insurance] deductions were withheld," (5) "submit a claim form within 49 days of the first day of . . . leave," and (6) provide a medical certificate, if caring for a sick family member.⁴³ Though the number of eligibility requirements may seem more daunting than those of the FMLA, in reality they are fairly easy to meet. In fact, perhaps the most difficult prerequisite to meet is having earned a certain amount of money from which disability insurance deductions were withheld. However, this requirement is anything but unfair. Considering that the program is an expansion of the state's temporary disability insurance program and the financial benefits to be awarded from it are entirely funded through employee contributions to the program,⁴⁴ it is simply practical and fair that to receive benefits, eligible employees must have paid into this program. Furthermore, this type of eligibility requirement is arguably far more logical and substantiated than the seemingly arbitrarily chosen eligibility requirements—such as the minimum amount of hours an employee has worked for their employer—under the FMLA.

Second, California's program offers financial benefits of up to fifty-five percent of a worker's earnings that is capped at a set "maximum weekly benefit amount."⁴⁵ In 2013, the maximum weekly benefit amount was \$1,067, which was nearly double the maximum amount awarded in 2004,⁴⁶ which demonstrates not only economic growth during the program's existence, but also that a paid maternity leave program can be structured to aptly respond to changes in the economy.⁴⁷ Additionally, since the policy's implementation in

43. *Id.*

44. CAL. UNEMP. INS. CODE § 3300 (Deering 2016).

45. PAID FAMILY LEAVE, *supra* note 38, at 7.

46. *Id.* at 3.

47. Again, because the program is entirely funded through an employee payroll deduction—the State Disability Insurance (SDI) Tax—and the California State Legislature may change the yearly SDI tax rate, the program continues to steadfastly provide benefits while remaining flexible to adjust to inevitable variance in the economy, like unemployment rates and minimum wage changes. See § 3300; *What Are State Payroll Taxes?*, STATE OF CAL. EMP'T DEV. DEP'T, http://www.edd.ca.gov/Payroll_Taxes/What_Are_State_Payroll_Taxes.htm [<http://perma.cc/2SD4-MJN6>].

2004, 1.8 million claims authorizing \$4.6 billion in benefit payments have been paid out to Californian workers.⁴⁸

Third, California's program is specifically tailored to extend to more people.⁴⁹ Unlike the FMLA that only covers caring for one's immediate family, which is defined as a "spouse, child, or parent—but not a parent 'in-law,'" ⁵⁰ California's paid family leave provisions apply to not only the same categories of persons under the FMLA, but also extends to caring for one's "parent-in-law, grandparent, grandchild, or sibling."⁵¹ By taking different family structures and relationships into account, this expansion has likely contributed to the increase in both the number of claims that have been filed since the policy's enactment in general, as well as those filed by males.⁵²

In the years following the enactment of California's paid family leave program, a couple of other states—New Jersey and Rhode Island—followed suit and structured their own respective programs to closely parallel that of California.⁵³ Though these programs have been overwhelmingly successful and are a drastic upgrade from the FMLA, the enactment of New York's program made it clear that there is still room for both change to and improvement in these programs' provisions.

2. New York

As of 2016, New York is the most recent state to enact a paid family leave policy.⁵⁴ Though the program's benefits will not begin to phase in until 2018,⁵⁵ it is "the longest and most comprehensive" paid family leave policy in the United States.⁵⁶ New York's paid leave

48. PAID FAMILY LEAVE, *supra* note 38, at 2.

49. *See id.* at 1.

50. Family and Medical Leave Act of 1993, Pub. L. No. 103-3, § 2(b)(2), 107 Stat. 6 (1993); THE FAMILY AND MEDICAL LEAVE ACT, U.S. DEP'T OF LABOR, WAGE & HOUR DIV., <https://www.dol.gov/whd/regs/compliance/1421.htm> [<http://perma.cc/F8KN-SCRE>].

51. PAID FAMILY LEAVE, *supra* note 38, at 1.

52. Over the past ten years, "[t]here has been a 43.3[%] increase in [the number of] claims filed," and the number of "claims filed by males ha[s] increased by [over] 400[%]." *Id.* at 2.

53. *See* OVERVIEW OF PAID FAMILY & MEDICAL LEAVE LAWS IN THE UNITED STATES, A BETTER BALANCE 1, 3, <http://www.abetterbalance.org/wp-content/uploads/2017/08/CombinedPFMLChart-.pdf> [<http://perma.cc/D27G-TM5X>] (comparing and contrasting the paid maternity/family leave laws in effect by six U.S. states and the District of Columbia).

54. S.B. 6406, 239th Ann. Legis. Sess. (N.Y. 2016).

55. *Governor Cuomo Signs \$15 Minimum Wage Plan and 12 Week Paid Family Leave Policy into Law*, N.Y. STATE (Apr. 4, 2016), <https://www.governor.ny.gov/news/governor-cuomo-signs-15-minimum-wage-plan-and-12-week-paid-family-leave-policy-law> [<http://perma.cc/M5P3-QHB8>] [hereinafter *Governor Cuomo*].

56. *Id.*; *Programs: New York State Paid Family Leave*, N.Y. STATE, <https://www.ny.gov/programs/new-york-state-paid-family-leave> [<http://perma.cc/MTC2-FSNB>].

policy was drafted in direct response to the major shortcomings of the FMLA and to reflect the powerful examples that states with paid leave legislation have exemplified.⁵⁷ As *A Better Balance*⁵⁸ explains in its Paid Family Leave Report for 2015, because “workers [are consistently] see[ing] [paid family leave] as a necessary policy to keep their families stable and secure, . . . without jeopardizing their financial security, it is crucial that elected officials at the state and federal level introduce and pass paid family leave legislation.”⁵⁹

Again, because the FMLA does not cover at least forty percent of the current workforce,⁶⁰ New York’s paid family leave program is intended to fill the FMLA’s voids.⁶¹ Unlike the FMLA’s numerous strict eligibility requirements, in New York, employees are eligible for the state program’s benefits “after [only] having worked for their employer for six months.”⁶² In addition to providing greater numbers of employees with access to paid maternity leave, “compared to its progressive predecessors, New York’s [paid family leave] bill is startlingly robust.”⁶³ In terms of the length of leave alone, New York’s policy of twelve weeks doubles that of California and New Jersey, and triples what is offered by Rhode Island.⁶⁴ When fully implemented in 2021, New York’s program will provide not only twelve weeks of leave, but also up “to 67[%] of the statewide average weekly wage” during that leave period,⁶⁵ which is the highest benefit cap awarded by any state’s paid leave program.⁶⁶ Finally, because the “program will be funded entirely through a nominal payroll deduction [from] employees . . . it [will] cost[] businesses [of all sizes] nothing.”⁶⁷

As with the other states that have either implemented or are working towards implementing paid maternity and/or family leave

57. *Investing in Our Families*, *supra* note 1, at 4.

58. “A Better Balance is a national legal advocacy organization” that “promot[es] fairness in the workplace and [aims to] help[] workers meet the conflicting demands of work and family.” *Id.* at 2.

59. *Id.* at 4.

60. FMLA IS WORKING, *supra* note 11.

61. See *Investing in Our Families*, *supra* note 1, at 4.

62. *Governor Cuomo*, *supra* note 55.

63. Rebecca Traister, *New York Just Created a Revolutionary New Family-Leave Policy*, THE CUT (Apr. 1, 2016, 7:30 AM), <https://www.thecut.com/2016/03/new-york-revolutionary-family-leave-paid-time-off.html> [<http://perma.cc/VY4Q-JKRA>].

64. *Id.*

65. *Governor Cuomo*, *supra* note 55.

66. As of 2017, California awards fifty-five percent of one’s average weekly wage up to \$1,173 per week; New Jersey awards two-thirds of one’s average weekly wage up to \$633 per week; and Rhode Island awards approximately sixty percent of one’s average weekly wage up to \$833 per week. See OVERVIEW OF PAID FAMILY & MEDICAL LEAVE LAWS IN THE UNITED STATES, *supra* note 53, at 5–6.

67. *Governor Cuomo*, *supra* note 55.

programs, the general response in New York towards paid family leave legislation has been highly favorable.⁶⁸ In the years preceding New York's adoption of a paid leave program, widespread support for such legislation existed across both New Yorkers in general and women.⁶⁹ Though it is too early to know the exact outcomes of or what New York's policy will mean for the state and eligible employees, the path to enacting the legislation itself still serves as an example for other states. Namely, that when paid leave is highly favorable and becomes a priority for legislators, a progressive and comprehensive paid maternity leave program has the potential to become the norm in the United States.

Overall, across states individually and the nation as a whole, there is overwhelming support for paid maternity leave.⁷⁰ Furthermore, this support transcends across citizens' political affiliations and politicians themselves.⁷¹ Even businesses of all sizes and natures have widely supported or enacted their own program of paid maternity leave.⁷² All of these examples of far-reaching support for, and enactment of, paid maternity leave programs stress the inherent dissatisfaction the country has with its current federal provision, the FMLA.⁷³ This dissatisfaction, in turn, highlights the obvious need for a more expansive federal paid maternity leave program. The failings of the FMLA are increasingly being corrected at

68. See *Investing in Our Families*, *supra* note 1, at 4.

69. A 2009 statewide poll revealed that "76% favored or strongly favored extending New York's temporary disability insurance program to provide up to 12 weeks a year of paid family leave," and that "82% of New York state women favored or strongly favored [paid family leave]" legislation. *Id.* at 4–5.

