

# Don't Leave U.S. Behind: Problems With the Existing Family and Medical Leave Act, and Alternatives to Help Enhance the Employee Work - Family Relationship in the 21st Century

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## Abstract

This article examines the pace at which Federal and State legislation were implemented to provide working parents and caregivers the ability to take time off for the birth or adoption of a child, to care for the elderly, sick or disabled family members, and others in need of care. Compared with many industrialized nations, the United States ranks alongside the least generous countries in terms of providing a balanced lifestyle between work and family life. For instance, the United States does not even provide national paid family leave. This article provides the history, purpose, and scope of the Family and Medical Leave Act, and later implementations of State programs. Furthermore, this article will present a brief survey of the paternal, maternal, and parental leave policies of other countries and will provide suggestions for changing existing federal policies to provide a more conducive family and work balance for employees.

## Keywords

paid leave, family policies, employment law

## Introduction

Current U.S. policies surrounding the needs of an employee's right to care for his or her family are inadequate. American families and workplaces are not only diverse by race, gender, or overall makeup but are also varied in the way they treat and plan for the care of a child, an elderly person, or a sick family member. However, no single national family policy measure unequivocally aims at reducing female career interruptions and increasing men's involvement in the childrearing or elderly care domains. The Family and Medical Leave Act of 1993 (FMLA), and almost every state law counterpart provides unpaid leave for a finite time, but half of American workers are either ineligible to take family leave or cannot afford it (Ajinka, 2013). Only four states, California, New Jersey, District of Columbia, and Rhode Island have implemented a form of paid family leave. Although women are entering the workforce in greater numbers and many are key income earners in their household (Selmi & Cahn, 2006), they are entering workplaces that continue to reinforce the male-breadwinner/female-homemaker family model because of continued societal constructs. The unintended consequences heavily impact women, children, and low-income

families as well as any employee with caregiver responsibilities. For the majority of employees living in other states, the rising childcare and eldercare costs present families with difficult choices.

The United States continues to lag behind many industrialized and developing nations in the degree to which they provide protection for the employee with caregiving responsibilities. The United States remains the only industrialized nation that does not provide a national paid leave for family caregiving (Eichner, 2010). State and Federal law govern policies surrounding parental work leave for taking time off to care for a newborn child, adoption, or an ailing family member. The only statutory protections granted by federal law for families are the FMLA, the Pregnancy Discrimination Act of 1978 ("PDA"), and the Fair Labor Standards Act as amended in 2010 which includes a provision to support a break time for nursing mothers.

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The FMLA was signed into law to promote work–life balance for American workers. It grants covered employees the right to take 12 weeks of unpaid leave within a span of a 12-month period to care for oneself, a child, spouse, or parent. Most importantly, FMLA guarantees the right to return to one’s job following the leave. Other than caring for one’s child following birth or adoption, the only way to request leave for oneself, a spouse, or parent is to determine whether the ailment is defined as a serious illness under the FMLA statute. As a result, ongoing care such as for the common cold or injury may not apply.

Under the PDA, employees cannot be fired, denied a promotion, demoted, or forced to stop working because they are or might become pregnant. Moreover, employers cannot refuse to hire someone because she may become pregnant. However, unlike the FMLA, the PDA does not require employers to grant any leave time for pregnant women and does not guarantee job protection. The only protection mothers have falls under the Fair Labor Standards Act which provides nursing mothers the right to take a reasonable break to express milk at work (U.S. Department of Labor Wage and Hour Division, 2010).

It is clear from recent media coverage that many Americans still find this promised work–life balance to be unattainable. On one hand, there seems to be a growing number of men and women who have once “opted out” of the paid labor market to care for children, on the other hand, commentators urge working women to “lean in” and secure job protection before raising a family (Sandberg, 2013). Existing family policies do not assist workers faced with the choice of either opting out or leaning in. As women have moved into the workplace in the last decade, gender barriers in the workforce have rarely changed. Despite the passage of the Lilly Ledbetter Fair Pay Act, which allows individuals subjected to unlawful pay discrimination to assert their rights under federal anti-discrimination laws, American job structures have largely remained premised on a model that assumes at least one caregiver stays at home, namely, the breadwinner (also known as the homemaker family model; Barzilay, 2012). Today, with the economy struggling to improve, policies such as paid sick days and paid family leave are more important than ever. Especially during these difficult economic times, losing a job takes a toll on employees and their families and adds demands on an already strained market while indirectly affecting employers who prioritize cost containment over employee quality and retention (Selmi & Cahn, 2006). A change is adamant for America to achieve equality in the workplace, and to improve family life. Women should not be forced to turn down their workplace roles to achieve a work–life balance.

This article is about the needs of workers to have job protection and compensation in the event of a crisis at home. This article will discuss the FMLA, how the FMLA reinforces gender inequality, and how the FMLA is ultimately inadequate in helping employees care for their family members in times of need. Then, it will demonstrate that the current FMLA is inferior to certain states’ progressive legislation, and

the progressive legislation of other nations. Finally, this article will offer changes to existing federal legislation to provide a better work–family lifestyle for employees.

