THE FAMILY AND MEDICAL LEAVE ACT & PARENTAL LEAVE POLICIES

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I. INTRODUCTION

> Since its inception in 1993, the Family and Medical Leave Act[1] (hereinafter, FMLA or the Act) has sparked debates among scholars and policy-makers regarding its impact on gender roles and stereotypes in the United States. During this time of heightened awareness of gender roles across the American workforce and the increasing costs of family care, it is crucial to review, analyze, and offer alternatives to the existing flawed approach to family leave policy.[2]

Some scholars and legislators contend that, by providing greater opportunity for caregiving leave from work, the FMLA has advanced gender equality through increased flexibility to balance work and family.[3] However, others argue that the FMLA has further entrenched stereotypes regarding men's and women's roles in the workplace and in family life. For example, while women disproportionately rely on the FMLA to fulfill family obligations, gender stereotypes generally prevent men from using its provisions and men instead rely primarily on vacation and personal leave in order to fulfill family obligations.[4] The United States is one of the few countries not to mandate paid family leave,[5] and this issue received unprecedented attention during the 2016 Presidential election, in part because voters favor paid family leave policies.[6]

This article will provide a broad overview of legislation related to family leave in the United States, including a historical background and analysis in light of recent Supreme Court decisions. Part II surveys gender discrimination in American employment and discusses Congressional intent in passing the FMLA as a response to that discrimination. Part III examines the ways in which courts have interpreted and applied the Act, and Part IV considers whether the FMLA has met its objectives. Part V examines pending federal legislation proposals

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1. Family and Medical Leave Act (FMLA), 29 U.S.C.A. §§ 2601-2654 (West, Westlaw through P.L. 115-161).

2. *See* Rebecca Gale, *How the Women of Amazon Fought for—and Won—a Revolutionary Family Leave Policy*, SLATE: BETTER LIFE LAB (Oct. 10, 2017), https://slate.com/human-interest/2017/10/how-the-women-of-amazon-fought-for-and-won-a-revolutionary-family-leave-policy.html; Rebecca Gale, *Starbucks Employees Speak Out: Why Don't Baristas Get the Same Maternity Leave as Corporate Workers?*, MARIE CLAIRE (Apr. 10, 2017), http://www.marieclaire.com/career-advice/news/a26441/starbucks-matemity-leave-policy-discriminatory/; Binyamin Appelbaum, *Key Differences in Being Out of Work for Men and Women*, N.Y. TIMES: THE UPSHOT (Dec. 15, 2014), https://www.nytimes.com/2014/12/16/upshot/key-differences-in-being-out-of-work-for-men-and-women.html.

3. *See, e.g.*, Elissa Hope Gainsburg, *Cost of Retaining vs. the Cost of Retraining: An Analysis of the Family and Medical Leave Act*, 10 HOFSTRA LAB. & EMPLOY. L.J. 753, 766 (1993).

4. *See, e.g.*, Chuck Halverson, *From Here to Paternity: Why Men Are Not Taking Paternity Leave under the Family and Medical Leave Act*, 18 WIS. WOMEN'S L.J. 257, 262-63 (2003).

5. *See* Danielle Kurtzleben, *Lots of Other Countries Mandate Paid Leave. Why Not The U.S.?*, NPR: IT'S ALL POLITICS (July 15, 2015), https://www.npr.org/sections/itsallpolitics/2015/07/15/422957640/lots-of-other-countries-mandate-paid-leave-why-not-the-us.

6. *See* Danielle Kurtzleben, *Why Paid Family Leave Has Become A Major Campaign Issue*, NPR: IT'S ALL POLITICS (Oct. 17, 2015), https://www.npr.org/sections/itsallpolitics/2015/10/09/447210270/why-paid-family-has-become-a-major-campaign-issue.

regarding family and parental leave, while Part VI presents some state legislative approaches to family leave.

II. THE FMLA: BACKGROUND

To understand the challenges of balancing work and family through family and medical leave, one must understand the uniquely American myth of the ideal worker. In this context, the ideal worker refers to an employee with no obligations outside of their job.[7] This employee is always available and considers their job their highest priority, which means they never need to take time off nor are they ever distracted from their work.[8] This ideal worker is generally conceived of as male and has a spouse who stays at home to address family obligations.[9] Many corporations developed their employee culture with the mythical ideal worker in mind and expect their workers to emulate this ideal.[10] As a result, many American employees feel pressure from their bosses or coworkers to abridge or abrogate their leave time altogether.[11] While these unrealistic expectations harm people of all genders, their ill effects particularly disadvantage women, who are more likely to take time off for family leave.[12] Women also devote more time to childcare and household work on average, even when they are working full-time.[13] Society also views the "ideal" mother as working either part time or not at all instead of full time, while the vast majority of society seems to agree that fathers should work "full-time."[14] These prevalent societal myths make it near impossible for someone to be both an ideal parent and an ideal worker, and can present particular challenges for women who attempt to have families and work at the same time. Women often need to take more social leave than men, in particular maternity or medical leave related to childbearing, which frequently interrupts their careers.[15] Despite these realities, the insufficiency of American family leave law affects people of all genders looking to balance their work and family lives. Men are increasingly likely to take paternity leave or express a desire to do so.[16] On the other hand, research suggests that many men are reluctant to take family leave due to concerns that taking leave will harm their career, and indeed

7. *See* Deborah J. Anthony, *The Hidden Harms of the Family and Medical Leave Act: Gender-Neutral Versus Gender-Equal*, 16 AM. U.J. OF GENDER & SOC. POL'Y & L. 459, 471 (2008).

8. *See id.*

9. *See id.*

10. *Id.* at 497.

11. *Id.* at 480.

12. *See* Kim Parker, *Women More Than Men Adjust Their Careers More for Family Life*, PEW RESEARCH CTR. (Oct. 1, 2015), https://www.pewresearch.org/fact-tank/2015/10/01/women-more-than-men-adjust-their-careers-for-family-life/.

13. *See id.*

14. *Id.*

15. *See* Clare Cain Miller, *More Than Their Mothers, Young Women Plan Career Pauses*, N.Y. TIMES (July 22, 2015), https://www.nytimes.com/2015/07/23/upshot/more-than-their-mothers-young-women-plan-career-pauses.html.

16. *See Maternity Leave for Men: Everything You Need to Know*, UPCONSEL, https://www.upcounsel.com/maternity-leave-for-men (last visited Feb. 20, 2020).

there is evidence that taking family leave can damage a man's professional reputation and earning potential.[17] Therefore, the inadequacy of the law presents serious problems for men and women.

The governments of most developed countries have implemented generous and comprehensive mandatory family leave policies, and many large corporations have also done so voluntarily.[18] Despite these trends, the United States has implemented only very limited mandatory family and medical leave policies.[19] The United States' primary legislation related to family leave is the 1987 Family and Medical Leave Act (hereafter "FMLA"), of which limited provisions and various shortcomings present challenges as women attempt to close the pay gap and otherwise achieve equality in the workplace.[20] Due to the limitations in the FMLA, women often fall behind in their careers due to taking time off of work for reasons related to pregnancy and childcare.[21] The losses women experience from taking family leave can last a lifetime, even affecting their social security payments, not to mention their career advancement prospects.[22] Yet many women need to take time off for medical reasons, or may feel pressure to do so given societal expectations of motherhood.[23] In explaining and making policy recommendations with regard to this issue, this article will first furnish a historical and legislative background of the FMLA.

A. BRIEF HISTORY OF THE FMLA

Employers, vested with the power to dictate leave policies, implemented policies that disadvantaged women.[24] In the absence of federal congressional action to address gender discrimination in employment, the Supreme Court repeatedly upheld private discriminatory employment policies.[25] In response to these cases

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17. *See* Nathaniel Popper, *Paternity Leave has long-lasting benefits. So why don't more American men take it?*, N.Y. TIMES (June 11, 2019), https://parenting.nytimes.com/work-money/paternity-leave.

18. *See* Jeanne Sahadi, *It's Good to Be a Working Parent in Europe*, CNN (Feb. 19, 2016), https://money.cnn.com/2016/02/17/pf/working-parents-paid-leave/index.html; *see also* Kristen Lotze, *10 Tech Companies with Generous Potential Leave Benefits*, TECH REPUBLIC (Feb. 15, 2019) https://www.techrepublic.com/article/10-tech-companies-with-generous-parental-leave-benefits/.

19. *See* Jessica Mason, *The U.S. Is Decades Behind the World on Paid Leave*, SLATE (Feb. 6, 2019), https://slate.com/human-interest/2018/02/the-u-s-is-decades-behind-the-world-on-paid-leave-this-gives-us-an-advantage.html.

20. *See Paid Leave Will Help Close the Gender Wage Gap*, NAT'L P'SHIP FOR WOMEN AND FAMILIES (April 2019).

21. *See id.*

22. *See id.*

23. *See* Parker, *supra* note 16.