70. Brigid Schulte, *Voters want paid leave, paid sick days, poll shows. Obama, too. Will Congress oblige?*, WASH. POST (Jan. 21, 2015), https://www.washingtonpost.com/news/local/wp/2015/01/21/voters-want-paid-leave-paid-sick-days-poll-shows-obama-too-will-congress-oblige/?utm_term=.877f7a1b7e5d [<http://perma.cc/ZBM3-JJ6S>].

71. A poll of likely 2016 voters, conducted by an advocacy organization focused on highlighting working families issues, reveals that "94[%] Democrats [sic], 80[%] of Independents and 65[%] of Republicans agree" that it is good for the United States to have workplace rules such as "paid time off to care for family members." *Id.*

72. See Alicia Adamczyk, *These Are the Companies With the Best Parental Leave Policies*, TIME (Nov. 4, 2015), <http://time.com/money/4098469/paid-parental-leave-google-amazon-apple-facebook> [<http://perma.cc/C6S8-QDWJ>] (identifying both tech-based companies, such as Microsoft, Facebook, and Google, and non-tech-based companies, like Goldman Sachs and Johnson & Johnson, as having strong paid parental leave policies); SMALL BUS. MAJORITY OPINION POLL: NEW YORK SMALL BUSINESSES SUPPORT FAMILY MEDICAL LEAVE, 4–5 (2013), <https://www.smallbusinessmajority.org/sites/default/files/research-reports/121213-Family-Medical-Leave-NY-poll-report.pdf> [<http://perma.cc/2YDM-C8DH>] (finding that nearly eighty percent of small business owners in New York already have some form parental leave, and that "75% of New York small businesses favor expanding the current system to provide paid leave" like other states have done).

73. See *Investing in Our Families*, *supra* note 1, at 4, 21.

the state level, and the success of these paid leave provisions at the state level have proven to be effective.⁷⁴ Thus, most concerns about broadening the FMLA should be abated. Even if current states' policies and their effectiveness continue to concern some, such skeptics simply need to look at the nearly two hundred other countries in the world with paid maternity or family leave programs. Many of these countries, just like states such as California, are doing just fine, if not better than before.⁷⁵

II. COMPARATIVE ANALYSIS—CANADA: A FOREIGN NATION'S PAID MATERNITY LEAVE PROVISIONS

Although a comparative analysis between numerous countries with paid maternity leave programs and the United States can be done at great length, this Note focuses on one country in particular: Canada. In addition to geographic proximity, the United States and Canada share numerous similarities that arguably bind the two countries together.⁷⁶ These similarities help to show the feasibility—and potential success—of a federal paid maternity leave program like Canada's being implemented in the United States.

While the International Labour Organization (ILO) has prioritized “child welfare and maternity protection . . . since its very inception in 1919,”⁷⁷ Canada did not enact a federal paid maternity

74. See Schulte, *supra* note 70.

75. See Christopher J. Ruhm, *Parental leave and child health*, 19 J. HEALTH ECON. 931, 936, 946, 953, 955 (2000) (determining that, through an analysis of aggregate data from sixteen European countries over twenty-five years, paid parental leave not only “ha[s] a substantial negative effect on infant mortality” and other “health risks during early childhood,” but also “may partially offset other types of government spending” like subsidizing health care); LINDA HOUSER & THOMAS P. VARTANIAN, RUTGERS CTR. FOR WOMEN & WORK, *PAY MATTERS: THE POSITIVE ECONOMIC IMPACTS OF PAID FAMILY LEAVE FOR FAMILIES, BUSINESSES AND THE PUBLIC* 6, 8, 9 (2012), <http://www.nationalpartnership.org/research-library/work-family/other/pay-matters.pdf> [<http://perma.cc/FQR2-LJM2>] (explaining their study's findings that women who take paid leave after the birth of a child report stronger labor force attachment by being “93% more likely to be working” nine to twelve months postpartum, and that both men and women report lower levels of receiving public assistance “in the year following [a] child's birth,” compared to those who did not take any leave).

76. Ed Grabb, *Comparing Canadians and Americans*, 1 THINKSOC. 4, 4 (2011), http://soci.sites.olt.ubc.ca/files/2013/02/spring_2011.pdf [<http://perma.cc/Z599-5FB2>] (suggesting that even despite “regular periods of both divergence and convergence,” Canada and the United States will always share “many cultural, political, and economic commonalities”). See also Basil Waugh, *Canadians and Americans are more similar than assumed*, UBC NEWS (July 7, 2011), <http://news.ubc.ca/2011/07/07/canadians-and-americans-are-more-similar-than-assumed/> [<http://perma.cc/5M3K-KTHR>].

77. INTERNATIONAL LABOUR ORGANIZATION, *supra* note 4, at 1.

leave program until 1971.⁷⁸ Nevertheless, Canada's program has been in effect for nearly fifty years and actually exceeds the ILO's standard of at least fourteen weeks of paid leave by providing up to fifty-two weeks of paid leave for both parents.⁷⁹

Much like California and other states that have implemented paid maternity leave programs, and unlike the FMLA, Canada's federal paid leave program is quite expansive.

First, the eligibility requirements are less rigid than those of the FMLA, and as a result, the program benefits more of Canada's workforce. Unlike the FMLA that unnecessarily restricts program eligibility based on stringent requirements, such as being employed by an employer with a set minimum number of employees, Canada's paid leave program adopts guidelines that are fairly easy to meet. In fact, the eligibility requirements in Canada closely match those of California.⁸⁰ To qualify for Employment Insurance (EI) maternity or parental benefits, an individual must (1) be "employed in insurable employment;" (2) "meet the specific criteria for receiving EI maternity or parental benefits;" (3) earn "normal weekly earnings [that] are reduced by more than 40%;" and (4) "accumulate[] at least 600 hours of insurable employment during the qualifying period."⁸¹ While some of these requirements seem rather vague, the government provides clear definitions and corresponding examples of what each eligibility element actually requires,⁸² which are anything but formidable compared to the FMLA's requirements. Perhaps the most intimidating eligibility requirement is the accumulation of at least 600 hours of insurable employment. Put another way, this simply requires that

78. Specifically, Canada began providing maternity benefits through its Unemployment Insurance (UI) program in 1971, and later also provided parental benefits under the same program beginning in the 1990s. Eileen Trzcinski & William T. Alpert, *Pregnancy and Parental Leave Benefits in the United States and Canada: Judicial Decisions and Legislation*, 29 J. HUM. RES. 535, 537-38 (1994).

79. Compare INTERNATIONAL LABOUR ORGANIZATION, *supra* note 4, at 2 (explaining that the most recent ILO standard for the duration of maternity leave "mandates a minimum leave period of 14 weeks"), with Employment Insurance Act, S.C. 1996, c 23 art 12(3)-(4) (Can.) (defining "[t]he maximum number of weeks for which benefits may be paid in a benefit period," specifically fifteen weeks for pregnancy and another thirty-five weeks for providing care for the newborn or adopted child/children).

80. This is rather unsurprising since both programs are funded through governmental insurance programs—namely through State Disability Insurance (SDI) in California, and Employment Insurance (EI) in Canada. PAID FAMILY LEAVE, *supra* note 38, at 1 (California); see GOV'T OF CAN., EMPLOYMENT INSURANCE MATERNITY AND PARENTAL BENEFITS, <https://www.canada.ca/en/employment-social-development/programs/ei/ei-list/reports/maternity-parental.html#h2.2> [<http://perma.cc/5UUG-ECQL>] (Canada).

81. GOV'T OF CAN., EI MATERNITY AND PARENTAL BENEFITS—ELIGIBILITY, <https://www.canada.ca/en/services/benefits/ei/ei-maternity-parental/eligibility.html> [<http://perma.cc/V8FM-L4UQ>].

82. *Id.*

an individual be employed in insurable employment for just less than four months.⁸³ Compared to the FMLA, which requires over twice as many hours—specifically, 1250—of service with an eligible employer,⁸⁴ Canada’s program’s minimum hour requirement is hardly demanding. Even the most fervent skeptics of Canada’s EI eligibility requirements should be persuaded by the ease with which potential beneficiaries meet the requirements. Whereas nearly half of the United States’ current workforce is ineligible for the FMLA’s sparse benefits,⁸⁵ in 2015, nearly seventy-six percent of all recent mothers⁸⁶ in Canada had insurable employment.⁸⁷ Even more convincing is the percentage of mothers who worked before the birth of their child(ren) who reported taking not only leave in general, but also paid leave. In 2012, *Statistics Canada* published a report indicating that “[a]mong children whose mothers were working before their birth, 90% of mothers reported having taken leave.”⁸⁸ The same report also indicated that eighty-three percent of women who worked before the birth of their child(ren) took paid leave.⁸⁹ With such overwhelming numbers of new parents taking paid leave, it is obvious that Canada’s EI eligibility requirements for maternity and parental benefits are meant to be easy to meet and, unlike the FMLA’s requirements, are not designed to restrict access to governmentally funded benefits.

Furthermore, since Canada’s program is not structured to apply to limited groups—such as only to mothers or even biological parents⁹⁰—there has been a remarkable increase in the amount of beneficiaries of paid parental leave. While the number of beneficiaries receiving maternity benefits has remained fairly consistent over time,⁹¹ the same cannot be said of the number receiving adoption or

83. This calculation assumes an average workweek of forty hours and each month consisting of four weeks.

84. Family and Medical Leave Act of 1993, Pub. L. No. 103-3, § 101(2), 107 Stat. 6 (1993).

85. FMLA IS WORKING, *supra* note 11.

86. Defined as “those with a child aged twelve months or less.” *Employment Insurance Coverage Survey, 2015*, STAT. CAN.: THE DAILY (Nov. 16, 2016, 8:30 AM), <http://www.statcan.gc.ca/daily-quotidien/161116/dq161116b-eng.pdf> [<http://perma.cc/XL4G-FFHS>].