## The Rising Cost of Childcare and Eldercare

American employees are entering the workforce while the costs of caring for children and elderly continue to rise. Parents of children under 18 years of age and families with elders in need of care are devoting a greater percentage of their income to provide support. Studies show that those who do not pay a hefty amount for childcare or eldercare have a higher risk of unsteady employment and workplace absenteeism because they need to take care of their family members (Matthews, 2006). Over the past decades, both women and men are working longer hours outside of the home. Women are either working full-time jobs or juggling multiple part-time positions to make ends meet. Accordingly, the demands to keep up with male counterparts in all types of industries illustrate that women are increasingly becoming key income earners in their home and leaving very little recourse to change that pace (Selmi & Cahn, 2006). Although most families are affected by the costs of care, low-income families are likely to have fewer resources to reconcile the consequences of balancing the demands and costs of care.

Although the U.S. Government provides subsidies for childcare, through HeadStart and Temporary Assistance for Needy Families, the cost of such programs do not meet the overwhelming demands of the population. Consequently, some states have implemented a cap on the amount of subsidies it will offer low-income families. For example, states offer certificates or vouchers that allow families to purchase care from any provider that meets state regulations and licensing standards (Kimmel & Hoffman, 2002). Despite this benefit, the main goals for family leave and childcare policies are to help low-to-middle income families become more self-sufficient, and limit the demand that requires cash-assistance welfare programs (Franke, 2001).

### *Caring for Elders*

Eldercare is a growing national concern. Eldercare addresses such diverse needs as preparing meals, assisting with personal hygiene, providing medical care, transportation, shopping, housekeeping, making appointments, managing financial affairs, and offering companionship (Pearce & Kuhn, 2009). Although protecting parents’ ability to take leave for pregnancy or child health remains an important aspect of FMLA, eldercare is an issue that has received little attention in legislation since 1993. Although the FMLA provides that “an eligible employee shall be entitled to . . . leave . . . [i]n order to care for the spouse, or son, daughter, or parent, of the employee,” the plain language of the statute provides little guidance on the meaning of the phrase “to care

for.” As a result, management, employers, and courts look to the U.S. Department of Labor’s FMLA Regulations for guidance.

The U.S. Department of Labor (2014) regulations discuss what it means for an employee to be needed to care for a family member:

(a) The medical certification provision that an employee is “needed to care for” a family member or covered servicemember encompasses both physical and psychological care. It includes situations where, for example, because of a serious health condition, the family member is unable to care for his or her own basic medical, hygienic, or nutritional needs or safety, or is unable to transport himself or herself to the doctor. The term also includes providing psychological comfort and reassurance, which would be beneficial to a child, spouse, or parent with a serious health condition who is receiving in-patient or home care.

(b) The term also includes situations where the employee may be needed to substitute for others who normally care for a family member or covered servicemember, or to make arrangements for changes in care, such as transfer to a nursing home. (p. 823)

The emergence of eldercare is tied both to the advancement in medical science that enables people with health problems to live longer, and to the growing percentage of the American elder population. Currently, nearly 20% of those above the age of 65 need help with the basic activities of daily living. Similarly, it is projected that by 2050 up to 20% of the American population will be above the age of 65 (Congressional Budget Office, 2013).

Due to this increase in the elder population, many families are also under pressure to meet the needs of eldercare while also meeting the demands of their respective careers. The majority of elders live in general population, assisted not in homes or facilities, with family members providing the majority of their care (Span, 2013). Only 5% of U.S. elders are institutionalized, and of those 5%, 90% are disabled elders in nursing homes, but receive informal care from relatives and friends. Many of the formal facilities such as assisted living and nursing homes provide inadequate, costly facilities and eldercare (Span, 2013).

American families do not all proceed with eldercare in the same way. For example, as a result of decades of immigration, many intergenerational transnational family members living in the United States are continuously navigating between the notions of eldercare described in the FMLA, and their own cultural understandings of caring for elders. Family members across generations reconstruct “rules of reciprocity” to facilitate the application of ethnic traditions regarding aging and geriatric care in the context of family separation and dislocation (Sun, 2012).

In an ethnographic study on Taiwanese immigrants in the United States, Ken C. Sun (2012) writes, “Given that Taiwanese immigrants cannot provide hands-on physical

care for their elderly parents halfway around the world, both these immigrants and their parents in Taiwan place more emphasis on the emotional dimension of filial piety” (p. 1253). Consequently, families of immigrants may equate visiting as a form of care. Employers that emphasize demanding hours and erratic shifts as the norm, such as in the hospitals and factories, may require employees to limit their care to visiting time with their elders.

### *Childcare and the Costs Associated*

Maternity leave is also an important issue for Americans. The issue of paid leave for family care or childbirth is one that is almost equally favorable to republicans, democrats, and independents alike (Deng, 2014). Studies have shown that parents with reliable childcare are better able to get and maintain jobs and are able to work longer hours and earn more money (National Women’s Law Center, 2013). Although childcare affects most families economically, low-income families spend a larger portion of income on childcare (Dinan, 2009).

When both parents work outside the home, it is imperative that other arrangements are made for childcare. Many working parents choose professional childcare centers, but they are often unaffordable. High-quality private centers charge US\$20 to US\$50 per day (or US\$300 to US\$1,000 per month; Cox, 2013). The average monthly income for a family making less than US\$1,500 per month was US\$938 in 2010, accounting for 49.5% of which was spent on childcare (Glynn, 2012). Similarly, existing federal tax policies, such as the Child and Dependent Care Tax Credit, most likely benefit middle-income families, instead of the low-income families (Tax Policy Center, 2010). For all working parents, they would need to arrange childcare in order to return to work at a reasonable time after childbirth or adoption. As a result, seeking institutional day care may create setbacks such as waiting lists or other requirements. Paid family leave may assist families to offset costs for childrearing and childcare.