24. *See* Patricia Schroeder, *Is There a Role for the Federal Government in Work and the Family*, 26 HARV. J. ON LEG. 299, 305–06 (1989) ("What all of these accounts made evident was that employers were not providing reasonable leaves and job security to employees who chose to become parents.").

25. *See* Lisa Bornstein, *Inclusions and Exclusions in Work-Family Policy: The Public Values and Moral Code Embedded in the Family and Medical Leave Act*, 10 COLUM. J. GENDER & L. 77, 82-83 (2000) (noting that the Pregnancy Discrimination Act was a congressional response to Supreme Court decisions allowing discrimination against pregnant women); *see also* Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 125 (1976) (holding that employer did not violate Title VII when refusing to consider pregnancy a

and policies, Congress passed the Pregnancy Discrimination Act (PDA) in 1978.[26] The PDA attempted to provide women with a more stable position in the American workforce by prohibiting discrimination in the hiring or retaining of a woman on the basis of pregnancy.[27] The Supreme Court upheld the PDA, declaring that it guaranteed "women the basic right to participate fully and equally in the workforce, without denying them the fundamental right to full participation in family life."[28] By outlawing employment discrimination against women based on pregnancy, the PDA represented a fundamental step toward the achievement of gender equality in American employment.[29]

The PDA was not a silver bullet for discriminatory policies in the workplace. Because of its focus on pregnancy and specifically a woman's period of physical disability following childbirth, the PDA did not address the myriad other issues that contribute to the unique difficulties women face in the workforce, including the need for employment leave to care for children or sick family members when necessary.[30] Moreover, the PDA did not address the importance of *paternal* leave, nor did it provide other mechanisms to address and break down gender role stereotypes in work and family life, crucial steps toward achieving gender equality in caretaking obligations.[31]

Recognizing these weaknesses, some states attempted to remedy the gender imbalance in employment opportunities by taking efforts that reached beyond pregnancy-related legislation.[32] By enacting new laws or amending existing laws to address parental leave and childcare, these states more comprehensively addressed the broader challenges that men and women face in balancing work and family life.[33]

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temporary disability, absent a pretext of discrimination against women); Geduldig v. Aiello, 417 U.S. 484, 494 (1974) (finding that denial of benefits for work loss resulting from normal pregnancy did not violate the Equal Protection Clause).

26. Pregnancy Discrimination Act (PDA), 42 U.S.C.A. § 2000e(k) (West, Westlaw through Pub. L. No. 116-108).

27. *See* Bornstein, *supra* note 25, at 82-84 (discussing the history of the PDA).

28. Cal. Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 289 (1987).

29. *See* Bornstein, *supra* note 25, at 83 ("[The PDA] offered a step toward incorporating pregnant women into the workplace, by explicitly equating pregnancy with other temporary disabilities.").

30. *See id.*

31. *See id.* ("[W]hile the PDA provided job-protected leave for women after childbirth, it stopped short of addressing family or medical needs more broadly and failed to provide a mechanism to extend parental leave to men. In addition, . . [the PDA] was merely intended to cover the pregnant woman's period of physical disability after childbirth, and it did not extend to caretaking leave.").

32. *See, e.g.*, N.J. STAT. ANN. § 34:11B-7 (West, Westlaw through L. 2014, c. 80 & J.R. No. 3) (entitling an employee who exercises the right to family leave to restoration of position upon expiration of leave); CONN. GEN. STAT. ANN. § 46a-60(b)(7) (West, Westlaw through 2014 Feb. Reg. Sess. of Gen. Assemb.) (protecting women disabled by pregnancy under Connecticut anti-discrimination law).

33. *See* Bornstein, *supra* note 25, at 83 (explaining that each state generally took one of three approaches: (1) extending "benefits based on general disability leave," (2) offering "parenting leave only for female employees," or (3) adopting a "gender-neutral approach" to employment leave law).

Fifteen years after passing the PDA, Congress recognized the need for federal policies to facilitate gender equality at work and at home and passed the FMLA.[34] When President Bill Clinton signed the FMLA into law on February 5, 1993, he declared that American workers "will no longer need to choose between the job they need and the family they love."[35] The passage of the FMLA marked the first time that the United States federal government acknowledged and attempted to promote "work-family policy" through legislation.[36]

Opponents of the FMLA argued that the Act would interfere with employer flexibility and create massive costs for businesses.[37] Critics were also concerned that creating leave requirements directed toward women would provide employers with a further disincentive to hire women.[38]

The FMLA was intended to achieve its family-friendly goal "by encouraging stability in the family as well as productivity in the work place."[39] Congress enumerated five main purposes of the FMLA in the text: (1) balancing the demands of family life and the work place, (2) allowing both male and female employees to take reasonable leave for medical reasons, the birth or adoption of a child, or to care for a family member, (3) promoting the legitimate interests of employers, (4) minimizing employment discrimination based on sex, and (5) promoting the goal of equal employment opportunity for men and women.[40] In enacting the FMLA, Congress hoped that the standardization of family leave policies would ensure that employees could manage illness and care for family members without threatening the stability of their work environment.[41]

B. THE FAMILY AND MEDICAL LEAVE ACT

The FMLA requires some employers to provide up to twelve weeks of unpaid, job-protected leave to any employee, male or female, to take care of a new child (birth, adoptive, or foster), an immediate family member, or oneself in the event of a "serious health condition."[42] The FMLA defines the term "serious health condition"

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34. FMLA, 29 U.S.C.A. §§ 2601-2654, 2601(a)(5), 2601(b)(4) (West, Westlaw through P. L. 113—63); *see also* Bornstein, *supra* note 25, at 83-84 ("With the Act, Congress sought to ensure job security by providing job-protected leave benefits on a gender-neutral basis to qualified employees in order to 'promote family stability.'").

35. Pauline Kim, *The Family and Medical Leave Act of 1993: Ten Years of Experience*, 15 WASH. U. J.L. & POL'Y 1, 1 (2004) (quoting Paul Richter & Gebe Martinez, *Clinton Signs Family Leave Bill into Law*, L.A. TIMES (Feb. 6, 1993, at A22).

36. *Id.*

37. *See, e.g.*, Peter Susser, *Employer Perspective on Paid Leave & the FMLA*, 15 WASH. U. J.L. & POL'Y 169, 169 (2004).

38. *See* Coleman v. Court of Appeals of Maryland, 132 S. Ct. 1327, 1342 (2012) (Ginsburg, J., dissenting).

39. Marcus D. Ward, *The Family Medical Leave Act of 1993: "A Sound Investment, or an Expensive Lesson in Employee Benefits?"*, 20 T. MARSHALL L. REV. 413, 419 (1995).

40. 29 U.S.C.A. § 2601(b)(l)–(5) (West, Westlaw through Pub. L. No. 116-108); *see also* Kim, *supra* note 35, at 3.

41. *Id.* § 2601(b)(l).

42. *Id.* §§ 2611-2612 (2012). The constitutionality of the "self-care" provision for personal medical conditions, 29 U.S.C.A. § 2612(a)(l)(D), was questioned by Toeller v. Wis. Dep't of Corr., 461 F.3d

as "an illness, injury, impairment, or physical or mental condition that involves: (A) inpatient care in a hospital, hospice, or residential medical care facility; or (B) continuing treatment by a health care provider."[43] In 2009, Congress amended the FMLA to also provide twenty-six weeks of leave for any "exigency . . . arising out of the fact that the spouse, son, daughter, or parent of an employee is on covered active duty (or has been notified of an impending call or order to covered active duty) in the Armed Forces."[44] The Armed Forces coverage within the FMLA again expanded in 2013 to cover parental care necessitated by the military member's covered active duty.[45]

Employers required to provide leave include public agencies, such as state,[46] local and federal employers, and local education agencies (schools), regardless of the number of people the federal agency or school employs. The Act also covers private-sector employers with "fifty or more employees in twenty or more workweeks in the current or preceding calendar year, including a joint employer or successor in interest to a covered employer," and those who are engaged in commerce or in any industry or activity affecting commerce, including joint employers and successors of covered employers.[47]

If an employee intends to take leave pursuant to the FMLA, they must provide their employer with notice of their intention to do so.[48] When the need for leave is foreseeable, an employee must provide their employer with at least thirty days' notice of their intent to take leave under the Act.[49] If a thirty-day notice is not possible, the employee must provide notice as soon as is practicable.[50]

Upon returning from FMLA leave, employees are entitled to restoration to their previous position or to "an equivalent position with equivalent employment benefits, pay and other terms and conditions of employment."[51] However, certain "highly compensated" (key) employees are not automatically guaranteed restoration to their previous or equivalent position if, "(A) such denial is necessary to prevent substantial and grievous economic injury to the operations of the employer; or (B) the employer notifies the employee of the intent of the employer to deny restoration on such basis at the time the employer determines that such

871, 879-80 (7th Cir. 2006). In reversing the district court's verdict, the appellate court found no evidence that the self-care provision of the FMLA was linked by Congress to the elimination of gender discrimination, and thus it could not be used for money damages against the state of Wisconsin. *See* Toeller v. Wis. Dep't of Corr., 461 F.3d 871, 879-80 (7th Cir. 2006).