87. *Id.*

88. LEANNE C. FINDLAY & DAFNA E. KOHEN, CANADIAN SOC. TRENDS, LEAVE PRACTICES OF PARENTS AFTER THE BIRTH OR ADOPTION OF YOUNG CHILDREN 1, 3 (2012), <http://www.statcan.gc.ca/pub/11-008-x/2012002/article/11697-eng.pdf> [<http://perma.cc/Y2QA-U9VG>].

89. *Id.*

90. EI maternity or parental benefits are payable to the following classifications of parents: “biological mothers, including surrogate[s]”; and “biological, adoptive, or legally recognized parents.” EI MATERNITY AND PARENTAL BENEFITS—ELIGIBILITY, *supra* note 81; GOV’T OF CAN., EI MATERNITY AND PARENTAL BENEFITS—OVERVIEW, <https://www.canada.ca/en/services/benefits/ei/ei-maternity-parental.html> [<http://perma.cc/GL7B-VDDX>].

91. Vincent Ferrao, *Paid Work*, 89-503-X WOMEN IN CAN.: A GENDER-BASED STAT. REP. 5, 31 (2010), <http://www.statcan.gc.ca/pub/89-503-x/2010001/article/11387-eng.pdf> [<http://perma.cc/8EBT-L7XN>].

parental benefits; the number of beneficiaries has skyrocketed.⁹² Although the amount of women receiving parental benefits has more than tripled, it is more notable to recognize that the amount of men receiving parental benefits is nearly eight times higher.⁹³

Second, the program's paid benefits, which almost directly parallel those of California's program, allow recipients to receive over half of their average weekly insurable earnings up to a set maximum amount.⁹⁴ Even though a maximum amount of \$543 CAD per week may seem rather low, especially considering the breadth of the program's provisions, it is important to remember that, unlike California's program, regional unemployment rates factor into the calculation of each worker's paid benefits in Canada.⁹⁵ These "regional unemployment rates . . . are seasonally adjusted . . . averages,"⁹⁶ which not only allows for appropriate variation in the amount of benefits a recipient will receive, but also enables the program to respond accordingly to changes in *local* economies. This type of narrow tailoring within an expansive program is unique in comparison to the blanket-like benefit structures seen in states like California. Though seemingly counterintuitive, it is simply equitable for a paid leave program to allow for providing different benefit amounts to program participants. Arguably, those living in a region with an exceptionally high unemployment rate should not receive the same amount of paid benefits as those living in a region with unusually low unemployment rates. Proportionately, people living in areas with high unemployment rates have less money to begin with than those in areas with low unemployment rates, and therefore need more money to provide the same level of care.⁹⁷ Canada's program also provides an

92. The overall number of beneficiaries receiving adoption benefits more than tripled between 1997 and 2009. As for parental benefits, the average number of monthly claimants almost quadrupled in the same time frame. *Id.*

93. *Id.*

94. In California, the paid leave program offers financial benefits amounting up to fifty-five percent of a worker's earnings with a maximum weekly benefit amount of \$1,173, while Canada's program also offers financial benefits of "55% of [a worker's] average insurable weekly earnings" with a maximum weekly benefit amount of \$543 CAD. See *Calculating Disability Insurance Benefit Payment Amounts*, ST. OF CAL. EMP. DEV. DEPT., http://www.edd.ca.gov/Disability/Calculating_DI_Benefit_Payment_Amounts.htm [<http://perma.cc/AS7F-VTER>]; GOV'T OF CAN., EI MATERNITY AND PARENTAL BENEFITS—HOW MUCH YOU COULD RECEIVE, <https://www.canada.ca/en/services/benefits/ei/ei-maternity-parental/benefit-amount.html> [<http://perma.cc/ME3Q-WU9H>].

95. EI MATERNITY AND PARENTAL BENEFITS—HOW MUCH YOU COULD RECEIVE, *supra* note 94.

96. GOV'T OF CAN., EI (EMPLOYMENT INSURANCE) PROGRAM CHARACTERISTICS FOR THE PERIOD OF AUGUST 06, 2017 TO SEPTEMBER 09, 2017, http://srv129.services.gc.ca/eiregions/eng/rates_cur.aspx [<http://perma.cc/BT2U-7NGG>].

97. See generally GOV'T OF CAN., VARIABLE BEST WEEKS FOR EMPLOYERS, <https://www.canada.ca/en/employment-social-development/programs/ei/ei-list/ei-roe/variable-best>

additional supplement—the “Family Supplement”—for families that have an exceptionally low net family income.⁹⁸ The Family Supplement drastically increases access to benefits by increasing a recipient’s benefit rate as high as eighty percent of his or her average insurable earnings instead of fifty-five percent (the standard benefit rate).⁹⁹ Thus, Canada’s program not only provides robust base benefits to all, but also offers additional benefits to those who are significantly more disadvantaged than others.

Third, the maximum allotted length of leave in Canada is nearly five times the length provided to eligible Americans under the FMLA.¹⁰⁰ Furthermore, the biggest, and perhaps the most important, difference between Canada’s paid leave program and both state and federal programs in the United States is that the length of leave applies solely to maternity and parental leave.¹⁰¹ Amazingly, rather than having to decide, as one must under the FMLA or in California, between caring for either a loved one who has a serious health condition or a new child, in Canada, most recipients can actually *combine* special benefits under the EI program structure.¹⁰² Within any given benefit period, most people can receive combined special benefits—such as maternity, parental, sickness and compassionate care—for up to fifty weeks.¹⁰³ In certain and undefined “special circumstances,” some people may qualify for *even more* than fifty weeks of combined EI special benefits too.¹⁰⁴ Finally, there are *other* types of benefits for sick or disabled people and their families that are available under other benefit programs such as the Canada Pension Plan.¹⁰⁵ Clearly, Canada is not hesitant to provide paid leave benefits for extended periods of time, which reflects not only on how the Canadian government views the importance of families caring for a new child, but also a broader value—that people should not have to

-weeks.html [<https://perma.cc/XG22-FS5V>] (explaining the change to use different best weeks in EI calculations based on the unemployment rate of that region).

98. EI MATERNITY AND PARENTAL BENEFITS—HOW MUCH YOU COULD RECEIVE, *supra* note 94.

99. *Id.*

100. The FMLA provides up to twelve weeks of leave whereas Canada’s paid leave program provides up to fifty-two weeks of leave. Family and Medical Leave Act of 1993, Pub. L. No. 103-3, § 102(a)(1), 107 Stat. 6 (1993); EI MATERNITY AND PARENTAL BENEFITS—HOW MUCH YOU COULD RECEIVE, *supra* note 94.

101. *Compare* § 102(a)(1) (allowing entitlement to leave for various enumerated reasons), *with* EI MATERNITY AND PARENTAL BENEFITS—HOW MUCH YOU COULD RECEIVE, *supra* note 94 (referring only to “maternity or parental benefits”).

102. GOV’T OF CAN., EMPLOYMENT INSURANCE SICKNESS BENEFITS, <https://www.canada.ca/en/employment-social-development/programs/ei/ei-list/reports/sickness.html> [<https://perma.cc/HFX2-C6PD>].

103. *Id.*

104. *Id.*

105. *Id.*

choose between caring for and supporting loved ones who both desperately need and depend on such care. Though it is unlikely that such a comprehensive paid leave program—just in terms of allotted leave time—will be adopted in the United States,¹⁰⁶ proponents of adopting a paid parental leave program should remain hopeful.¹⁰⁷

Fourth, Canada's federal paid leave program has evolved over time to match not only the needs of workers, but also society's changing conceptions of family and shifts in the economy.¹⁰⁸ Perhaps the program's flexibility in accounting for these types of changes is simply the result of Canada's liberal tendencies; however, it is important to note that in this regard, Canada is not the exception. Instead, it is one of many countries that take paternal leave into consideration within its broader paid leave program's framework.¹⁰⁹

Overall, the flexibility and robust nature of Canada's federal paid leave program has enabled the vast majority of the Canadian workforce to not only maintain their employment,¹¹⁰ but also spend adequate and meaningful time with their children.¹¹¹ As a result of

106. "Welfare" remains a charged and undesirable word within the American lexicon and, despite the reality that the current American welfare state is larger than most believe, myths that America is not a welfare state continue to be pervasive. See Irwin Garfinkel & Timothy Smeeding, *Welfare State Myths and Measurement*, 10 CAPITALISM & SOC'Y 1, 2 (2015).

107. Richard V. Reeves, *How much paid parental leave do Americans really want?*, BROOKINGS INST. (July 6, 2016), <https://www.brookings.edu/blog/social-mobility-memos/2016/07/06/how-much-paid-parental-leave-do-americans-really-want> [<http://perma.cc/5A9P-DFTW>] (revealing that while Democrats support at least four and a half months of paid family leave, across all major political parties, Americans are still supportive of at least three months of paid family leave).

108. See EI MATERNITY AND PARENTAL BENEFITS—ELIGIBILITY, *supra* note 81 (describing the eligibility guidelines for paid leave benefits using terms that are tailored to include all forms of new parents—biological, adoptive, surrogate, legally recognized—regardless of their sex); EI MATERNITY AND PARENTAL BENEFITS—HOW MUCH COULD YOU RECEIVE, *supra* note 94 (demonstrating the financial benefits a claimant may receive are capped at different rates that take factors such as regional rates of unemployment and yearly average weekly earning amounts into consideration).