### **FMLA and the Need for Family-Friendly Workplaces**

On February 5, 1993, President William J. Clinton signed the FMLA into law to provide job protection for certain employees faced with serious illnesses, and/or caregiving responsibilities. The FMLA entitles certain covered employees to take 12 weeks of job-protected, unpaid leave for the birth of a son or daughter, the adoption of a child, or placing a child in foster care; to care for a spouse, son, daughter, or parent with a serious health condition; and to care for one’s own serious health condition when the condition interferes with the employee’s ability to perform at work. An employee is guaranteed their previous position or a similar one when returning to work.

Although the FMLA was signed into law as a victory for gender-neutral policy (Bhushan, 2012), the work–family lifestyle has changed immensely since the 20 years that the FMLA was passed. Americans quickly learned that the 12 weeks of unpaid leave that FMLA provides is not always enough to care for their loved ones (Silbaugh, 2004). Even among families with two parents, who each work full-time, the demand to create schedules that fit their needs or meet income levels that cover costs have proven very difficult. Inadequate child support and other income transfers are often economically insufficient for single parents with full-time careers (Dowd, 2004). As women are more likely to leave the workplace to have and care for children, as well as take care of an ailing parent, they continue to be disadvantaged in the workplace (Ali, 2009). One quarter of the best employers for working mothers provide 4 or fewer weeks of maternity leave, and half provide 6 weeks or less. Even the highest grossing companies do not provide adequate leave for working mothers (Lovell, O’Neill, & Olsen, 2007).

The numerous setbacks to family-friendly policies begin with how the FMLA is implemented against the pervasive normative family values considered in U.S. Federal policies affecting the family. The beginning of normative pro-family values crept into public discourse when President Ronald Reagan signed Executive Order 12606 in 1987. Executive Order 12606 called for the Executive Branch to consider the following questions “in formulative and implementing policies and regulations” of the federal government:

- (a) [d]oes this action by government strengthen or erode the stability of the family and, particularly, the marital commitment?
- (b) [d]oes this action strengthen or erode the authority and rights of parents in the education, nurture, and supervision of their children?
- (c) [d]oes this action help the family perform its functions, or does it substitute governmental activity for the function?
- (d) [d]oes this action by government increase or decrease family earnings?

As a result of Executive Order 12606, the Federal Government has crafted its policies and regulations with the idea of normative family values in mind. However, Executive Order 12606 in fact ignores the concerns of the family. Senator Walter Mondale (1973) stated, “[t]o envision a single family model or a single way to raise children would do great damage to the pluralism and diversity that makes our country strong.”

The implications of the FMLA are not far from reinforcing the traditional family values of the Reagan administration that discouraged women from entering the workforce by reinforcing stereotypical gender roles within the home and marketplace (Maril, 2013). The FMLA reinforces the

antiquated family view that men are breadwinners, and women can take unpaid leave because their income is not as essential to the family’s livelihood. Although the FMLA does not explicitly state the likely gender of the employee that will request leave, the eligibility requirements and the nature of caregiving in society often reflect the notion that women are most likely to request FMLA leave if they are eligible (Williams & Segal, 2003).

The structure of the FMLA assumes that women are more financially and culturally available to take unpaid leave (Ali, 2009). To be eligible for FMLA leave, an employee must be employed with the same employer for at least 12 months and must have worked at least 1,250 hr in the prior year. In addition, an employer must have at least 50 employees to be covered. If there are multiple worksites, employees within a 75-mile radius are included in the total count. In 1996, 65.5 million workers were ineligible and 47.3 million employees were ineligible because their employer had less than 50 employees. The remaining 18.3 million employees were ineligible because they failed to meet the required number of months or hours (U.S. Department of Labor, 1996). As a result, almost half of all full-time workers in the United States have no job-protected leave (Boushey, Farrell, & Schmitt, 2013). Opponents of the FMLA have argued that unpaid leave and eligibility restrictions undervalue because FMLA assumes that women can afford to take leave because their incomes are not as essential (Ali, 2009).

On November 17, 2008, the U.S. Department of Labor published revised regulations that removed an employee’s ability to use accrued paid leave as a substitute for FMLA leave (U.S. Department of Labor, 2008). Previously, the language in the FMLA specified that an employee may elect, or an employer may require the employee, to substitute any of the accrued paid vacation leave, personal leave, or family leave of the employee for leave provided under the Act. Although critics have argued that the interpretation of the regulation allowing substitution created incentives for employees not to work, the overwhelming response from employees and the general public illustrated that the substitution only further disadvantaged employees who are in workplaces without paid leave benefits. Opponents of the 2008 amendments have argued that the ability to substitute accrued vacation or personal leave for paid FMLA leave is useless if employees have to comply with their employers’ policies, such as documentation and notice requirements. This procedural hurdle in using accrued vacation or personal leave requires employees to bid for vacation time up to a year in advance.