43. 29 U.S.C.A. § 2611(11).

44. *Id.* § 2612(a)(l)(E).

45. *See Side by Side Comparison of Current/Final Regulations*, U.S. DEP'T OF LAB. (Mar. 19, 2013), http://www.dol.gov/whd/fmla/2013rule/comparison.htm.

46. The Supreme Court recently held that state employees may not sue for violations of the FMLA's self-care provision. *See* Coleman v. Court of Appeals of Maryland, 132 S. Ct. 1327, 1338 (2012).

47. U.S. DEP'T OF LAB, FACT SHEET #28: THE FAMILY AND MEDICAL LEAVE ACT OF 1993 (2012), *available at* https://www.dol.gov/whd/regs/compliance/whdfs28.pdf.

48. 29 U.S.C. § 2612(e)(l).

49. *Id.*

50. *Id.*

51. *Id.* § 2614(a)(l).

injury would occur."[52] Key employees include employees eligible for FMLA leave who are situated among the highest ten percent of those employed by the employer within seventy-five miles.[53] In addition, all but key employers retain group health insurance from their employer during their period of leave, although no additional seniority or benefits are required to accrue during this time.[54]

If an employer violates an employee's rights under the FMLA provisions, the employee is entitled to damages equal to: (a) back pay (plus interest) covering all compensation lost due to the violation; (b) monetary expenses of caretaking necessitated by the violation, if no compensation was lost; (c) liquidated damages, essentially doubling the sum of back pay and monetary expenses; and (d) equitable relief as appropriate, including employment, reinstatement, and/or promotion.[55] The FMLA does not allow punitive damages or damages for physical and emotional distress.[56]

C. EXTENDING THE FMLA AFTER WINDSOR AND OBERGEFELL

Two Supreme Court decisions, *United States v. Windsor*[57] and *Obergefell v. Hodges*,[58] changed the definition of marriage to include a union between two people of the same sex. Subsequently, the Obama administration expanded the FMLA to apply to same-sex couples.

In *Windsor*, the Court struck down the federal Defense of Marriage Act (DOMA), holding that the definition of marriage as solely between a man and woman violates the Due Process Clause of the Fifth Amendment.[59] Following the decision, President Obama directed federal agencies to implement the Court's decision.[60] The Department of Labor (DOL) announced that the FMLA allowed eligible employees to "take leave under the FMLA to care for a same-sex spouse, but only if the employee resided in a state that recognizes same-sex marriage."[61] DOL also issued a new federal rule[62] changing the regulatory definition of "spouse" under the FMLA to look to the law of the "place of celebration" rather than the law of the couple's "state of residence."[63] Practically, this new definition granted federal family leave rights to all legally married same-sex couples, since

52. *Id*. § 2614(b)(l)(A)-(B).
53. *See id*. § 26l4(b)(2).
54. *See id*. § 2614(a)(3)(A), (c)(l).
55. *See id*. § 2617(1).
56. *See* Pagan-Colon v. Walgreens of San Patricio, Inc., 697 F.3d 1, 16 (1st Cir. 2012).
57. *See* United States v. Windsor, 133 S. Ct. 2675, 2693 (2013).
58. *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2604–05 (2015).
59. *See* Windsor, 133 S. Ct. at 2695.
60. Press Release, White House, Statement by the President on the Supreme Court Ruling on the Defense of Marriage Act (June 26, 2013), https://obamawhitehouse.archives.gov/doma-statement (last visited Oct. 11, 2019).
61. FACT SHEET: FINAL RULE TO AMEND THE DEFINITION OF SPOUSE IN THE FAMILY AND MEDICAL LEAVE ACT REGULATIONS, U.S. DEP'T. OF LAB. (Feb. 2015) *available at* https://www.dol.gov/agencies/whd/fmla/spouse/fact-sheet [hereinafter FACT SHEET: DEF. OF SPOUSE, DEP'T. OF LAB.].
62. *See* 29 C.F.R. § 825.102 (2017).
63. FACT SHEET: DEF. OF SPOUSE, DEP'T. OF LAB, *supra* note 61.

all same-sex couples were legally married in the state of their celebration. Thus, eligible employees in same-sex couples were entitled to the same FMLA provisions as opposite-sex couples: to care for a sick spouse, to take military exigency leave, and to take military caregiver leave.[64] The new rule also expanded parental rights for same-sex couples under the FMLA, allowing eligible employees to care for a sick stepchild "regardless of whether the *in loco parentis* requirement of providing day-to-day care or financial support for the child is met."[65]

Two years later in *Obergefell*, the Supreme Court held that marriage is a fundamental right that cannot be denied to same-sex couples.[66] While the Court's decision to grant full marriage rights to same-sex couples in every state *de facto* nullified the final rule promulgated by DOL,[67] it achieved the same goal, i.e., that eligible employees can take leave under the FMLA for the qualifying reasons regardless of whether they are in a same-sex or opposite-sex marriage.[68]

Looking at these two landmark cases together, *Windsor* paved the way for *Obergefell*: *Windsor* provided a solution at the federal level while *Obergefell* filled in the gaps left by *Windsor* at the state level.[69] In the post-*Obergefell* landscape, same-sex married couples and opposite-sex married couples are entitled to all of the same provisions of the FMLA. Scholars are now thinking ahead, asking how the *Windsor* and *Obergefell* decisions will impact the gender imbalance of the FMLA.[70] Perhaps the inclusion of same-sex couples in family leave policies will disrupt gendered stereotypes. As more same-sex couples exercise their right to take leave under the FMLA, they may demonstrate that individuals, regardless of gender, can take advantage of the FMLA to fulfill socially and economically important family responsibilities.

Even as the *Windsor* and *Obergefell* decisions offered hope of a more egalitarian future under the FMLA, many same-sex couples continue to face significant barriers to taking advantage of FMLA protections.[71] While DOL revised the definition of "spouse" after *Windsor* to include same-sex married couples, this interpretation only applies to married couples.[72] The limited definition does not encompass "domestic partners," leaving many LGB individuals seeking paid or

64. *See id.*

65. *Id.*

66. Obergefell v. Hodges, 135 S. Ct. 2584, 2604–05 (2015).

67. *Id.*

68. *See* Jeff Nowak, *Now That Same-Sex Marriage is a Constitutional Right, How Do Employers Administer FMLA Leave?*, FMLA INSIGHTS (June 29, 2015), http://www.fmlainsights.com/ now-that-same-sex-marriage-is-a-constitutional-right-how-do-employers-administer-fmla-leave/.

69. *See* Jasmine Foo, *In Sickness and in Health, Until Death Do Us Part: An Examination of FMLA Rights for Same-Sex Spouses and a Case Note on* Obergefell v. Hodges, 36 J. OF THE NAT'L ASS'N. OF ADMIN. L. JUDICIARY 638, 648 (Fall 2016).

70. *Id.* at 679 (citing Deborah A. Widness, *Reconfiguring Sex, Gender, and the Law of Marriage*, 50 FAM. CT. REV. 205, 209 (Apr. 2012)).

71. *See* Mary Beth Maxwell, *2018 U.S. LGBTQ Leave Survey*, HUMAN RIGHTS CAMPAIGN FOUNDATION, https://assets2.hrc.org/files/assets/resources/2018-HRC-LGBTQ-Paid-Leave-Survey.pdf (last visited Jan. 31, 2020).

72. FACT SHEET: DEF. OF SPOUSE, DEP'T. OF LAB., *supra* note 61.

unpaid leave to care for a sick domestic partner without protection and at the mercy of discriminatory employers.[73]

Although the revision reflects legal recognition of same-sex relationships through marriage, the realities of familial and chosen familial relationships within the LGBTQ community extend beyond marriage.[74] In a 2018 survey conducted by the Human Rights Campaign, a significant proportion of respondents reported anticipating reliance on chosen family members in the event of a serious health condition.[75] The revisions to the FMLA in the wake of the *Windsor* and *Obergefell* decisions provide the opportunity of family leave for same-sex married couples, but they do not represent fully realized equality for the LGBTQ community.

III. THE FMLA: CASE LAW APPLIED

Courts have worked to clarify and resolve the many ambiguities of the FMLA. This section addresses issues which arise during the litigation process involving judicial interpretation of the FMLA, including: (A) when has a plaintiff met the prima facie requirement of the FMLA; (B) what establishes "timely notice" from employees to employers; (C) what constitutes a "serious medical condition" under the FMLA; (D) when may an employee sue an employer for violating the FMLA; and (E) what amounts to retaliation against an employee who takes FMLA leave or files a complaint.