109. Gretchen Livingston, *Among 41 nations, U.S. is the outlier when it comes to paid parental leave*, PEW RESEARCH CTR. (Sept. 26, 2016), <http://www.pewresearch.org/fact-tank/2016/09/26/u-s-lacks-mandated-paid-parental-leave> [<http://perma.cc/SN33-UPCK>] (noting that thirty-one of the forty-one countries represented in their data specifically earmark a portion of paid leave for fathers; while most of these countries reserve two weeks or less of paid leave for new dads, several countries mandate around two months of paid leave for fathers).

110. The employment rate of women who have children has increased over the past three decades; since 1976, the percentage of employed women with children—age zero until age sixteen—in Canada has nearly doubled. See Ferrao, *supra* note 91, at 9.

111. Despite continually increasing rates of employed women in the Canadian workforce, Canada has seen a fairly continuous upward trend in the number of births as well, which indicates that women are able to not only have children, but also maintain their involvement in the workforce. See *The surge of women in the workforce*, STAT. CAN., <http://www.statcan.gc.ca/pub/11-630-x/11-630-x2015009-eng.htm> [<http://perma.cc/7VRX-M7YN>] (noting that one of the most substantial changes in the Canadian labor market

more workers being able to maintain their employment despite having to take leave to care for their children, they have been able to not only benefit financially themselves, but also have a positive impact on the economy.¹¹² In fact, due in part to mothers joining the workforce, “Canada [has] led OECD nations in economic growth.”¹¹³ Furthermore, both workers and their employers are able to benefit without having to suffer from lost opportunity costs.¹¹⁴ Employees do not have to sacrifice starting or expanding their families in order to either have enough money to care for their child(ren) or a career to which they can return.¹¹⁵ Alternatively, while employers will temporarily “lose” an employee, statistics show that mothers not only return to the workforce,¹¹⁶ but also do so fairly quickly after receiving benefits while on leave.¹¹⁷ Additionally, within Statistics Canada’s longitudinal study, quit rates of returning mothers were consistently lower than those of other women.¹¹⁸

As with state level programs in California and New York, Canada’s federal program has proven that paid leave is not only a benefit that can easily be provided, but one that can also be provided

has been the participation of women); STAT. CAN., BIRTHS: 2009 13 (2009), <http://www.statcan.gc.ca/pub/84f0210x/84f0210x2009000-eng.pdf> [<https://perma.cc/Z6NY-8YHS>].

112. See Evridiki Tsounta, *Why Are Women Working So Much More in Canada? An International Perspective* 4 (Int’l Monetary Fund, Working Paper No. 06/92, 2006), <https://www.imf.org/external/pubs/ft/wp/2006/wp0692.pdf> [<http://perma.cc/BFP5-EMU2>] (determining that the rate of female labor participation in Canada is only short of the rate in Nordic countries, and this “performance has helped spur Canada’s remarkable growth performance since 1995”). Cf. Katrin Elborgh-Woytek et al., *Women, Work, and the Economy: Macroeconomic Gains from Gender Equity* 4–5 (Int’l Monetary Fund, Staff Discussion Note 13/10, 2013), <https://www.imf.org/external/pubs/ft/sdn/2013/sdn1310.pdf> [<http://perma.cc/3VAR-HLSK>] (identifying numerous significant macroeconomic gains when women are able to participate more fully in labor markets).

113. *Working women have kept Canadian economy strong, IMF says*, CBC NEWS (July 24, 2013, 2:11 PM), <http://www.cbc.ca/news/business/working-women-have-kept-canadian-economy-strong-imf-says-1.1390115> [<http://perma.cc/C3HU-Y9JT>].

114. See Xuelin Zhang, *Returning to the job after childbirth*, 8 PERSP. ON LAB. & INCOME 18, 18 (2007), <http://www.statcan.gc.ca/pub/75-001-x/75-001-x2007112-eng.pdf> [<http://perma.cc/PLW6-BWS6>] (noting that approximately ninety percent of mothers had begun working again within a year of their child’s birth).

115. See *id.*

116. Ferrao, *supra* note 91, at 9 (highlighting that nearly three-quarters of women with children under the age of sixteen were part of the employed workforce); Zhang, *supra* note 114 (noting that approximately ninety percent of new mothers returned to work within a year of giving birth); *Study: Employment patterns of families with children, 1976 to 2014*, STAT. CAN.: THE DAILY (June 24, 2015, 8:30 AM), <http://www.statcan.gc.ca/daily-quotidien/150624/dq150624a-eng.pdf> [<http://perma.cc/XD9B-ZLKT>] (finding that in 2014, sixty-nine percent of couple families with at least one child under sixteen years of age had *two working parents*) (emphasis added).

117. Zhang, *supra* note 114, at 13 (explaining that approximately “60% of new Canadian mothers returned to work within six months of giving birth,” and approximately “90% returned to work [within a] year”).

118. *Id.* at 20–21.

in a way that serves an employer's or business' interests without imposing heavy financial burdens.¹¹⁹

Taking everything—from the overwhelming similarities between Canada and the United States, to the feasibility, flexibility and resulting economic benefits of Canada's paid leave program—together, there is an even stronger case that expanding and making the FMLA more comprehensive can only serve to benefit the United States. By funding the benefits through a payroll deduction, a paid leave program will not adversely affect or burden either the nation's government or individual employers.¹²⁰ Access to and use of paid leave is proven to benefit both new parents and the economy long-term.¹²¹ With the failings of the FMLA increasingly being corrected at the state level through states adopting their own paid leave provisions (that are proving to be quite successful), and nearly two hundred other countries in the world with similar and successful programs—including a northern neighbor—it seems obvious that the United States, too, can modify the FMLA and reasonably adopt, support, and enforce a more far-reaching federal paid maternity leave program.

III. COST-BENEFIT ANALYSIS—HOW MUCH DOES THE LACK OF PAID MATERNITY LEAVE IN THE UNITED STATES OF AMERICA REALLY COST?

With multiple states and nearly two hundred other countries around the world having adopted some form of a paid maternity leave program,¹²² the benefits of such programs are proven to be tangible and striking. Studies, reports, and experience show that paid leave

119. Jasmine Budak, *The dark side of maternity leave*, CANADIAN BUS. (Sept. 8, 2011), <http://www.canadianbusiness.com/business-strategy/the-dark-side-of-maternity-leave> [<http://perma.cc/QQD5-Z9MH>] (noting that while for some employers, it may be in their interest to provide additional benefits to employees, “[b]eyond paying into EI, Canadian companies *front no direct parental leave costs unless they choose to offer top-ups over and above the [base] 55%*”) (emphasis added); Brooke Smith, *What to expect when your employee's expecting*, BENEFITS CAN. (Mar. 14, 2011), <http://www.benefitscanada.com/benefits/health-wellness/what-to-expect-when-your-employee's-expecting-14766> [<http://perma.cc/T3RF-HHKM>] (explaining that employers have several available options to help mitigate the costs of an employee going on maternity leave, including choosing not to replace the employee, dispersing the employee's duties to other employees or—with the employee's consent—allowing the employee to continue to be involved in the workplace somehow, whether through reduced hours or working from home).

120. See BARBARA GAULT ET AL., INST. FOR WOMEN'S POL'Y RES., PAID PARENTAL LEAVE IN THE UNITED STATES: WHAT THE DATA TELL US ABOUT ACCESS, USAGE, AND ECONOMIC AND HEALTH BENEFITS 2, 3 (2014), <https://iwpr.org/wp-content/uploads/wpallimport/files/iwpr-export/publications/B334-Paid%20Parental%20Leave%20in%20the%20United%20States.pdf> [<http://perma.cc/F9XM-H5WP>] (discussing state programs).

121. See *id.* at 14–15 (explaining economic benefits).

122. See INTERNATIONAL LABOUR ORGANIZATION, *supra* note 4, at 2.

provides economic benefits for employees and their employers, social benefits for families and workplace environments, and both short- and long-term health benefits for children and their parents.¹²³ Given that many of these benefits are intertwined, not only are the lives of beneficiaries enhanced, but the cost associated with doing so is also minimized.

A. *Economically*

Arguably, some of the largest concerns with adopting a federal paid maternity leave program are economically based.¹²⁴ Opponents typically cite the immense costs such programs create for employers and the stalling effect that leaving has on women's careers.¹²⁵ However, opponents fail to recognize all of the economic benefits of paid maternity leave; not only does it positively impact economic growth, but it also conclusively better current employment.¹²⁶

Paid maternity leave spurs economic growth through various ways. By giving women financial incentives to have children, they will not be forced to choose between working and being mothers. Instead, they can do both, which will not only increase fertility rates, but also ensure adequate replacement of workers in the labor force as the current population ages.¹²⁷

Women's labor force participation rates have steadily increased over the past seventy years; "following World War II, less than [one in three] women were in the labor force," while now, nearly three in five women participate.¹²⁸ When working women are positively encouraged to have children, and are not seen as a bad investment by their employers for wanting to be mothers,¹²⁹ expectations for continuing, if not increased, rates of female labor force participation should be met. Additionally, because the current fertility rate is slightly below two children per woman, as the current working population ages, there will not be enough people to replace them in the labor force two

123. GAULT ET AL., *supra* note 120, at 1.

124. See Abigail R. Hall, *Mandated Paid Maternity Leave: A Bad Idea For Women*, DAILY CALLER (June 16, 2015, 12:09 PM), <http://dailycaller.com/2015/06/16/mandated-paid-maternity-leave-a-bad-idea-for-women> [<http://perma.cc/RS3L-FNPY>].