### State Programs as Models for National Reform

The FMLA sets the minimum requirements that must be complied with, but allows state laws to provide greater

**Table I.** U.S. Federal Leave Law Versus State Laws.

Federal law: FMLA				
Weeks of Leave		Paid		Unpaid
12				✓
The federal FMLA allows a worker to take leave to care for a new child or to care for a parent, a spouse, or a child under the age of 18 (or older if the child qualifies as a person with a disability) with a serious health condition. In 2008, the FMLA was amended to allow for 26 weeks of leave for military family members caring for wounded servicemembers. For this military family expansion, the definition of “family” has been increased to include next of kin. However, the leave remains unpaid.				
State laws				
State	Weeks of leave	Paid	Unpaid	Comments
California	6	✓		55% wage replacement caring for a child, parent, spouse, domestic partner (includes same-sex spouses).
New Jersey	6	✓		67% wage replacement, caring for child, parent, spouse, domestic partner or civil union partner with serious health condition
District of Columbia	1	✓		Only employers with 50 or more employees
Connecticut	1	✓		Care or self-care for physical disability, domestic violence victims, or sexual assault
Washington	5	✓		Provides additional leave for domestic violence and pregnancy complications
Rhode Island	4	✓		Includes stepparents and parents-in-law
Other States	0		✓	

Source. Family Caregiver Alliance, National Center on Caregiving (2012), National Partnership for Women & Families (2012c).  
 Note. FMLA = Family and Medical Leave Act.

protection for employees. The absence of paid leave has impaired the ability of the FMLA to further its goals of helping employees balance the demands of the workplace with the needs of their families. Therefore, several states, such as California, New Jersey, Washington, and Rhode Island, have implemented or proposed some form of paid leave legislation.

Regulations that affect workers and families often begin at the state level. Although the Federal Government plays a main role in regulating the relationships among workers, employers, and unions, state governments have the power to establish greater protections because states have the ability to set labor policies in both the public and private sector as long as the policies do not interfere with established Federal laws and regulations (Collins, 2014). In addition, state laws regarding fault and no fault divorce had an impact on whether families stay together (Ellman, Kurtz, Scott, Weithorn, & Bix, 2004). Because family leave policies affect children and often affect marriages, the care that children receive from family members is intertwined with state policies. The stability and continuity of an employee’s job affects stress levels in the home, the quality of caregiving and the employee’s productivity at work.

Four states have implemented paid family leave policies that draw their funds from state disability insurance funds, payroll, and other wage replacement models. The states with fully implemented policies are California, New Jersey, Connecticut, and Rhode Island. There are ongoing efforts to implement a form of paid family leave in Washington State. These states can serve as models for federal legislation. Furthermore, some states have responded to the FMLA’s strict eligibility requirements and have passed legislation that covers employers with less than 50 employees and provided job-protected paid sick leave. See Table 1 which provides an overview of states that have implemented a form of paid leave in comparison to existing Federal Law.

***The Moore-Roberti California Family Rights Act (CFRA)***

Before the FMLA was passed in 1993, California enacted the Moore-Roberti CFRA which provided similar protections to the current FMLA. The state was ahead of the game again in 2002, when it became the first state to adopt a wage replacement requirement for parents to bond with a newborn or adopted child. Governor Gray Davis signed Senate Bill 1661

that put forth the comprehensive paid family leave program that uses State Disability Insurance as its funding source. California employees are afforded the right to 6 weeks of partially paid family leave to care for a newborn, an adoptive child, or a seriously ill family member regardless of the size of the employer. Payout is equivalent to 55% of wages funded by a mandatory employee payroll tax, which funds up to US\$882 per week. (Mesirow Financial, 2007). It provides the financial benefit for families that require that paid time off. However, an employee's job may be protected if the employer is subject to the federal FMLA. As a result, the plan is an addition to the paid protection for the employees who would be otherwise eligible for unpaid family leave. In addition, California provides school-related parental leave, which allows up to 40 hr per year, but no more than 8 hr per month to participate in children's educational activities. Unlike the FMLA, the California paid family leave allows employees to care for a domestic partner, stepparent, or the child of a domestic partner. Although California's workable wage replacement system is efficient and effective, it also has some disadvantages. The California Paid Family Leave provides wage replacement during leave, but does not provide job protection during the leaves or the right to return to the same position after leave (Cohen, 2011).

### *The New Jersey Family Leave Act (NJFLA) and Family Leave Insurance*

In 2009, New Jersey enacted a similar program to California called the NJFLA in which employees may be eligible to pay a capped amount into their temporary disability insurance for up to two thirds of their income. The New Jersey program covers up to 6 weeks of family leave. To establish a valid family leave claim, an individual must have employment with a New Jersey covered employer and earn a certain amount of wages. To be covered an employee must earn either US\$145 or more per week during 20 calendar weeks in the base year or US\$7,300 or more during the base year (New Jersey Department of Labor and Workforce Development, 2014). An individual can claim Family Leave Insurance benefits to bond with a newborn child during the first 12 months after the child's birth or after the child's placement in adoption cases (New Jersey Department of Labor and Workforce Development, 2014).