A. PRIMA FACIE CASE REQUIREMENT

The FMLA contains two types of claims, and employees must establish a prima facie case under both.[76] "Interference claims" protect employees who assert that their employer interfered with, restrained, or denied their substantive rights under the FMLA.[77] "Retaliation claims" protect employees who assert that their employer unlawfully discriminated against or discharged them due to exercising their rights under the FMLA.[78]

1. Interference Claims

To make a prima facie case of interference under the FMLA, employees must show that: (1) they were eligible for FMLA protection; (2) their employer was covered by the FMLA; (3) they were entitled to FMLA leave; (4) they gave sufficient notice to their employer of their intent to take leave; and (5) they were denied FMLA benefits to which they were entitled.[79] When assessing interference

73. *See* Maxwell, *supra* note 71.
74. *Id.*
75. *Id.*
76. 29 U.S.C. §§ 2615(a)(l)–(2) (West, Westlaw through Pub. L. No. 116-108).
77. *Id.* § 2615(a)(1).
78. *Id.* § 2615(a)(2).
79. Sanders v. City of Newport, 657 F.3d 772, 778 (9th Cir. 2011).

claims, the employer's subjective intent is not relevant.[80] After plaintiffs' establish a prima facie case based on preponderance of the evidence, the employer must demonstrate that their conduct was lawful.[81] Interference includes "not only refusing to authorize FMLA leave, but discouraging an employee from using such leave."[82]

In *Latorraca v. Forsythe Technology Inc*., the Northern District of Illinois denied summary judgment to a private employer, Forsythe, who argued, in part, that the plaintiff did not establish a prima facie interference claim, as she was not entitled to FMLA leave.[83] The plaintiff claimed her employer unlawfully discharged her after she took leave for her second childbirth.[84] Forsythe conceded all prima facie elements, except that the employer "denied [the plaintiff] FMLA benefits to which she was entitled," arguing that financial constraints precluded her reinstatement, as her part-time position had been dissolved as "part of a company-wide effort to reduce expenses."[85] The court held that the plaintiff had been unlawfully discharged and that the financial constraints were pretextual.[86] The court noted that the plaintiff's supervisor curiously "did not retain her in any capacity," despite speaking highly of her abilities, and did not offer her at least two available part-time positions for which she was qualified.[87] Taking these observations with "the fact that the two remaining part-time employees were male and the person who replaced the plaintiff was a nonpregnant, childless female," the court concluded that the plaintiff's dismissal could be found to be pretextual.[88]

In *Michelucci v. County of Napa*, the Northern District of California held that work-related contacts during FMLA leave could amount to interference with the employee's ability to take leave.[89] The plaintiff experienced severe harassment at work, which escalated until the plaintiff was forced to take urgent medical leave under the FMLA.[90] After taking leave, his employer launched an investigation into his hostile work environment claims and required the plaintiff to participate in the investigation while on leave.[91] The court found that while *de minimis* work-related contacts, like several emails, during FMLA leave may not rise to the level of interference, requiring the plaintiff to participate in an investigation while on FMLA leave could constitute FMLA interference.[92]

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80. *Id*.
81. *Id*. at 780.
82. 29 C.F.R. § 825.220(b) (2013).
83. Latorraca v. Forsythe Technology Inc., No. 06 C 02331, 2007 WL 2669019, at *1, *4 (N.D. Ill. Sept. 7, 2007).
84. *Id*. at *1.
85. *Id*. at *4.
86. *Id*.
87. *Id*. at *3.
88. *Id*.
89. Michelucci v. County of Napa, No. 18-cv-05144-HSG, 2019 WL 1995332, at *6 (N.D. Cal. May 6, 2019).
90. *Id*. at *2.
91. *Id*.
92. *Id*. at *6.

2. Retaliation Claims

To prove a prima facie case for retaliation under the FMLA, employees must show that: (1) they engaged in protected activity under the Act; (2) they suffered an adverse employment action; and (3) a causal connection existed between the employee's action and the adverse employment action.[93]

In *Russell v. Bronson Heating and Cooling*, the Eastern District of Michigan held that the plaintiff successfully presented a prima facie case of employment discrimination under the FMLA.[94] The plaintiff qualified for FMLA leave under Section 2612(a)(l) of the Act and gave adequate notice of her intent to take eight weeks of leave after her daughter was born.[95] The plaintiff's supervisor terminated her employment seven weeks after she prematurely gave birth to her daughter, adversely affecting the plaintiff.[96] The plaintiff established a causal connection between her FMLA leave and termination through close temporal proximity between the birth of her baby and her termination, and through her coworkers' testimony that the supervisor said, "[plaintiff] would be gone as soon as she had the baby."[97] The court found that close temporal proximity between the employee's protected conduct and the employer's adverse action may be sufficient evidence of a causal connection.[98]

In *DeBoer v. Musashi Auto Parts, Inc*., the Sixth Circuit found that the plaintiff successfully proved a prima facie case of employment discrimination under the FMLA, after showing that she was demoted from a supervisory position to a machine operator when she requested FMLA leave for the upcoming birth of her child.[99] The court ruled that DeBoer had the right to take FMLA leave, her subsequent demotion adversely affected her, and it was causally related to her FMLA leave.[100] Thus, DeBoer's retaliation claims met the prima facie requirements for an FMLA violation.[101]

3. Failure to Prove & Limits on Prima Facie Cases

When plaintiffs fail to meet the prima facie requirements of the FMLA, courts generally rule in favor of the employer.[102] In *Slanaker v. Accesspoint Employment Alternatives, LLC*, the plaintiff sued her former employer alleging that she was terminated in retaliation for exercising her FMLA rights.[103] The

93. 29 U.S.C. § 2615 (West, Westlaw through Pub. L. No. 116-108); *see also* Pulczinski v. Trinity Structural Towers, Inc., 691 F.3d 996, 1007 (8th Cir. 2012).

94. Russell v. Bronson Heating and Cooling, 345 F. Supp. 2d 761, 781 (E.D. Mich. 2004).

95. *Id*. at 769, 781.

96. *Id*. at 781.

97. *Id*.

98. *Id*.

99. DeBoer v. Musashi Auto Parts, Inc., 124 F. App'x 387, 389–391 (6th Cir. 2005).

100. *Id*. at 391.

101. *Id*.

102. *See, e.g*., Slanaker v. Accesspoint Employment Alternatives, No. 01-11024, 2008 WL 408519, at *5 (E.D. Mich. Feb. 13, 2008).

103. *Id*.

Eastern District of Michigan granted defendants' motion for summary judgment, finding that the employer did not have sufficient notice of plaintiff's request for FMLA leave.[104] Although the employer did not give notice to the plaintiff that her maternity leave was FMLA qualifying, the plaintiff had previously handled FMLA request forms as part of her job and "did not complete an FMLA request form" or mention that she was requesting FMLA leave.[105] The court determined that there is "no evidence that Defendants knew Plaintiff was exercising her rights under the FMLA when they decided to terminate her'' and granted the defendants' motion for summary judgment.[106]

While courts generally treat plaintiffs who meet the prima facie requirement favorably, they have set limits on the boundaries of FMLA leave.[107] In *Green v. New Balance Athletic Shoe, Inc*., the plaintiff alleged that her employer violated the FMLA by terminating her employment after she took pregnancy leave.[108] The District Court of Maine held that, under the FMLA, the employer had the right to terminate her once her leave expired and she could not return to work.[109] While the plaintiff met the elements for a *prima facie* case under the FMLA, the court made it clear that an employer has the right to terminate employment if, after that employee maximizes his or her leave time pursuant to the FMLA, he or she is not able to return to work.[110]

B. NOTICE REQUIREMENT FOR REQUESTING LEAVE

Employees must provide thirty days advance notice to their employers when the need to take FMLA leave is foreseeable,[111] and employees must provide notice "as soon as practicable under the facts and circumstances" when the need to take FMLA leave is unforeseeable.[112] However, what constitutes sufficient notice for unforeseeable leave "[d]epend[s] on the situation."[113]

Furthermore, the notice requirement balances competing interests: the employer's interest in maintaining a predictable workforce and the employee's interest in employment stability.[114] In *Aubuchon v. Knauf Fiberglass*, the Seventh Circuit explained that the FMLA places the notice burden on employees as "quid pro quo for the employer's partial surrender of control over [their] work force."[115] However, the notice requirement is not demanding of the employee; it requires

104. *Id*.
105. *Id*.
106. *Id*.
107. *See, e.g*., Green v. New Balance Athletic Shoe, Inc., 182 F. Supp. 2d 128, 135–36 (D. Me. 2002).
108. *Id*. at 134.
109. *Id*. at 140.
110. *Id*.
111. 29 C.F.R. § 825.302 (2013).
112. *Id*. § 825.303(a).
113. *Id*. § 825.303(b).
114. *See* Aubuchon v. Knauf Fiberglass, 359 F.3d 950, 951–52 (7th Cir. 2004).
115. *Id*.

only that the employee "place the employer on notice of a probable basis for FMLA leave . . . He just has to give the employer enough information to establish probable cause, as it were, to believe that he is entitled to FMLA leave."[116] Once the employee gives sufficient notice, the employer has the duty to request "additional information . . . to confirm the employee's entitlement [to FMLA leave]."[117]

Court interpretation of the notice requirement often precludes imposing harsh burdens on employees.[118] In *Williams v. Illinois Department of Corrections*, the plaintiff was forced to resign when he needed to take care of his sick mother.[119] After resigning, the plaintiff became aware of his rights under the FMLA and filed suit against his employer, alleging a violation of the FMLA.[120] The court held that the employer had *sufficient* notice that the plaintiff needed time off, after he "mentioned that his mother was very ill" and that he needed to take care of her, even though he did not give "proper notice" per the employer's rules.[121] The court found that this conversation was sufficient to notify his employer that "there was a probable basis for FMLA leave."[122] Sufficient notice need only give an employer reason to believe FMLA leave is required.