125. *Id.*

126. See GAULT ET AL., *supra* note 120, at 1.

127. See *id.* at 12.

128. U.S. BUREAU OF LABOR STATISTICS, WOMEN IN THE LABOR FORCE: A DATABOOK 1 (2015), <https://www.bls.gov/opub/reports/womens-databook/archive/women-in-the-labor-force-a-databook-2015.pdf> [<http://perma.cc/H9DV-64L2>] [hereinafter WOMEN IN THE LABOR FORCE].

129. See Hall, *supra* note 124.

to three decades from now.¹³⁰ Without paid leave, women are indirectly discouraged from having children, and some expect that for this very reason, the fertility rate will continue to decline.¹³¹ By encouraging women to have children through financial support like paid leave, the national fertility rate can increase, which will inevitably help maintain overall labor force participation rates.¹³²

Paid maternity leave programs also positively impact current employment. Statistics already show that the labor force participation rate among women with children is higher than the national rate for all women.¹³³ In 2014, a staggering seventy-five percent of women with children aged six to seventeen were working.¹³⁴ These statistics prove that women are not inclined to stop working as soon as they have children, so providing them with financial benefits to take care of their children will not act as an incentive for them to leave the labor force completely after childbirth. In fact, paid maternity leave has been shown to increase the likelihood of women returning to work.¹³⁵ A study of the effects of California's paid leave program found that "[a]mong workers [with] low-quality jobs, . . . use of the [state paid leave] program [was] associated with a far greater likelihood of [workers] returning to the same employer after [the] leave" compared to those who did not take paid leave.¹³⁶ High worker retention not only reduces worker turnover, which can inhibit productivity, but it is also cost-effective for businesses.¹³⁷ In the same study of California's paid leave program, just under eighty-seven percent of surveyed employers reported that paid leave did not result in any increased costs.¹³⁸ Moreover, nearly ten percent of employers reported that the state paid leave program "generated cost *savings* for their organizations."¹³⁹ As aforementioned, paid leave reduces worker turnover, which saves employers money; however, by having a federally enforced paid leave program, employers themselves can further reduce or save costs because they no longer have to individually

130. Ryan Cooper, *Why America is about to start freaking out about babies*, THE WEEK (May 23, 2016), <http://theweek.com/articles/625705/why-america-about-startfreaking-about-babies> [<http://perma.cc/6QXH-RCVZ>].

131. *Id.*

132. *See id.*

133. WOMEN IN THE LABOR FORCE, *supra* note 128, at 1–2.

134. *Id.* at 2.

135. EILEEN APPELBAUM & RUTH MILKMAN, CTR. FOR ECON. & POLICY RESEARCH, LEAVES THAT PAY: EMPLOYER AND WORKER EXPERIENCES WITH PAID FAMILY LEAVE IN CALIFORNIA 25 (2011), <http://cepr.net/documents/publications/paid-family-leave-1-2011.pdf> [<http://perma.cc/367L-SETG>].

136. *Id.*

137. *Id.* at 8.

138. *Id.*

139. *Id.*

provide workers with paid leave benefits—it becomes solely the federal government’s responsibility.

Businesses and employers are not the lone beneficiaries of paid leave; employees benefit in spades too. Family income can remain steady while mothers are on leave through the paid benefits,¹⁴⁰ which not only reduces their need for other forms of government assistance like welfare, but also ensures families will have economic security. Increased job retention and lower turnover rates also provide employees with greater stability.¹⁴¹ Considering that nearly fifty-eight percent of married couple families have two income earners¹⁴² and “[m]others are the sole or primary breadwinner for . . . 40% of [American] households,”¹⁴³ both job stability and economic security are all the more important in today’s society.

B. Socially

Not only does paid maternity leave result in economic benefits for program beneficiaries and their employers, but it also leads to numerous social benefits.

First, paid maternity leave has a remarkable impact on any given workplace environment’s health through things like employee morale and loyalty.¹⁴⁴ The Harvard Business Review released a report that examined the impact that benefits, such as health insurance and financial security, have on businesses.¹⁴⁵ When asking the studied businesses about the extent to which the benefits they offer impact specific work environment factors, like employee loyalty and employee engagement, the businesses believed that benefits nearly always had significant or at least some impact.¹⁴⁶ In the states that currently have paid maternity leave programs, studies have resoundingly tied such programs to positive work environment characteristics.¹⁴⁷ In a study of over 250 California employers that participate

140. *See id.* at 3.

141. U.S. DEPT OF LABOR, DOL FACTSHEET: PAID FAMILY AND MEDICAL LEAVE (2015), <https://www.dol.gov/wb/paidleave/PDF/PaidLeave.pdf> [<http://perma.cc/L5Q7-T4HZ>].

142. WOMEN IN THE LABOR FORCE, *supra* note 128, at 85.

143. *Working Mothers in the U.S.*, U.S. DEPT OF LABOR, https://www.dol.gov/wb/Infographic_on_working_mothers.pdf [<http://perma.cc/8YV6-H3GA>].

144. HARVARD BUSINESS REVIEW ANALYTIC SERVICES, COMMITMENT TO THE FUTURE: 10 YEARS OF THE PRINCIPAL 10 BEST COMPANIES 1, 6 (2012), https://hbr.org/resources/pdfs/tools/17323_HBR_Principal_White%20Paper_webview.pdf [<http://perma.cc/WL6X-UTT7>].

145. *Id.* at 1–2.

146. Specifically, one hundred percent of businesses believed benefits had significant or some impact on employee loyalty, while ninety-four percent of businesses believed benefits had significant or some impact on employee engagement. *See id.* at 6.

147. *See* DOL FACTSHEET: PAID FAMILY AND MEDICAL LEAVE, *supra* note 141.

in the state's paid family leave program, nearly ninety percent reported that the program had either a positive effect or no noticeable effect on their business' productivity.¹⁴⁸ Of the same surveyed employers, virtually all (nearly ninety-nine percent) reported that, with respect to employee morale, the effect of paid leave was either positive or not noticeable.¹⁴⁹ Although this Note did not examine New Jersey's paid leave legislation, its program¹⁵⁰ closely matches that of California, and similar effects of the program were observed.¹⁵¹ Specifically, the employers' studies emphasized that paid leave not only reduced stress among employees, but also boosted the morale of both the employees taking leave and their coworkers.¹⁵² Employers recognize that when their companies support every employee in an unbiased way, employees feel encouraged, supported and appreciated, as opposed to feeling "put-upon."¹⁵³

Second, paid maternity leave helps to both reduce work-family conflict and promote better life balance.¹⁵⁴ A recent study shows that parents in the United States report being less happy than nonparents.¹⁵⁵ Furthermore, the same study reveals that even after examining comparative data of nearly two dozen other nations, the United States has not only "the largest happiness shortfall among parents compared to nonparents," but also a happiness gap that is significantly larger than equivalent countries worldwide.¹⁵⁶ In trying to determine the cause of this disparity, the researchers were astonished to discover that "[t]he negative effects of parenthood on happiness were *entirely* explained by the presence or absence of social policies allowing parents to better combine paid work with family obligations."¹⁵⁷ Even though the work-life balance problem in the United States affects families of all economic backgrounds, the problem is

148. APPELBAUM & MILKMAN, *supra* note 135, at 7.

149. *Id.* at 8.

150. See STATE OF N.J. DEP'T OF LABOR & WORKFORCE DIV., YOUR GUIDE TO FAMILY LEAVE INSURANCE IN NEW JERSEY (2013), https://lwd.state.nj.us/labor/forms_pdfs/tdi/WPR-119.pdf [<http://perma.cc/N9HY-6H44>].

151. SHARON LERNER & EILEEN APPELBAUM, CTR. FOR ECON. & POLICY RESEARCH, BUSINESS AS USUAL: NEW JERSEY EMPLOYERS' EXPERIENCES WITH FAMILY LEAVE INSURANCE 7–9, 30–31 (2014), <http://cepr.net/documents/nj-fli-2014-06.pdf> [<http://perma.cc/AL24-RXM6>].

152. *Id.* at 15–16.

153. *Id.* at 16.

154. See Jennifer Glass, *CCF BRIEF: Parenting & Happiness in 22 Countries*, COUNCIL ON CONTEMPORARY FAMILIES (June 15, 2016), <https://contemporaryfamilies.org/brief-parenting-happiness> [<http://perma.cc/27U2-QLC9>].