The Family Leave Insurance plan allows an employee, the employee's spouse, domestic partner, or partner in civil union to be the biological parent of the child. The New Jersey Division on Civil Rights enforces the NJFLA, which requires covered employers to grant eligible employees time off from work in connection with the birth or adoption of a child or the serious illness of a parent, child, or spouse (New Jersey Department of Labor and Workforce Development, 2014). The NJFLA's definition of "parent" encompasses stepparents and parent in laws. The NJFLA differs from the FMLA in

that it covers employee leave for 12 weeks in a 24-month period. Coverage may be paid, unpaid, or a combination. The NJFLA does not allow an employee to use leave time for his or her own medical condition, but one can use the protections under the FMLA for those purposes if the employee is eligible. The NJFLA also applies to companies with 50 or more employees nationwide, instead of within a 75-mile radius in the FMLA. According to the New Jersey Department of Labor and Workforce Development, between July 2009 and March 2012, New Jersey's paid family leave program was used more than 60,000 times by parents caring for new children (National Partnership for Women & Families, 2012b). However, similar to the California program, New Jersey does not offer job protection to workers who take paid family leave under the state's programs. This leaves with the possibility of not being able to return to their jobs. As a result, there may be an increased risk of job loss for individuals who end up taking paid leave.

### *Rhode Island Paid Family Leave*

On July 24, 2013, Governor Lincoln Chafee of Rhode Island signed into law a bill effective January 2014, that provides working families with income when they have a new child or need to care for a seriously ill family member. Rhode Island's program, known as The Temporary Caregiver Insurance Program is financed by an employee payroll deductions that will provide 4 weeks of paid leave for family care needs, which goes into the employee's temporary disability insurance. Unlike the California paid leave plan, Rhode Island provides an employee who takes under this program to return to their position with equivalent seniority, status, benefits, and pay.

Employees will be able to collect benefits for "any week in which he or she is unable to perform his or her regular and customary work" due to bonding with a newborn child or adopted child or caring for a child, parent, parent-in-law, grandparent, spouse, or domestic partner who has a serious health condition. The Temporary Caregiver Insurance law defines "serious health condition" as "any illness, injury, impairment, or physical or mental condition that involves inpatient care in a hospital, hospice, residential health care facility, or continued treatment or continuing supervision by a licensed health care provider." To receive temporary disability insurance benefits, employees must both file an application with the Department of Labor and Training and provide their employer with written notice of their intent to take a leave of absence for at least 30 days prior to leave. An employee's failure to provide notice may delay or reduce benefits, unless the leave was unforeseeable. In 2014, the Rhode Island Department of Labor and Training issued the form of the notice. Rhode Island also allows parental leave for up to 10 hr annually to participate in children's educational activities.

### Washington State's Family Care Act

In 2007, Washington State passed the Family Care Act which will provide parents with weekly paid leave benefits for up to 5 weeks in the event of childbirth, adoption, or to care for a seriously ill domestic partner, spouse, or parent. This program is similar to the FMLA in the way it defines "employer" and "covered employees." Unlike the California, New Jersey, or Rhode Island plans, the lawmakers still have not decided how they will finance the program, and thus, it has not been fully implemented (Richard, 2013).

Washington's approach to paid leave would be to provide a flat rate of US\$250 a week. However, Washington does not have a temporary disability insurance program to build from. Proponents for the plan argue that a payroll tax may be an appropriate funding mechanism. An employer is not required to provide employment benefits while an employee is on leave, but there are certain important exceptions. Benefits like vacation time, sick leave, and retirement benefits generally do not continue to accrue during an employee's leave. However, an employer cannot deny or eliminate employment benefits that had already accrued before the employee took FMLA leave.

### Connecticut FMLA (CT FMLA) and Job-Protected Leave Policies

Connecticut has implemented the CT FMLA, a state law that is similar to the Federal FMLA, but contains greater protections. Employees who qualify for the CT FMLA are entitled to 16 weeks of job-protected leave, in a span of 24 months, rather than 12 weeks. The CT FMLA requires employers with 75 or more employees to provide job-protected leave (Georgetown University Law Center, 2010). In 2012, Governor Malloy passed legislation that allows employees who work in public jobs in Connecticut to earn paid sick leave that can be used toward caring for a seriously ill child or spouse or even his own illnesses or health conditions. The law enables pregnant women to use paid sick leave to seek prenatal or postnatal care. In addition, the law states that a service worker shall be entitled to the use of accrued paid sick leave upon the completion of the service worker's 680th hr of employment. However, a service worker is not entitled to the use of accrued paid sick if the employee did not work an average of 10 or more hours a week for the employer in the most recent calendar year. The CT FMLA law even allows the employee to use paid sick leave if he or she is a victim of family violence or sexual assault.

### Massachusetts Maternity Leave

The Commonwealth of Massachusetts provides greater leave relating to pregnant employees regardless of marital status. The law applies to employers with six or more workers. According to the law, every full-time female employee is

entitled to at least 8 weeks of maternity leave if she complies with the following conditions:

- a. she has completed an initial probationary period set by her employer which does not exceed 6 months or in the event the employer does not utilize a probationary period for the position in question has been employed for at least 3 consecutive months and;
- b. employee gives 2 weeks' notice of her expected departure date and notice that employee intends to return to the job.

Unlike the FMLA, the 3 months tenure makes it easier for women to start new jobs and still get job protection upon maternity leave.

Although Massachusetts is considered generally to be a progressive state with progressive social policies, the drafters of this bill left much to be desired. One aspect missing is the Massachusetts Leave Act does not apply to male employees. The Act was recently amended to provide leave for adoptive mothers but not to male counterparts. In addition, Massachusetts Maternity Leave can count simultaneously as FMLA leave. However, employers cannot require employees to use accrued time off such as vacation, sick, and personal days during a maternity leave. Maternity leave under the Massachusetts Act is available "at the time of birth or adoption," but not "substantially earlier or substantially later." As a result, time off due to pregnancy-related complications or illness would not count against an employee's 8-week maternity leave entitlement.