Employees are not expected to give perfect notice of serious medical conditions requiring FMLA leave.[123] In *Lichtenstein v. University of Pittsburgh Medical Center*, the plaintiff called the hospital where she worked and informed her supervisor that she would not be able to work because her mother had been taken to the hospital in an ambulance.[124] The district court concluded that this was insufficient notice, since her mother might not have a serious condition requiring ongoing care and FMLA leave.[125] The Court of Appeals reversed, noting that the plaintiff's burden is not to eliminate all non-FMLA scenarios but only to present a scenario where the FMLA *may* apply.[126]

Employees must, however, specifically reference the qualifying reason for or the need to take leave, when requesting previously-approved FMLA leave.[127] In *Holladay v. Rockwell Collins, Inc*., the plaintiff claimed that her employer's obligations under FMLA were triggered when she left a voicemail telling her supervisor that she was sick.[128] The plaintiff had previously been granted FMLA leave

116. *Id*. at 953.
117. *Id*.
118. *See, e.g*., Williams v. Illinois Dep't of Corr., No. 05-CV-4227, 2007 WL 772933, at *4 (S.D. Ill. Mar. 9, 2007).
119. *Id*. at *2.
120. *Id*. at *2–3.
121. *Id*. at *5–6.
122. *Id*. at *6.
123. *See* Lichtenstein v. Univ. of Pittsburgh Med. Ctr., 691 F.3d 294, 304 (3rd Cir. 2012).
124. *Id*.
125. *Id*.
126. *Id*.
127. Holladay v. Rockwell Collins, Inc., 357 F. Supp. 3d 848, 858 (S.D. Iowa 2019).
128. *Id*.

for sporadic migraines.[129] The court held that if the plaintiff referenced her migraine headaches in the voicemail, her FMLA notice was sufficient; however, if the plaintiff merely referenced a general illness, her FMLA notice was deficient.[130] Although the employer argued that merely referencing migraine headaches in her voicemail would still be deficient notice, the court found that the employer's previous approval of FMLA leave for migraines put the employer on notice that FMLA may apply to any sick leave for migraines.[131]

Courts have also emphasized that employers must have reasonable expectations of employees' abilities to meet FMLA notice requirements. In *Manuel v. Westlake Polymers Corporation*, the Fifth Circuit distinguished between what could reasonably be expected of *employees* and what could reasonably be expected of *attorneys* with respect to the notice requirements, noting that "Congress, in enacting the FMLA, did not intend employees . . . to become conversant with the legal intricacies of the Act."[132] Thus, it is not necessary for employees to refer to the FMLA as a source of their leave rights.[133] Furthermore, in *Nicholson v. Pulte Homes Corp.*, the Seventh Circuit held that an employee must "alert her employer to the seriousness of the health condition" but need not specifically invoke the FMLA.[134] Likewise, in *Hendry v. GTE North, Inc.*, the Northern District of Illinois did not require a plaintiff to invoke the FMLA by name when informing her employer that she needed to take FMLA leave due to migraine headaches, but rather only required that she state that she needed leave.[135]

Some courts have allowed the notice requirement to be met through constructive notice, further lessening the burden on employees.[136] In *Byrne v. Avon Products*, the Seventh Circuit held that either the inability of an employee to communicate his illness to his employer or clear abnormalities in the employee's behavior could constitute constructive notice of a serious health condition.[137] The court found that "[i]t is enough under the FMLA if the employer *knows* of the employee's need for leave; the employee need not mention the statute or demand

129. *Id.*

130. *Id.* at 858–59.

131. *Id.* at 859–60.

132. Manuel v. Westlake Polymers Corp., 66 F.3d 758, 763–64 (5th Cir. 1995).

133. 29 C.F.R. § 825.302(c) (2013) ("When an employee seeks leave for the first time for a FMLA-qualifying reason, the employee need not expressly assert rights under the FMLA or even mention the FMLA."); *see* Robert J. Aalberts & Lorne Seidman, Employee Notice Requirements Under the Family and Medical Leave Act: Are They Manageable?, 24 PEPP. L. R. 1209, 1222 (1997).

134. Nicholson v. Pulte Homes Corp., 690 F.3d. 819, 826 (7th Cir. 2012) (quoting Stevenson v. Hyre Elec. Co., 505 F.3d 720, 725 (7th Cir. 2007)).

135. Hendry v. GTE North, Inc., 896 F. Supp. 816, 828 (N.D. Ind. 1995) (citing 29 C.F.R. § 825.302 (2012)).

136. *See, e.g.*, Byrne v. Avon Prods., 328 F.3d 379, 381–82 (7th Cir. 2003); *Stevenson*, 505 F.3d at 725 (7th Cir. 2007).

137. *See Byrne*, 328 F.3d at 381–82.

its benefits."[138] Three years later, the Seventh Circuit again found constructive notice in *Stevenson v. Hyre Electric Company*, when the plaintiff began experiencing severe anxiety after a stray dog wandered into her work and, two weeks later, screamed obscenities at her supervisor, left work with little to no explanation, and called the police after a coworker moved her belongings.[139] The Seventh Circuit found that although the plaintiff had an obligation to tell her supervisor that she was experiencing severe distress,[140] the employer was on constructive notice that the plaintiff required FMLA-qualifying leave based on the plaintiff's bizarre behavior.[141]

C. SERIOUS MEDICAL CONDITION REQUIREMENT

Judicial decisions have broadly interpreted the FMLA's definition of "serious medical condition."[142] In *Navarro v. Pfizer Corp*., the First Circuit reversed summary judgment against an employee who took leave to travel to Germany to care for her adult daughter, who was suffering from maternity difficulties due to high blood pressure.[143] The court found that the daughter's condition could be sufficient "to qualify her as disabled *for purposes of the FMLA*."[144] The court further held that an impairment need not be long-term to constitute a serious medical condition under FMLA.[145] The Eighth Circuit in *Clinkscale v. St. Therese of New Hope* likewise demonstrated an expansive judicial reading of "serious medical condition," concluding that an employer bears the risk of discharging an employee who takes leave to treat a minor condition that later develops into a serious one.[146]

Although courts have taken an inclusive approach toward qualifying personal issues as "serious medical conditions," employers may require employees to complete several strict procedural steps to take leave under this provision of the FMLA. For example, an employer may order an employee to provide sufficient certification confirming the existence of a serious health condition.[147] This certification may include "(l) the date on which the serious health condition began, (2) the probable duration of the condition, (3) the appropriate medical facts within

138. *Id*. at 382 (emphasis added).

139. Stevenson v. Hyre Electric Co., 505 F.3d 720, 721–23 (7th Cir. 2007).

140. *Id*. at 725; *cf*. Aubuchon v. Knauf Fiberglass, 359 F.3d 950, 952 (7th Cir. 2004) (holding that an employee did not provide any timely notice when he told his employer that he wanted to stay home with his pregnant wife until birth); Burnett v. LFW Inc., 472 F.3d 471, 479 (7th Cir. 2006) (noting that calling in sick while providing no additional information is insufficient for FMLA notice).

141. *Stevenson*, 505 F.3d at 726–27.

142. *See, e.g*., Navarro v. Pfizer Corp., 261 F.3d 90 (1st Cir. 2001).

143. *Id*. at 93.

144. *Id*. at 104–05 (emphasis in original).

145. *Id*. at 103.

146. Clinkscale v. St. Therese of New Hope, 701 F.3d 825, 828 (8th Cir. 2012) (citing Caldwell v. Holland of Tex., Inc., 208 F.3d 671, 672- 73 (8th Cir. 2000)).