155. *Id.*

156. *Id.*

157. *Id.*

exacerbated for lower socio-economic classes.¹⁵⁸ For example, while high-income earning professionals struggle to achieve work-life balance because of demanding hours, the middle class is often “overlooked by government policies.”¹⁵⁹ Furthermore, the bottom third of American families that earn a median annual income of \$19,000 not only hold jobs that are unpredictable in terms of hours and wages, but are also underfunded by inadequate government programs.¹⁶⁰ The struggle for lower socio-economic classes becomes twofold: work-life balance is nearly impossible because of the nature of their work, and from the lack of suitable government paid family programs. By offering better familial support programs like paid maternity leave, parents across the income spectrum will be happier both at home and in the workplace because they will not be forced to choose one over the other, but rather have both. However, so long as the United States only has a federal maternity leave program where “[o]nly 12[%] of . . . private sector workers have access to paid family leave,”¹⁶¹ this highly problematic “happiness gap” will continue to persist.¹⁶²

Third, paid maternity leave may help to close certain observable wage gaps. As a general rule, data from the Bureau of Labor Statistics show that working mothers make less money than working women who do not have children.¹⁶³ However, women who receive “30 or more days of paid family leave [are] over 50[%] more likely [than those who receive no paid leave] to see [their] wages increase.”¹⁶⁴ Even though most economists believe that the gender wage gap stems mostly from women and men pursuing different career paths rather than employers simply paying women less for the same job, some argue that the constraints of motherhood—which can stem from the lack of paid leave—are the driving force behind such differences in career paths.¹⁶⁵ Generally, women are paid less and shoulder more

158. JOAN C. WILLIAMS & HEATHER BOUSHEY, CTR. FOR AM. PROGRESS, *THE THREE FACES OF WORK-FAMILY CONFLICT: THE POOR, THE PROFESSIONALS, AND THE MISSING MIDDLE*, ii, 3 (2010), <https://cdn.americanprogress.org/wp-content/uploads/issues/2010/01/pdf/threefaces.pdf> [<http://perma.cc/P3R2-8G7K>].

159. *Id.* at iii.

160. *Id.* at ii.

161. DOL FACTSHEET: PAID FAMILY AND MEDICAL LEAVE, *supra* note 141.

162. See Glass, *supra* note 154 regarding the “happiness gap.”

163. See Bryce Covert, *Children Hurt Women's Pay, Give Men's A Boost*, THINKPROGRESS (Nov. 27, 2013, 1:59 PM), <https://thinkprogress.org/children-hurt-womens-pay-give-men-s-a-boost-efaa432a7bd7> [<http://perma.cc/9QJZ-9GPS>].

164. Bryce Covert, *Women Get Less Paid Leave Than Men*, AM. WOMEN (Feb. 9, 2014), <https://www.americanwomen.org/news/women-get-less-paid-leave-than-men> [<http://perma.cc/TG48-7HXB>].

165. See Eduardo Porter, *Motherhood Still a Cause of Pay Inequality*, N.Y. TIMES (June 12, 2012), <http://www.nytimes.com/2012/06/13/business/economy/motherhood-still-a>

familial burdens than men;¹⁶⁶ this should serve to encourage, not discourage, programs that allow workers to accommodate both their work and family obligations, especially when paid leave is associated with higher levels of employee morale and productivity.¹⁶⁷

Fourth, those who have access to and use paid maternity leave may be less likely to be welfare recipients. Though some scholars argue that welfare is misused as a “pseudo-leave program,” other research shows quite the opposite.¹⁶⁸ According to the U.S. Department of Labor, in 2012, less than fifteen percent of employees who were either not paid or received partial pay while on leave went on public assistance.¹⁶⁹ Furthermore, in her study of nearly three hundred new mothers in Wisconsin who were welfare recipients, Marci Ybarra found that the overwhelming majority of the women not only were working prior to receiving welfare, but also returned to work quickly and remained employed rather than simply relying on welfare.¹⁷⁰ Additionally, notable percentages of these mothers who received cash welfare would have received *more* in the way of benefits from state paid leave programs—specifically, thirty-two percent in California, twenty-four percent in New Jersey and nearly half in Washington—further suggesting that new mothers are not exploiting welfare.¹⁷¹ Access to paid leave is the largest obstacle for many workers.¹⁷² More than half of poor workers, working welfare recipients, and workers who recently left welfare do not have access to paid leave.¹⁷³ Arguably, if these types of workers did actually have access to paid leave, they would be less inclined to lean on or even use welfare. In fact, “paid leave [has been shown to be] associated with [less] welfare spending [and a] reduce[d] . . . chance that a[ny given] family receiving welfare will increase its dependenc[y] on [welfare] following a child’s

-cause-of-pay-inequality.html [http://perma.cc/QA3U-CQM9]. *But see* Gretchen Livingston, *The link between parental leave and the gender pay gap*, PEW RESEARCH CTR. (Dec. 20, 2013), <http://www.pewresearch.org/fact-tank/2013/12/20/the-link-between-parental-leave-and-the-gender-pay-gap> [http://perma.cc/79PZ-C7N6] (finding conflicting results between paid leave and gender pay gaps. Though some countries with lower pay gaps offer a significantly shorter amount of paid leave, other countries with lengthy paid leave have some of the largest gender pay gaps).

166. Covert, *supra* note 163.

167. APPELBAUM & MILKMAN, *supra* note 135, at 7–8.

168. *See* Marci Ybarra, *Implications of Paid Family Leave for Welfare Participants*, 37 SOC. WORK RES. 375, 376, 385 (2013); ABT ASSOCIATES INC., *supra* note 20, at 104.

169. ABT ASSOCIATES INC., *supra* note 20, at 104.

170. Ybarra, *supra* note 168, at 381–82.

171. *Id.* at 385.

172. *See* KATHERIN ROSS PHILLIPS, URBAN INST., *GETTING TIME OFF: ACCESS TO LEAVE AMONG WORKING PARENTS 1* (2004), <http://www.urban.org/sites/default/files/publication/57606/310977-Getting-Time-Off.PDF> [http://perma.cc/87X4-8L6K].

173. *Id.*

birth.”¹⁷⁴ In New Jersey, a state with its own paid leave program, “[w]omen who return[ed] to work after [taking] paid leave [were] 39% [less likely to] receiv[e] public assistance and 40% [less likely to receive] food stamp[s] in the year following the[ir] child’s birth . . . compared to those who return[ed] to work [but took] no leave” (and received no paid leave benefits).¹⁷⁵ Thus, it can be concluded that paid leave not only helps families financially, but also enables them to be financially independent and less likely to rely on welfare.

C. Health

In addition to economic and social benefits, studies have consistently shown that paid leave is associated with both short-term and long-term health advantages.¹⁷⁶

In its 2014 publication summarizing research on paid leave, the Institute for Women’s Policy Research revealed that children benefit tremendously from their parent(s) taking leave.¹⁷⁷ Specifically, “both the likelihood and duration of breastfeeding increase,” which in turn increases the bonding between a child and his/her mother.¹⁷⁸ In fact, a study of those who took advantage of California’s paid leave program found that mothers breastfed *twice* as long as compared to mothers who did not take leave.¹⁷⁹ The increased bonding through breastfeeding can reduce various health problems, like obesity, Type 2 diabetes, asthma, and leukemia; “strengthen a child’s immune system”; and “stimulate positive neurological and psycho-social development.”¹⁸⁰ “National guarantees of lengthier paid matern[ity] leave [have been] associated with significantly lower neonatal mortality” rates too.¹⁸¹ A study of the relationship between paid maternity leave and child health outcomes in over 140 countries¹⁸² found that an increase of ten full-time-equivalent weeks of paid maternity leave

174. HOUSER & VARTANIAN, *supra* note 75, at 9.

175. *Id.* at 2.

176. See GAULT ET AL., *supra* note 120, at 14 for examples of benefits to the child.

177. *Id.* at 2.

178. *Id.* at 14.

179. *Id.*

180. *Id.*

181. Jody Heymann et al., *Creating and Using New Data Sources to Analyze the Relationship Between Social Policy and Global Health: The Case of Maternal Leave*, 126 PUB. HEALTH REPS. 127, 130 (2011), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3150137/pdf/phr126s30127.pdf> [<http://perma.cc/G3LK-LAH8>].

182. It is important to note that these rates were calculated after controlling for various factors, such as the countries’ total health-care expenditures in relation to GDP, GDP per capita, percentage of total health expenditures by the government, and female literacy rates. *Id.* at 129.

was associated with a ten percent lower neonatal and infant mortality rate, as well as a nine percent lower child mortality rate.¹⁸³ Further research has shown that children with college-educated and married mothers who were able to take maternity leave not only had substantially decreased infant mortality rates, but also increased birth weights and decreased premature births.¹⁸⁴

Furthermore, these health benefits—like increased bonding and improved development—resulting from paid leave are not exclusive to the child; they also impact parents.¹⁸⁵ Mothers are able to focus on postpartum care, including physical recovery, despite the United States' strange cultural lack thereof.¹⁸⁶ Paid maternity leave would relieve the “financial and personal pressure to get back to work very quickly, often within days or scant weeks after giving birth” that growing numbers of new, working mothers feel.¹⁸⁷ Additionally, multiple studies have proven that paid leave can deeply impact a mother's mental health.¹⁸⁸ A 2012 study revealed “that taking more than 12 weeks of maternity leave from work and taking more than 8 weeks of leave is associated with declines in depressive symptoms, a reduction in the likelihood of severe depression” and furthermore, that paid leave is associated with “an improvement in overall maternal health.”¹⁸⁹ These mental health benefits are not limited to just the time period following childbirth; a recent study's results provide convincing evidence that a longer period of fully paid maternity leave leads to a fourteen percent reduction in late life (defined as age fifty and older) depression scores.¹⁹⁰

183. *Id.* at 131.

184. Maya Rossin, *The effects of maternity leave on children's birth and infant health outcomes in the United States*, 30 J. HEALTH ECON. 221, 235 (2011).

185. Mauricio Avendano et al., *The Long-Run Effect of Maternity Leave Benefits on Mental Health: Evidence from European Countries* 5–6 (Netspar, Discussion Paper No. 05/2014-015, 2014), <http://arno.utv.nl/show.cgi?fid=133880> [<https://perma.cc/WQ8E-FE89>] (“[I]n the first postpartum year, an increase in leave duration is associated with a decrease in depressive symptoms until six months postpartum, and . . . the FMLA provisions may place mothers at risk for postpartum depression.”).