California, Rhode Island, and New Jersey are the only states that provide paid family leave insurance for employees who require time off for caregiving (Bravo, 2013). According to the National Partnership for Women and Families' *Dads Expect Better* article, other states such as Washington, Oregon, and Maine have expanded access to unpaid, job-protected leave beyond the FMLA (National Partnership for Women & Families, 2012a). Finally, According to the National Partnership for Women and Families' website on *Current Sick Day Laws*, Connecticut, Washington, and D.C. are the only jurisdictions that guarantee the right to earn paid sick leave (National Partnership for Women & Families, 2014). As the data show, an employee's access to better work-life conditions to meet the needs of his or her family depends upon where that employee lives in the United States. Consequently, there is an inequity with regard to family leave access within the United States.

### Advanced Work/Family Policies in Other Countries

As many studies have shown, work-life balance policies in the United States is inadequate compared with the rest of the world. According to the National Partnerships for Women and Families in their *Expecting Better* Report, 178 countries

**Table 2.** Family Leave Policies, United States Versus Sampling of 2014 G20 Countries.

Country	Paternity leave	Maternity leave	Parental leave/family leave	More protections
United States	12 weeks, unpaid	12 weeks, unpaid	12 weeks, unpaid	Depends on the state
Argentina	2 days, paid leave	90 days, 100% paid maternity leave	10 days paid leave for parents	—
Australia	2 weeks, leave paid at national minimum wage	18 weeks, paid	18 weeks, paid	Paid at the national minimum wage (includes same-sex partners)
Canada	—	18 weeks, 50% paid leave	37 weeks, 50% paid	Funded by employer and federal/state employment insurance program
France	2 weeks, 100% paid	16 weeks, 100% paid	3 years, varies	Parents are entitled to leave or to work part-time until child is 3 years old Leave to care for seriously ill or disabled family member depends on circumstances
Japan	—	14 weeks, 60% paid	Parental Leave 1 year, 30% paid Family Leave 3 months, 40% paid	Returning job privileges allowed after parental leave
Korea	5 days, paid	12 weeks, 70% paid	—	30 days remaining % of income
Mexico	5 days, paid by employer	12 weeks, paid	—	Government and employer funded
Russia	—	16 weeks, paid	—	Paid by social insurance fund
Saudi Arabia	1 day, unpaid	10 weeks, 50% paid	—	—
South Africa	3 days, unpaid	12 weeks, unpaid	—	—

Source: International Labour Organization (2012).

guarantee paid leave to women in connection with childbirth and about 54 guarantee paid paternity leave (National Partnership for Women & Families, 2012b). Europeans and Asians have the most generous paid leave laws.

### *Maternity Leave Benefits Outside of the United States*

Many countries outside of the United States have interest in making sure families with childcare responsibilities are financially sound. In 2010, the International Labor Organization; (ILO, 2012) conducted Convention No. 183, which reviewed maternity leave policies of ILO member states and determined that out of 167 countries, 97% provide money to women during maternity leave. According to Article 6 of the Convention, cash benefits shall be provided, in accordance with national laws and regulations, or in any other manner consistent with national practice, to women who are absent from work on leave. Article 6 further provides the following:

Cash benefits shall be at a level, which ensures that the woman can maintain herself and her child in proper conditions of health and with a suitable standard of living. Where practicable, and after consultation with the representative organizations of employers and workers, the cash benefits to which a woman is entitled during leave should be raised to the full amount of the woman's previous earnings or of such of those earnings as are taken into account for the purpose of computing benefits.

The ILO suggests that paid benefits to parents with maternity or paternity leave should be equivalent to at least two thirds of their earnings for a minimum of 14 weeks (ILO, 2012). In the report, the United States, Lesotho, Papua New Guinea, and Swaziland were the only countries without a general legal provision of cash benefits for maternity leave (ILO, 2012). See Table 2 for a summary of family leave policies in some G20 countries in 2014.

To finance maternity leave, countries develop an insurance pool from social security, employer liability, or a mix of both. Social security systems include health or unemployment insurance, and public funds, derived from municipalities, states, or governments. These systems use contributions from a combination of employees, employers, and government revenues to create an insurance pool to finance maternity leave. Financing maternity benefits through social security systems is the most common approach among Latin American countries. The length of leave is the most common gap of the three provisions in this region. Although many Latin American countries provide 100% of prior earnings, 14 countries fall short of the 14-week standard in Convention No. 183. Five countries in South America provide less than 14 weeks of leave and pay less than two thirds of prior earnings (ILO, 2012).

Similar to the provisions in the FMLA with regard to employee eligibility, many countries exclude domestic workers and highly compensated executives from their cash benefits and maternity leave programs. South Africa is an

exception; they provide cash benefits and maternity leave to its domestic workers, agricultural workers, and casual/temporary workers (ILO, 2012). To provide optimal maternity protection, more countries should seek to include all the aspects of Convention No. 183 in their legislation for their citizens.