147. *See* Kinds v. Ohio Bell Tel. Co., 724 F.3d 648, 652–654 (6th Cir. 2013) (holding that employee's failure to provide medical certification for FMLA leave within the time requested by employer allowed a denial of FMLA coverage).

the health care provider's knowledge, and (4) a statement that the employee is unable to perform her job duties."[148] Such a certification is presumptively valid if it contains the required information and is signed by the health care provider.[149] However, the employer may overcome this presumption by showing that the certification is "invalid or inauthentic."[150] In *Novak v. MetroHealth Medical Center*, the employer successfully overcame this presumption of validity and proved that plaintiff's certification forms were insufficient to establish a serious medical condition, as the forms did not contain the required information and were not authorized by her health care provider.[151]

The Sixth Circuit's decision in *Novak* illustrates the FMLA's age-based distinction regarding leave to care for children. The FMLA authorizes leave to care for a child eighteen years of age or older only if the child is suffering from a serious medical condition *and* is "incapable of self-care because of a mental or physical disability."[152] A "physical or mental disability" is a "physical or mental impairment that substantially limits one or more of the major life activities of an individual."[153] In *Novak*, the plaintiff argued that she had taken leave to care for her eighteen-year-old daughter who was struggling with temporary postpartum depression. The court rejected this argument, stating that the daughter's postpartum depression had not been sufficiently severe, enduring, or debilitating to qualify as a "physical or mental disability" under the FMLA.[154]

D. RECOGNITION OF RIGHT TO SUE UNDER THE FMLA

The Supreme Court held that both private and public employers must comply with the FMLA, thereby granting employees expansive rights to sue under the FMLA.[155] In *Nevada Department of Human Resources v. Hibbs*, an employee sought FMLA leave to care for his wife who was recovering from a car accident and neck surgery.[156] His employers initially granted twelve weeks of intermittent leave but subsequently informed him that he had exhausted his FMLA leave.[157] When the employee did not return to work, he was terminated.[158] The Supreme Court affirmed the Ninth Circuit's holding that a Nevada state employee has the right to sue the State of Nevada for FMLA violations.[159] The Court's decision signaled that both public and private employers must comply with the FMLA. The Court stated that, because Congress intended the FMLA to apply to the states, the

148. Novak v. MetroHealth Med. Ctr., 503 F.3d 572, 578 (6th Cir. 2007).
149. *Id*. (citing Harcourt v. Cincinnati Bell Tel. Co., 383 F. Supp. 2d 944, 955-56 (S.D. Ohio 2005)).
150. *Id*. (citing *Harcourt*, 383 F. Supp. 2d at 955-56).
151. Id. at 578–79.
152. *Id*. at 580–81 (quoting 29 U.S.C. § 2611(12)(B)).
153. *Id*. at 581 (quoting 29 U.S.C. § 2611(12)(B)).
154. *Id*. at 582.
155. Nevada Dep't of Human Res. v. Hibbs, 538 U.S. 721, 724–25 (2003).
156. *Id*. at 725.
157. *Id*.
158. *Id*.
159. Hibbs v. Dep't of Human Res., 273 F.3d 844, 858 (9th Cir. 2001), *aff'd*, 538 U.S. 721 (2003).

FMLA "enables employees to seek damages 'against any employer (including a public agency) in any Federal or State court of competent jurisdiction."[160] The Court protected the FMLA rights of both private and public employees.

However, the Supreme Court recently limited this right for state employees. In *Coleman v. Maryland*, the Court ruled that Congress failed to properly abrogate states' sovereign immunity under FMLA's self-care provision because it did not "identify a pattern of constitutional violations and tailor a remedy congruent and proportional to the documented violations."[161] Specifically, the Court reasoned that Congress failed to demonstrate "how the self-care provision is necessary to the family-care provisions or how it reduces an employer's incentives to discriminate against women."[162] Therefore, state employees are now barred from receiving monetary damages under the FMLA when they exercise their leave rights under the self-care provision. Furthermore, state employees cannot be held liable as employers in their individual capacity under the FMLA.[163]

E. PROTECTIONS AGAINST EMPLOYER RETALIATION

To prevent employers from retaliating against employees who use FMLA leave, the FMLA prohibits employers from interfering with the attempt to exercise any right granted under it.[164] An employer may not discriminate against employees based on their use of FMLA leave.[165] If an employer considers FMLA use as a negative factor in an employment action, they may be liable if the employee can show through the use of direct or indirect evidence that the employer acted based on a discriminatory animus.[166] Direct evidence must be strong and clearly show the discriminatory animus and the adverse employment action.[167]

When an employee cannot provide evidence of direct discrimination, the employee must establish a prima facie case of discrimination. To establish a prima facie case, employees must show that (a) they exercised their rights under the FMLA, (b) they suffered an adverse employment action, and (c) there was a causal connection between the exercise of their FMLA rights and the adverse employment action.[168]

Employees can establish a causal relationship in several ways, including by temporal proximity or by comparing their negative treatment to the lenient

160. Nevada v. Hibbs, 538 U.S. 721, 726 (2003) (quoting 29 U.S.C. § 2617(a)(2) (West, Westlaw through Pub. L. No. 116-108)).

161. Coleman v. Court of Appeals of Maryland, 132 S. Ct. 1327, 1338 (2012).

162. *Id.* at 1336.

163. *See, e.g.*, Butler v. Pennington, 2018 WL 8263059, at *7–8 (D.S.C. Nov. 15, 2018).

164. 29 U.S.C.A. § 2615(a)(l).

165. *See* Ebersole v. Novo Nordisk, Inc., 758 F.3d 917, 923 (8th Cir. 2014) (quoting Hite v. Vermeer Mfg. Co., 446 F.3d 858, 865 (8th Cir. 2006)).

166. *Id.* at 924.

167. *Id.*

168. Phillips v. Mathews, 547 F.3d 905, 912 (8th Cir. 2008) (quoting Smith v. Allen Health Sys., Inc., 302 F.3d 827, 832 (8th Cir. 2002)).

treatment of other, similarly situated, employees.[169] In *Ebersole v. Novo Nordisk, Inc.*, an employee with a chronic medical condition was terminated for falsifying call records relating to her work as a sales representative.[170] She had been asked frequently about her medical condition and was terminated shortly after requesting three days of vacation leave.[171] Her last use of FMLA leave, however, was seven months before termination.[172] Although the plaintiff attempted to demonstrate that her employer's reason for termination, falsification of call records, was a pretext for discriminatory employment action, the Eighth Circuit found that the temporal proximity argument alone was not strong enough to constitute retaliation, as seven months was too long to establish a causal relationship.[173]

To show pretext by comparing an employee's termination to the more lenient treatment of other employees, the employee's coworkers "must have dealt with the same supervisor, have been subject to the same standards, and engaged in the same conduct without any mitigating or distinguishing circumstances."[174] In *Ebersole*, although the plaintiff drew comparisons to similarly situated employees who were not terminated, the court found that these comparisons were also not enough to show a pretext for retaliation.[175] The court found that two employees had mitigating circumstances, and the only other employee in an extremely similar situation was terminated on the same day.[176]

Courts have yet to settle on an appropriate causation standard for retaliation cases. In *Gourdeau v. City of Newton*, a Newton Police Department employee who was not selected to fill a new, more senior position for which she applied brought suit against the city, claiming retaliation for several days of FMLA leave that she took between 2008 and 2012.[177] The District Court considered which causation standard should apply: "but-for" or negative factor.[178] In other words, did Gourdeau have to prove that but for her FMLA leave, she would have been selected for the new position, or was it enough to prove that the leave was a negative factor in Newton's review of her application?[179] Looking to Supreme Court employment discrimination jurisprudence, the FMLA's structure, text, and legislative history, and public policy concerns, the court held that retaliation suits brought under the FMLA must be subject to a but-for causation standard.[180] The court noted, however, that other district courts have come to the opposite

169. *Ebersole*, 758 F.3d at 925.
170. *Id.* at 922.
171. *Id.* at 921–22.
172. *Id.* at 925.
173. *Id.* at 926.
174. Burton v. Ark. Sec'y of State, 737 F.3d 1219, 1230 (8th Cir. 2013) (quoting Wierman v. Casey's Gen. Stores, 638 F.3d 984, 994 (8th Cir. 2011)).
175. *Ebersole*, 758 F.3d at 926.
176. *Id.*
177. Gourdeau v. City of Newton, 238 F. Supp. 3d 179, 181 (D. Mass. 2017).
178. *Id.* at 183.
179. *Id.*
180. *Id.* at 183–92.

conclusion and have held that a negative-factor test applies, relying on a Department of Labor regulation which prohibits consideration of FMLA use as a negative factor in employment actions.[181]

After an employee has established a prima facie case of discrimination, the courts use the *McDonnell Douglas* burden-shifting test to evaluate claims of discrimination.[182] Under the *McDonnell Douglas* test, (a) the employee must establish a prima facie case of retaliation, and if he does (b) the employer must articulate some nondiscriminatory reason for the adverse employment action. If the employer provides a legitimate reason, (c) the burden falls on the employee to show that the proffered reason was only pretext and that the retaliation was for exercising a right under the FMLA.[183] The plaintiff in *Staunch v. Continental Airlines* successfully established a prima facie retaliation case for pregnancy-related absences.[184] Her employer then proffered evidence of legitimate concerns about Staunch's repeated absences and a written warning for attendance.[185] The Sixth Circuit found that the plaintiff could not prove pretext and that the employer's final decision to terminate Staunch was not pretext but based on "legitimate, non-discriminatory" reasoning.[186]

IV. SHORTCOMINGS AND CRITIQUES OF THE FMLA

Several critiques of the FMLA have emerged in recent years, including arguments that (A) the FMLA fails to meet its goal of promoting gender equality, as it guarantees only unpaid leave;[187] (B) FMLA leave is less accessible to people of color and working-class individuals, as it guarantees only unpaid leave;[188] and (C) Supreme Court interpretations of the FMLA self-care provision leave women unprotected from sex discrimination.[189] New critiques will likely emerge soon, as DOL recently (D) issued a controversial opinion letter explaining that sick leave and FMLA leave run concurrently[190] and (E) solicited comments on the FMLA.[191]

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181. *Id*. at 193 (quoting 29 C.F.R. § 825.220(c)); *see e.g*., Chase v. U.S. Postal Serv., 149 F. Supp. 3d 195, 209 (D. Mass. 2016), *aff'd on other grounds*, Chase v. U.S. Postal Serv., 843 F.3d 553 (1st Cir. 2016).