186. Hillary Brenhouse, *Why Are America's Postpartum Practices So Rough on New Mothers?*, DAILY BEAST (Aug. 15, 2013, 12:00 AM), <http://www.thedailybeast.com/why-are-americas-postpartum-practices-so-rough-on-new-mothers> [<https://perma.cc/WD6S-AYQW>] (noting “America insists mothers bounce immediately back after childbirth” even though “most other cultures allow for an extended period of pampering and rest”).

187. JoNel Aleccia, *Two weeks after baby? More new moms cut maternity leave short*, TODAY (Sept. 27, 2013, 4:49 AM), <https://www.today.com/health/two-weeks-after-baby-more-new-moms-cut-maternity-leave-4B11229443> [<https://perma.cc/7VC7-E7SK>].

188. Avendano et al., *supra* note 185, at 5–6, 15.

189. Pinka Chatterji & Sara Markowitz, *Family Leave After Childbirth and the Mental Health of New Mothers*, 15 J. MENTAL HEALTH POL'Y & ECON. 61, 73 (2012), http://i2.cdn.turner.com/cnn/2015/images/10/28/15-061_text.pdf [<https://perma.cc/8RHS-5HJT>].

190. Avendano et al., *supra* note 185, at 1, 4.

Taken together, there is strong support to suggest that both employers and employees not only recognize but also reap the benefits of paid maternity leave. These benefits—like the future of national economic growth, better work-life balance, and enriched physical and mental health—are not meager. While it does cost money to fund a paid leave program, the cost of doing so is not high enough to sacrifice the program's potential and guaranteed benefits.

IV. THE UNITED STATES OF AMERICA'S POTENTIAL NEXT STEPS—A MORE COMPREHENSIVE PAID MATERNITY LEAVE PROGRAM

In considering the limited scope of the FMLA, the success of both state initiated and foreign paid leave programs, and the burgeoning benefits resulting from paid leave, the best course for the United States of America to take regarding paid maternity leave is to adopt a federal program that is broader in scope and application than the FMLA. Adopting this type of federal paid maternity leave program is not only practical given domestic and foreign support, but also superficially beneficial because it will provide consistency across all states. Perhaps most importantly, a more comprehensive federal paid maternity leave program will help to abate the disenfranchisement and disparate impact on various groups the FMLA has unfortunately created.¹⁹¹

A. Superficial Benefits: Consistency Is Key

Simply adopting a more comprehensive federal paid maternity leave program is in and of itself beneficial for at least two reasons: across the board application and wide application. Practically speaking, a federal paid leave program will allow for consistency and eliminate any confusion as to what the law is across all fifty states. People living in states with their own paid leave programs, like California and New Jersey, will not have to learn two separate laws and decipher whether and how they can use both programs. Alternatively, people in states lacking their own paid leave program will not feel unfairly disadvantaged simply because of where they live. Embracing a national paid leave program does not mean that states cannot implement their own paid leave program structure(s); instead, it serves as a baseline from which states can expand, and develop more

191. See Jennifer Ludden, *FMLA Not Really Working For Many Employees*, NPR (Feb 5, 2013, 3:24 AM), <http://www.npr.org/2013/02/05/171078451/fmla-not-really-working-for-many-employees> [<https://perma.cc/9HA2-GZLN>].

efficient and cost-effective ways to ensure the program's success in the future.

Arguably, the FMLA's largest problem is accessibility. When a measly twelve percent of private sector workers have access to paid leave¹⁹² and nearly half of the entire workforce is ineligible,¹⁹³ it is clear that the program's diffusion to the American public is deficient. By adopting a more inclusive and sweeping federal paid leave program, current accessibility issues will subside, and allow for more women and families within the country to benefit not only health wise, but also economically and socially.¹⁹⁴ Changing the FMLA's eligibility requirements from its current arbitrary and strict standards—like being employed by an employer that employs fifty people and working within seventy-five miles of the work site¹⁹⁵—to more reasonable and attainable ones as seen in California¹⁹⁶ or Canada¹⁹⁷ will still ensure fairness, but also cut back on the unnecessary hoops people have to jump through to receive benefits. While paid leave benefits should not be given freely to anyone, other existing paid leave program structures demonstrate there are more efficient ways to regulate eligibility that still allow for more widespread accessibility than the FMLA currently permits.¹⁹⁸

B. Practicability: Domestic and International Support

The practicability of adopting not only a paid maternity leave program, but also one that is broader and more encompassing than the FMLA, is not as encumbering as skeptics believe. A collective mind-set supporting a more comprehensive paid leave program is steadily growing.¹⁹⁹ Non-profit organizations continue to advocate their pro-paid leave policies,²⁰⁰ while the general public has more recently begun

192. DOL FACTSHEET: PAID FAMILY AND MEDICAL LEAVE, *supra* note 141.

193. FMLA IS WORKING, *supra* note 11.

194. *See infra* Part II.

195. Family and Medical Leave Act of 1993, Pub. L. No. 103-3, § 101(2)(B)(ii), 107 Stat. 6 (1993).

196. *See infra* Section I.B.1.

197. *See infra* Part II.

198. *See* MONT. BUDGET & POLICY CTR., PAID LEAVE IN FOUR STATES: LESSONS FOR MONTANA POLICY MAKERS AND ADVOCATES 1, 3 (2015), <http://www.montanabudget.org/wp-content/uploads/2015/09/paid-leave-report-2-FINAL.pdf> [<http://perma.cc/L5H4-2VTQ>].

199. Reuters, *New Poll Shows Strong Support for Paid Family Leave Programs*, *FORTUNE* (May 20, 2016), <http://fortune.com/2016/05/20/new-poll-paid-family-leave-programs> [<https://perma.cc/LKR2-C4JR>] (citing to a recent poll where “72 percent [of respondents] support paid family leave”).

200. Organizations like the *National Partnership for Women & Families* have promoted policies that advance the interests of women and families for nearly fifty years. *See Our Impact*, NAT'L P'SHIP FOR WOMEN & FAMILIES, <http://www.nationalpartnership.org/our-impact> [<https://perma.cc/35NA-MMVV>].

expressing its support.²⁰¹ Even politicians on both sides of the aisle support paid leave; while Democrats support at least four and a half months of paid family leave, across all major political parties, Americans are still supportive of almost four months of paid family leave.²⁰² Moreover, legislators have repeatedly recognized that the aims of the FMLA remain paramount decades after its enactment, but expanding accessibility and introducing financial benefits can improve the program itself.²⁰³ This more accepting collective attitude, along with society's continued desire to have children²⁰⁴ suggests that a program like this is needed. The need for paid maternity leave is made more salient by the fact that finances and the economy are perceived as the main reason couples do not have more children.²⁰⁵

Nearly hundreds of other countries adopting some form of a paid leave program²⁰⁶ also suggests international support remains fervent. Furthermore, the maintenance and continued enforcement of such program further demonstrates that prioritizing families and their financial security is not completely uneconomical.²⁰⁷

With international and state-level programs as living examples, the necessary framework to implement a paid leave program is anything but clandestine. Simply put: the wheel does not have to be re-invented; a federal paid leave program can be based off, or even be a pure copy, of any existing program. There is a lot of flexibility in how the federal program can be structured, from the fixed level of cash benefits to how the benefits will be funded.²⁰⁸ Furthermore, the infrastructure needed to enforce a successful paid leave program already exists at the federal level. The FMLA, though ineffective and limited in its current application, can simply be modified to include a provision for paid benefits.

201. See Reuters, *supra* note 199 (citing to a recent poll where seventy-two percent of respondents supported paid family leave).

202. Reeves, *supra* note 107.

203. See 149 CONG. REC. S1,966 (daily ed. Feb. 5, 2003) (statement of Sen. Sarbanes) (arguing that “[Congress] should look at ways to make this very successful program available to more American workers” and “focus on ways in which [Congress] can make improvements to the program”); 159 CONG. REC. S465 (daily ed. Feb. 4, 2013) (statement of Sen. Harkin) (noting that even though the FMLA has been transformative for society, “[i]t is also time to look ahead to additional ways [Congress] can support families and allow them to stay strong, mutually supportive, and economically secure”).

204. Frank Newport & Joy Wilke, *Desire for Children Still Norm in U.S.*, GALLUP (Sept. 25, 2013), <http://www.gallup.com/poll/164618/desire-children-norm.aspx> [<https://perma.cc/6DZP-EC6U>].

205. *Id.*

206. INTERNATIONAL LABOUR ORGANIZATION, *supra* note 4.

207. See COUNCIL OF ECON. ADVISORS, EXEC. OFFICE OF THE PRESIDENT, THE ECONOMICS OF PAID AND UNPAID LEAVE 2, 17–18 (2014), https://obamawhitehouse.archives.gov/sites/default/files/docs/leave_report_final.pdf [<https://perma.cc/99B4-JSBW>].