### **Parental Leave**

Due to the effects of globalization on the workforce in the United States, paid leave is critical to consider for the country to compete for the top qualified workers. In many countries, there is a growing consideration for both men and women to take parental leave. Women receive a guaranteed 16 weeks of paid maternity leave. In Spain, mothers can take 16 weeks of paid maternity leave, and have the option to transfer 10 weeks leave to the father (Gornick, Ray, & Schmitt, 2009). In Sweden, mothers receive 16 weeks of maternity leave, parents combined can take a total of 18 months for parental leave. In Norway, maternal leave is compensated for up to 42 weeks, and the United Kingdom provides at least 5 weeks of paid leave (Clearinghouse on International Developments in Child, Youth, and Family Policies, 2003). In France, parents may share 156 weeks of paid leave (3 years of leave; Clearinghouse on International Developments in Child, Youth, and Family Policies, 2003). The paid benefits are set at a flat rate of the equivalent to US\$462 per month for second and subsequent children. In Germany, parents are allowed 14 weeks of paid leave and they can be paid during part-time employment for 30 hr per week. (Clearinghouse on International Developments in Child, Youth, and Family Policies, 2003). Parents in Canada can share 35 weeks of paid parental leave (combined maternity of 15 weeks and cannot exceed 50 weeks (Government of Canada, 2014). Further, places such as South Korea, Indonesia, and Russia have implemented full pay for a span of 84 to 140 days of parental leave (Hall & Spurlock, 2013).

### **Proposals for Change**

Discussions surrounding paid family leave have been in the works among many legislators and research organizations. One of the ways to achieve better workplace conditions for Americans and superior social policies that encourage the health and wellbeing of family relationships is to provide quality childcare and eldercare that is affordable in addition to the cash benefits that have been proposed the ILO and some states. Legislation needs to be created to expand paid leave to all employees and executives. Below are some suggestions that have been proposed by legislators and professionals.

#### ***The Family Act, 2013***

In 2013, Senator Kirsten Gillibrand of New York and Representative Rosa DeLauro of Connecticut sponsored

proposed legislation known as the Family and Medical Insurance Leave Act—"Family Act"—which will provide a funding mechanism for the FMLA (Gillibrand, 2013). The bill will create a national insurance collection to provide partial income for up to 12 weeks of leave for an employee's pregnancy, recovery from childbirth, care for a child, parent, spouse, domestic partner, or one's own serious health condition. The insurance program would be administered through a newly created office called the Office of Paid Family and Medical Leave, within the Social Security Administration. Unlike the FMLA, this program will cover workers regardless of their employer size. As a result, it recognizes that more than half the population works for a small business and that these workers should be entitled to receive leave to care for their families just like employees of large businesses (Gillibrand, 2013). This program would be funded through employee and employer payroll taxes which would cost approximately US\$1.50 per week for the average employee (National Partnership for Women & Families, 2013). Benefit levels, modeled after existing successful state programs in New Jersey and California, would equal 66% of an individual's typical monthly wages up to a capped monthly amount that would be indexed for inflation (Gillibrand, 2013). Although the Family Act is a proposed legislation, it has the potential to implement paid family leave in the United States.

#### ***Social Security Cares Act***

Heather Boushey of the Center for American Progress established a proposal for Social Security reform to provide paid family leave insurance known as Social Security Cares. This program is similar in the way social security benefits are given to an employer who pays into the program using his or her wages and salary (O'Leary, Chayt, & Weissman, 2012). Social Security Cares will be an insurance program run by each state in which benefits will supplement family income sufficiently to allow workers to take time off. Boushey's proposal also emphasizes the benefits of Social Security Cares to younger workers, who will have the ability to access the system early, which will provide incentive to continue to work hard until retirement (O'Leary et al., 2012).

Social Security's capacity to continue to provide retirement benefits for future generations is critically important. Heather Boushey suggests Social Security Cares will not add significant expenses to the system and will strengthen the Social Security system by increasing the labor supply of mothers, workers with health problems, and workers who need to care for those with chronic or serious health problems, while further increasing tax revenues to the system overall (Boushey & Glynn, 2012). The Social Security Cares Act will expand the qualifying criteria to include domestic partners of employees (O'Leary et al., 2012).

A combination of changes to the FMLA as well as the Social Security Cares has the potential to benefit all workers in the United States. Protecting families as well as incentivizing

work are two values that will create a diverse and thriving workforce.

### ***Paid Leave in Every State With Job-Protection After Leave***

The right to return to one's job is imperative for employees. Congress intended for employee's, who need leave to care for their family, to have the ability to return to their jobs under the FMLA. The type of paid leave should help to improve the quality of life for women and families, but not be too generous that it encourages lengthy absences from the workforce (Lester, 2005). Twenty-one states have introduced bills to expand their unemployment insurance programs to provide wage replacement to parents following the birth or adoption of a child. In addition, several states are considering bills that would expand existing temporary disability insurance programs or create new public insurance schemes. States with successful paid leave programs have shown the importance of crafting legislation with appropriate funding mechanisms and creating lag for families without the right process. The trends from these states prove that paid leave is attainable (Lester, 2005).

To successfully meet its stated goals and objectives, the FMLA should be amended to require paid parental leave and mandate each state to provide its own funding mechanisms. Each state is capable of instituting its own needs without interfering with Federal policies. States know best what their employees need and should be allowed to make decisions concerning how much paid leave is available for its workers. The FMLA should provide minimum requirements that states must meet. However, states should be given the opportunity to exceed those minimum requirements.