182. *See* Shelley v. Geren, 666 F.3d 599, 613 (9th Cir. 2012) ("Because Shelley has no direct evidence of discrimination based on age, he must rely on the burden-shifting approach articulated in *McDonnell Douglas*. . ..").

183. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-04 (1973); *see also* Hodgens v. General Dynamics Corp., 144 F.3d 151, 160-61 (1st Cir. 1998).

184. Staunch v. Cont'l Airlines, Inc., 511 F.3d 625, 631 (6th Cir. 2008).

185. *Id*. at 632.

186. *Id*.

187. *See* Anthony, *supra* note 7, at 479—480.

188. *See, e.g*., Leslie Agyemfra, *An Intersectional Lens On Paid Family And Medical Leave*, YW BOS. (Apr. 28, 2018), https://www.ywboston.org/2018/04/intersectional-lens-on-paid-family-leave.

189. *See Coleman*, 132 S. Ct. at 1338.

190. Christine B. Townsend & Christina L. Wabiszewski, *DOL Opinion Letter Clarifies Designation and Use of FMLA Leave*, OGLETREE DEAKINS BLOG (Mar. 5, 2019), https://ogletree.com/insights/2019-03-15/dol-opinion-letter-clarifies-designation-and-use-of-fmla-leave [hereinafter Townsend].

191. Lisa Nagele-Piazza, *DOL to Seek Comments on Improving FMLA*, SHRM (May 23, 2019), https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/dol-to-seek-comments-on-improving-the-fmla.aspx.

A. DISPARATE USE & GENDER INEQUALITY

While an increasing number of women have entered the paid workforce, women remain primarily responsible for the domestic sphere, doing "the bulk of domestic duties in 93 percent of cases."[192] The traditional stereotypes of women as primary caretakers in the domestic sphere and of men as the principal income-earners in the family structure remain entrenched in American culture.[193] Congress intended the FMLA to promote employment equality for men and women by providing increasing opportunities for both to balance work and family obligations.[194] However, many critics of the Act contend that it does not meet these goals and that it actually promotes gender neutrality, not gender equality.[195]

Although the FMLA enables both men and women to take leave for caregiving purposes, women are much more likely to use FMLA leave to care for others.[196] "Because women have traditionally taken primary responsibility for care work . . . an emphasis on family care will tend to entrench gendered patterns of leave-taking. These patterns, in turn, may reinforce stereotyped notions of women's lack of commitment to the labor market, undermining progress toward gender equality in the workplace."[197]

Thus, although the FMLA purports to facilitate an easier balance of work and family responsibilities by providing caregiving leave, critics argue that it does not address fundamental challenges to the achievement of equal employment opportunities for men and women, including unequal pay and the expectation that women will assume responsibility for domestic work.[198] Women are still more likely than men to perform both paid and unpaid caretaking work.[199] Despite the FMLA, these inequalities represent hurdles unique to women in the paid employment sphere, thereby creating "serious economic consequences" for women, including reduction of earning power and even loss of jobs.[200]

Although the FMLA does not eradicate gender inequality in care-giving, it has provided certain social benefits and many women have capitalized on their rights under the Act to achieve a greater work-family balance.[201] The FMLA has also

192. Sabrina Barr, *Women Still Do Majority of Household Chores*, INDEP. (July 26, 2019), https://www.independent.co.uk/life-style/women-men-household-chores-domestic-house-gender-norms-a9021586.html.

193. Bornstein, *supra* note 25, at 99.

194. *See* 29 U.S.C.A. § 2601(b)(5) (West, Westlaw through P.L. 115-190) ("[T]o promote the goal of equal employment opportunity for women and men. . .").

195. *See generally*, Anthony, *supra* 7.

196. *See, e.g.*, Bornstein, *supra* note 25, at 86–87.

197. *See* Kim, *supra* note 35, at 3.

198. *See* Bornstein, *supra* note 25, at 86–87. Barr, *supra* note 192.

199. *See* Gillian B. White, *The Invisible Work That Women Do Around the World*, ATLANTIC (Dec. 2015), https://www.theatlantic.com/business/archive/2015/12/the-invisible-work-that-women-do-around-the-world/420372/.

200. Kim, *supra* note 35, at 10.

201. *See* Angie K. Young, *Assessing the Family and Medical Leave Act in Terms of Gender Equality, Work/Family Balance, and the Needs of Children*, 5 MICH. J. GENDER & L. 113, 144–53 (1998).

generated important dialogue within the legislature and courts about deeply ingrained gender patterns of employment in the United States.[202] In *Hibbs*, the Court acknowledged that "stereotype-based beliefs about the allocation of family duties remained firmly rooted, and employers' reliance on them in establishing discriminatory leave policies remained widespread."[203] The Court in *Hibbs* additionally highlighted the pervasive, discriminatory effects of facially neutral leave policies: "Congress had evidence that, even where state laws and policies were not facially discriminatory, they were applied in discriminatory ways."[204] Thus, while many acknowledge that leave policies in the U.S. do not promote true gender equality, they also acknowledge that the FMLA has promoted important progress in work-family balance and gender equality.

B. INTERSECTIONALITY & THE FMLA

Persons of color and persons of lower socioeconomic status are often disproportionately unable to access FMLA leave,[205] which means that intersectionality—the compounding of overlapping gender, race, and socioeconomic discrimination[206]—plays a large role in the FMLA's disparate impact.

First, because the FMLA does not guarantee paid leave, it is inaccessible to people who lack sufficient savings to cover leave.[207] The lack of guaranteed pay means that pregnant persons who qualify for FMLA protections often return to work less than two weeks after giving birth because of the dire economic impact of losing those paychecks.[208] Returning to work after such a serious medical event not only impinges on the autonomy of the mother and her health but may even subject them to state intervention.[209] Mothers without class privilege are disproportionately targeted by the Department of Child and Family Services for removal of children, often on the basis of behaviors that they define as neglect in a cash-poor household.[210] Declining rates of government WIC support[211] and the

202. *See, e.g.*, *Hibbs*, 538 U.S. at 730.

203. *Id.*

204. *Id.* at 732.

205. *See* Agyemfra, *supra* note 188.

206. *See* Merrill Perlman, *The origin of the term 'intersectionality'*, COLUM. JOURNALISM REV. (Oct. 23, 2018), https://www.cjr.org/language_corner/intersectionality.php.

207. *C.f.*, Gale, *supra* note 2.

208. *Id.*

209. *See* Emma Ketteringham, *Live in a Poor Neighborhood? Better Be a Perfect Parent*, N.Y. TIMES (Aug. 22, 2017), https://www.nytimes.com/2017/08/22/opinion/poor-neighborhoods-black-parents-child-services.html.

210. *Id.*; Larissa MacFarquhar, *When Should a Child Be Taken From His Parents?*, THE NEW YORKER (Aug. 7, 2017), https://www.newyorker.com/magazine/2017/08/07/when-should-a-child-be-taken-from-his-parents; Stephanie Clifford & Jessica Silver-Greenberg, *Foster Care as Punishment: The New Reality of 'Jane Crow'*, N.Y. TIMES (July 21, 2017), https://www.nytimes.com/2017/07/21/nyregion/foster-care-nyc-jane-crow.html.

211. *See* VICTOR OLIVEIRA, THE FOOD ASSISTANCE LANDSCAPE: FY 2016 ANN'L REPORT 6 (Dale Sims, 2017) ("In fiscal year 2016, an average of 7.7 million people per month participated in the

Clinton-era welfare policies have made poor families increasingly vulnerable.[212]

The unpaid nature of FMLA leave forces parents to either leave a child with another caretaker (often a grandparent), which could result in DCFS targeting,[213] *or* go on leave without pay and suffer the material consequences. These are the families targeted for intervention by virtue of their frequent exposure to the state[214] and what Khiara Bridges calls the "moral construction of poverty."[215] Lack of paid family leave may hurt more than just the health of mother and child or economic wellbeing of the family unit. It can spell disaster for family unity if the state determines that a mother leaving her infant with another caretaker amounts to neglect[216]—a burden that falls most heavily on the population least able to demand paid leave.