208. INTERNATIONAL LABOUR ORGANIZATION, *supra* note 4, at 3.

C. Constitutionality/Anti-Discrimination Violation: Current Federal Paid Maternity Leave Laws Disenfranchise and Have a Disparate Impact Across Various Demographics

Perhaps one of the FMLA's most disconcerting flaws is that its provisions disenfranchise certain people within society: those who wish to have children, but literally cannot afford to do so.²⁰⁹ Statistics and studies consistently show that the absence of a federal paid maternity program disparately impacts various demographics too; specifically, Hispanic people with lower education attainment and lower-paying jobs.²¹⁰

Although being a parent is not a fundamental right, child rearing is fundamental to society and its continuation, especially when the national birthrate is well under replacement level.²¹¹ While choosing to have a child is indeed a choice, the lack of a federal guaranteed paid maternity leave program disenfranchises certain people from having that choice. Specifically, single parents and individuals with low incomes are stripped of their choice to procreate.²¹² Absent guaranteed federal paid leave, they simply cannot afford to have a child.²¹³ Again, due to the FMLA's arbitrary and strict eligibility requirements, many lower-income-earning workers are ineligible to receive even unpaid leave.²¹⁴ Assuming that low-income earners are eligible for the FMLA's twelve weeks of unpaid leave, a new dilemma arises; the Catch-22 of whether to take the leave and care for the child and have no income for three months, or continue working immediately following childbirth to have money to care for the child but having no time to provide such care.²¹⁵ Sadly, many parents are forced into this predicament. One such set of parents, Krystal Weston and Jamal Mustafa, "didn't take the decision lightly."²¹⁶ Choosing "between economic hardship and returning to work prematurely"

209. See Newport & Wilke, *supra* note 204.

210. COUNCIL OF ECON. ADVISERS, *supra* note 207, at 11–14.

211. Cooper, *supra* note 130.

212. Cf. Newport & Wilke, *supra* note 204 (reporting survey results demonstrating economics plays a role in whether individuals have children).

213. See PHILLIPS, *supra* note 172, at 1.

214. HELENE JORGENSEN & EILEEN APPELBAUM, CTR. FOR ECON. & POLICY RESEARCH, EXPANDING FEDERAL FAMILY AND MEDICAL LEAVE COVERAGE: WHO BENEFITS FROM CHANGES IN ELIGIBILITY REQUIREMENTS? 5–6 (2014), <http://cepr.net/documents/fmla-eligibility-2014-01.pdf> [<https://perma.cc/3WHN-PDA5>].

215. COUNCIL OF ECON. ADVISERS, *supra* note 207, at 14.

216. Rachel Gillett, *I didn't feel appreciated'—inside the 'backwards' reality of taking unpaid maternity leave in America*, BUS. INSIDER (June 20, 2015, 8:00 AM), <http://www.businessinsider.com/the-reality-of-unpaid-maternity-leave-in-america-2015-6> [<https://perma.cc/T7QS-XEFZ>].

has drastic implications, but adopting a federal paid leave program would eliminate the quandary.²¹⁷

Arguably, not everyone can or wants to have a child, but having a federal paid maternity leave program is not inherently unfair to those who hold such values and views. There are several federal and/or government programs to which people already contribute financially that they may never use. In Canada, a portion—six and one half cents—of every tax dollar is allocated to Employment Insurance, a federal program that provides both financial benefits to eligible unemployed workers and programs that assist people with preparing for, finding and maintaining jobs.²¹⁸ Similarly, in the United States, one-tenth of the federal budget (in 2015) supported safety net programs, other than health insurance or Social Security, like food stamps and low-income housing.²¹⁹ The fact that not everyone who contributed financially to these programs will personally benefit from them does not make their mandatory contribution fundamentally unjust. We live in a society that values helping those in need, and using social programs as a means to achieve that end is well-established. Furthermore, the actual individual financial contribution to a program like paid maternity leave is extremely low.²²⁰ In New Jersey, where the paid leave program is entirely funded by worker payroll deductions, it costs individual employees less than a dollar a week to finance the program.²²¹ Correspondingly, for these reasons, financing a federal paid leave program through taxes or a blanket payroll deduction is not fundamentally unfair.

Though the United States has yet to specifically extend its federal leave program to men/fathers,²²² and has made the FMLA arguably women/mother-centered,²²³ for countries that do enforce or support

217. *Id.*

218. CAN. DEPT OF FIN., WHERE YOUR TAX DOLLAR GOES, http://www.fin.gc.ca/taxdollar06/text/html/taxdollar06_-eng.asp [<https://perma.cc/NZF2-FW43>].

219. CTR. ON BUDGET & POLICY PRIORITIES, POLICY BASICS: WHERE DO OUR FEDERAL TAX DOLLARS GO? 1, 2 (Oct. 4, 2017), <https://www.cbpp.org/sites/default/files/atoms/files/4-14-08tax.pdf> [<http://perma.cc/RCD2-8GP9>].

220. See Memorandum from Maria T. Vullo, Superintendent of Financial Services, to New York State Department of Financial Services on the Decision on Premium Rate for Family Leave Benefits and Maximum Employee Contribution for Coverage Beginning January 1, 2018 2 (June 1, 2017), http://www.dfs.ny.gov/insurance/r_other/dec_prem_rate_flb_06012017.pdf [<https://perma.cc/ERF5-AJNL>].

221. Dory Devlin, *What would it cost to have mandatory, paid parental leave?*, FORTUNE (Feb. 5, 2015), <http://fortune.com/2015/02/05/paid-parental-leave-costs> [<https://perma.cc/C6GW-WVEY>].

222. The FMLA's language appears to be generalized enough as to remain gender neutral throughout. See Family and Medical Leave Act of 1993, Pub. L. No. 103-3, 107 Stat. 6 (1993).

223. Interestingly, the FMLA explicitly notes that “due to the nature of the roles of men and women in our society, the primary responsibility for family caretaking often falls on

paid paternity/parental leave programs, the argument that paid maternity leave is not necessary since being pregnant is a biological or a natural difference between genders is removed.²²⁴ Simply, paid paternity leave programs ensure equal protection with respect to gender and are not inherently unfair either.

While it can be argued that the intention was never to have the FMLA disparately impact certain groups, in practice, the FMLA remains inherently discriminatory. Not only are “[l]ow-income workers . . . less likely to meet [the FMLA’s] eligibility requirements,”²²⁵ but they are also the most likely to suffer from the lack of paid leave benefits.²²⁶ Their suffering is not limited to just financial hardship; the health of their children is more likely to suffer too.²²⁷ Medical scholarship has not only suggested, but has also found that because the FMLA reaches different mothers disparately due to its strict eligibility requirements, it is implied that the “FMLA may have increased disparities in early childhood health between children from different socio-economic backgrounds.”²²⁸

CONCLUSION: BOTH THE FUTURE OF AND GOING BEYOND PAID MATERNITY LEAVE

With nearly every country in the world having some form of guaranteed paid maternity leave,²²⁹ except the United States of America, it is time for the FMLA to expand—to become more comprehensive both in its accessibility and delivery of financial benefits. State initiated paid leave programs suggest not only a dissatisfaction with current federal provisions, but also a mounting desire for a more expansive program. The success of state-run paid leave programs, and those seen in other countries, demonstrate and provide a blueprint for various feasible ways the federal government can structure its own federal paid leave program. The economic, social, and health benefits resulting from paid leave are too vital to either ignore or forego, and perhaps most importantly, adopting a federal paid maternity leave program that is broader in scope and application than the FMLA will cease the FMLA’s current disenfranchisement of low-income workers. Under a comprehensive paid leave program, they

women, and such responsibility affects the working lives of women more than it affects the working lives of men.” *Id.* § 2(a)(5).

224. See INTERNATIONAL LABOUR ORGANIZATION, *supra* note 4, at 3, 51, 60.

225. PHILLIPS, *supra* note 172, at 2.

226. *Id.* at 1, 3, 6.

227. Rossin, *supra* note 184, at 235.

228. *Id.*

229. INTERNATIONAL LABOUR ORGANIZATION, *supra* note 4, at 2.

will finally be given the ability to truly choose if they want to have children, and how to utilize both their temporal and financial benefits. Selecting more reasonable and equitable eligibility requirements will enable greater access to the program's benefits without facilitating increased free-riding issues by which skeptics seem so troubled.²³⁰

All of the foregoing reasons and existing frameworks provide bolstering support for not only the importance of having a paid leave program available to mothers, but also eventually broadening that program in other ways too, such as extending paid leave to fathers. As with mothers, fathers deserve time off to bond with their children, too. Paid paternity leave provisions are becoming increasingly more common and reflect a modern attitude of what fatherhood is worldwide.²³¹ Several countries already provide fathers with paid leave for twice or three times the length of leave currently offered by the FMLA.²³²

The future of paid parental leave—whether just paid maternity or also eventually paid paternity leave—is incredibly bright and promising. The desirability and feasibility of adopting a paid maternity leave program alone should be enough to persuade the federal government to reconsider expanding the FMLA. If not, it may be time for the American government to reassess what it considers family values to be, because as Bernie Sanders advocates, “separat[ing] [a mom] from her baby, . . . because [she] does not have sufficient income [to stay at home] . . . is *not* a family value, [it] is the opposite.”²³³

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230. JORGENSEN & APPELBAUM, *supra* note 214, at 7, 9–10 (concluding that, if changes to the FMLA's eligibility requirements were made, greater access to its benefits would result).

231. INTERNATIONAL LABOUR ORGANIZATION, *supra* note 4, at 6–8.

232. Megan Holohan, *The problem with parental leave in the US and how other policies compare*, TODAY (Nov. 20, 2015, 9:47 AM), <https://www.today.com/health/problem-parental-leave-u-s-t38701> [<https://perma.cc/S2SU-ARYF>] (noting that “[fathers] in France enjoy 28 weeks of paid [paternity leave],” while those in Japan and Korea receive over 52 weeks of paid leave).

233. Bernie Sanders, *Paid Family & Medical Leave*, YOUTUBE (Jan. 8, 2016), <https://www.youtube.com/watch?v=vqDsQDh1EIE> [<https://perma.cc/8HEY-BFL8>] (emphasis added).

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