### ***Extend Coverage to Grant Leave for the Care of Any Relative***

Leave should be broad to encompass all relatives. Today, families are blended and are not always of the traditional, nuclear composition that is protected by the language of Executive Order 12606. For many families, the need to care for an aunt or uncle may be equally as important as the need to care for one's own ailing parent. Similarly, grandparents often fall between the status of *in loco parentis* and the typical grandparent relationship (*American Jurisprudence Proof of Facts*, 2012). Accordingly, these relationships should be protected under the Act or the proposed new legislation addressing the nature of various family dynamics. Family policymakers need to consider and engage all types of families (Maril, 2013). Until a national legislation passes recognizing same-sex partnerships, the definition of spouse should include those who are married legally by a state, and should also cover civil unions and domestic partnerships. The FMLA should be amended to allow same-sex relationships

to achieve equal access to childbirth and childcare for their families.

### ***Paternal Leave Campaigns***

Men in the workplace are less likely than women to leave the workforce to care for families. The United States is lagging behind other countries that emphasize the importance of the paternal role in caregiving for many families. Although the demographics of families have changed over the past decades, most men in heterosexual households have not changed their workdays to accommodate for parenting. Survey results report that women are more likely to take FMLA leave as they constituted 58.1% of those who took leave in 2000 when women comprised only 48.7% of all eligible employees in a population (Selmi & Cahn, 2006). According to the National Partnerships for Women and Families' *Expecting Dads* paper, only 14 states and the District of Columbia provide laws that expand beyond the FMLA for expecting fathers (National Partnership for Women & Families, 2013). Future campaigns that emphasize paid leave should not force women to be the ones taking breaks from the workforce. It should be just as important to provide policies that allow working men to also have the ability to leave the workforce to care for a loved one.

### ***Expand Definitions of Employer***

The FMLA's current eligibility requirements leave many low-wage and part-time workers uncovered. One solution to expand FMLA coverage for these workers is to amend the coverage for employees and employers. Under the proposed reform to FMLA, employers with 15 or more employees will have to comply with FMLA. As it stands, the FMLA only recognizes employers with 50 or more employees. Although having all employers eligible under this plan is ideal, the easiest solution would be to align the requirement to that of already existing employment related laws. For example, having 15 or more employees comply with FMLA aligns with Title VII of the Civil Rights Act of 1964 and the Americans With Disabilities Act. In addition, the proposal to reform should be explicit in providing coverage for part-time employees, and therefore will reduce the number of hours needed to be worked to gain eligibility.

### ***Funding Mechanisms That Directly Affect Childcare and Eldercare Costs***

Although this article primarily promotes paid family leave policies, upcoming legislation should consider social policies that deal with maintaining available childcare and eldercare after leave periods expire. After paid family leave and affordable health insurance are implemented in the marketplace, the various funding mechanisms in which employees pay into

their childcare or eldercare or are matched by their employers with considerable revenue can provide additional support to families. Economists suggest that childcare policies should allow for parents to choose high-quality care (Blau, 2002).

According to the Center for the Child Care Workforce, 2.3 million paid childcare workers care for children aged 0 to 5 years. The populations that need the most assistance with childcare and who also need to get back in the workforce are often stifled by current childcare policies. For example, current funding programs provide benefits for working parents and parents who are in school or participating in some formal training. However, the parents who are unemployed or underemployed may not qualify for childcare assistance (Gardner, Martin, Holod, Johnson, & Brooks-Gunn, 2009).

### No Documentation Requirement

According to *Frequently Asked Questions and Answers About the Revisions to the Family and Medical Leave Act* report by the U.S. Department of Labor (2009), an employee is not required to give the employer his or her medical records. The employer, however, does have a statutory right to request that an employee provide medical certification containing sufficient medical facts to establish that a serious health condition exists. Under the regulations, employers may contact an employee's health care provider for authentication or clarification of the medical certification by using a health care provider, a human resource professional, a leave administrator, or a management official. To address employee privacy concerns, the rule makes clear that in no case may the employee's direct supervisor contact the employee's health care provider (U.S. Department of Labor, 2009).

Employees and their families must be able to establish a sense of privacy when requesting leave. Currently under the law, it is the employer's discretion when to request medical certification. Although this is legally appropriate, it seems superfluous when an employee can establish the proper notice to his or her employer about the need for time off. Employees should be treated in a manner which respects their decisions when it comes to taking leave to care for oneself or other family members.

### Conclusion

Given the situation of workers and families in the United States, it has become clear that since 1993, taking unpaid leave is a burden for many American families, especially those with high levels of educational attainment who may qualify under the FMLA, and elders who require ongoing care. Although the FMLA does not place any restrictions on the ability of states to enact more favorable and generous policies, the states that do enact generous policies are paving the way toward protecting employees and their families. One solution for promoting long-term family and medical leave would be to follow the countries that place a greater

emphasis on family values. Globalization and the economy have affected our workforce as well as our families. Revisiting the FMLA in the near future would prove fruitful to strengthening the efforts of creating families, and allowing women to lead in the workplace by finally offering them the "peace of mind" once suggested to the nation.

Meaningful compromises must be made between advocates for paid leave and employers. Despite the economic differences, work-family policy making in the United States must change from the status quo to truly enhance employees' work-life relationships. The United States must prioritize family policymaking over ineffective financial shortcuts that compromise both families and employees.

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