Further, critics highlight that facially neutral requirements of the FMLA, like duration of employment and size of business, disadvantage poor women.[217] Poor women of color are overrepresented as low wage earners[218] and often work in informal economies which are not covered by the FMLA because of the business size eligibility requirement.[219] Additionally, poor women often face greater challenges to job stability as a result of gentrification pricing them out of

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program, 4 percent fewer than the previous year. This was the fewest number of participants in 13 years. Since peaking in fiscal 2010, the number of participants has decreased by 16 percent.").

212. *See* LOST GROUND: WELFARE REFORM, POVERTY, AND BEYOND (Randy Albelda & Ann Withom eds., 2002); Max Ehrenfreund, *Bernie Sanders is Right: Bill Clinton's Welfare Law Doubled Extreme Poverty*, WASH. POST (Feb. 27, 2016), https://www.washingtonpost.com/news/wonk/wp/2015/11/19/bernie-sanders-is-right-the-top-0-1-have-as-much-as-the-bottom-90/?arc404=true.

213. *See* Ketteringham, *supra* note 209.

214. *See generally* Michele Gilman, *Welfare, Privacy, and Feminism*, 39 U. BALT. L. F. 1–24 (2008); *see also* KHIARA BRIDGES, THE POVERTY OF PRIVACY RIGHTS, 86–87 (2017) ("One need not be steeped in Foucauldian theory to understand that visibility can be radically disempowering. And indeed, poor mothers are radically disempowered by their ability to be seen by the state . . . [and as a result] are more likely to become the objects of child welfare investigations.").

215. *See id*. at 46–47 (arguing that if CPS interventions were based on an assumption that poor mothers committed child neglect or abuse because of their lack of material resources, the reasonable CPS policy response to that lack of resources would be the provision of food, social services, housing support. Instead, a "moral construction of poverty" guides such interventions. The presumption of neglect and "high risk" therein "has everything to do with. . . the idea that people are poor because they are lazy, irresponsible, averse to work, promiscuous, and so on . . . If personal failures are the presumptive cause of poverty [as opposed to lack of benefits, expensive childcare, low minimum wage, and lack of paid leave], then poor mothers ought to be supervised closely, as their personal failures necessarily implicate children.").

216. *See* Ketteringham, *supra* note 209.

217. Jennifer Ludden, *FMLA Not Really Working for Many Employees*, NPR (Feb. 5, 2013), https://www.npr.org/2013/02/05/171078451/fmla-not-really-working-for-many-employees.

218. *See Underpaid & Overloaded: Women in Low-Wage Jobs*, NAT'L WOMEN'S L. CTR. (2014), https://www.nwlc.org/sites/default/files/pdfs/final_nwlc_lowwagereport2014.pdf (illustrating how women of color represent almost half of the low-wage workforce: black women made up 17.6% of the low-wage workforce; Hispanic women 22.8%, Asian, Hawaiian and/or Pacific Islander women made up 6.7%, and 23.8% are "foreign born").

219. *See* Asha DuMonthier et al., *The Status of Black Women in the US*, INST. FOR WOMEN'S POL'Y RES. 30 (2016) ("Black immigrant and Black American women represent 30% of the care economy" and are over-represented as "domestic workers", where there are often few employment protections where individuals work at un-registered businesses, small care facilities, or independently.).

neighborhoods[220] and the associated interruptions to livelihood related caused by over-policing.[221] Poor women of color are thus not only given the fewest entitlements to paid leave by virtue of their disproportionate representation in "pink collar" jobs, but they also may not be covered by the FMLA's guarantee of unpaid leave for workers due to "unstable" employment histories in informal economies and the relatively small size of their employers.

C. SELF-CARE PROVISION OF THE FMLA

Another critique of the FMLA's impact relates to the Supreme Court decision in *Coleman v. Court of Appeals of Maryland*, where the Court held that state governments cannot be required to follow the self-care provision of the FMLA that allows employees to take leave for serious medical conditions.[222] This ruling appears to permit state employers to discriminate against state employees who take leave for serious health problems on the basis of sex.[223] This ruling could leave women suffering miscarriages, pregnancy related illness, and physician recommended bed rest unprotected from sex discrimination. Justice Ginsburg's dissent in *Coleman* highlighted the disparate impact of the majority's interpretation of the self-care clause: "it would make scant sense to provide job-protected leave for a woman to care for a newborn, but not for her recovery from delivery, a miscarriage, or the birth of a stillborn baby. . .. [A]llowing States to provide no pregnancy disability leave at all, given that only women can become pregnant, would obviously exclude far more women than men from the workplace." [224] Poor, pregnant women of color are most likely to have pregnancy complications.[225]

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220. *See* Cherise Charleswell, *Gentrification is a Feminist Issue: A Discussion on the Intersection of Class*, HAMPTON INST.: WOMEN'S ISSUES (Aug. 15, 2015), http://www.hamptoninstitution.org/gentrification-and-feminism.html#.Wpx5cWaZN-U;."); Georgina Aide Jimenez, *Gentrification and Gender Expectations: Women in the Fruitvale*, CAUSA JUSTA, https://www.hungercenter.org/publications/gentrification-gender-expectations-women-in-the-fruitvale/ (last visited Nov. 6, 2017).

221. *See generally* ANDREA RITCHIE, INVISIBLE NO MORE: POLICE VIOLENCE AGAINST BLACK WOMEN AND WOMEN OF COLOR (2017); Natasha A. Frost et al., INST. ON WOMEN & CRIM. JUST., *Hard Hit: The Growth in the Imprisonment of Women 1977-2004* (2006), http://www.wpaonline.org/institute/hardhit/HardHitReport4.pdf; *Words From Prison-Did You Know . . .?*, ACLU (June 12, 2006), https://www.aclu.org/other/womens-rights/words-in-prison-did-you-know.

222. Coleman v. Court of Appeals of Maryland, 132 S. Ct. 1327, 1332 (2012).

223. *See id*. at 1338 ("Without widespread evidence of sex discrimination or sex stereotyping in the administration of sick leave, it is apparent that the congressional purpose in enacting the self-care provision is unrelated to these supposed wrongs. The legislative history of the self-care provision reveals a concern for the economic burdens on the employee and the employee's family resulting from illness-related job loss and a concern for discrimination on the basis of illness, not sex.").

224. *Id*. at 1345 (Ginsburg, J., dissenting). We understand that the majority of persons who become pregnant identify as female, but we would diverge from Justice Ginsburg's opinion insofar as not all pregnant persons identify as women. Indeed the disparate impact on trans-persons likely exceed that of women insofar as non-recognition of sex discrimination in the FMLA self-care provision would leave pregnant trans persons who diverge from the normative conception of pregnancy open to non-compensable termination so long as there was a "rational" basis.

225. *See* Barbara A. Laraia et al., *Household Food Insecurity is Associated with Self-reported Pregravid Weight Status, Gestational Weight Gain and Pregnancy Complications*, 110 J. AM. DIET ASSOC. 692, 692—701 (May 2011).

Coleman thus creates another gap in FMLA protection for women of low socioeconomic status. Critics of *Coleman* argue that the Court would have women rely on private sick leave policies despite the evidence that the FMLA Congress knew of and responded to the shortcomings of private policies.[226] As Justice Ginsburg suggests excepting medical self-care from the FMLA's requirements is not gender neutral.

D. DEPARTMENT OF LABOR—FMLA & SICK LEAVE RUN CONCURRENTLY

A potential FMLA issue stems from an opinion letter issued by the Department of Labor (DOL) in March 2019, clarifying that FMLA and sick leave run concurrently.[227] This means that employees who qualify for FMLA leave but choose to take private sick leave instead to maintain their annual FMLA leave balance actually exhaust their available FMLA leave while on sick leave.[228] Several courts, including the Ninth Circuit in *Escriba v. Foster Poultry Farms*, have previously ruled that FMLA and sick leave should run consecutively,[229] giving employees more overall time off.

In *Escriba*, the Ninth Circuit held that employees can seek time off, but can still decline to invoke FMLA leave, in order to preserve FMLA leave for future use. [230] The plaintiff in *Escriba* was fired after she used more vacation leave than allotted and explicitly declared that she wanted to use annual leave instead of FMLA leave to care for her sick father.[231] DOL's opinion letter may become controversial, as it takes away flexibility from employees who want to preserve their FMLA leave, but it also protects plaintiffs like Escriba from being discharged while on FMLA-qualifying leave.

E. SOLICITATION ON COMMENTS TO IMPROVE THE FMLA

Other potential FMLA critiques will likely emerge soon, as DOL announced in May 2019 that it would seek comments on how to improve the FMLA. [232] A request for information is expected in April 2020.[233] The request for information aims to "(1) 'better protect and suit the needs of workers' and (2) 'reduce administrative and compliance burdens on employers.'"[234] DOL, however, has noted

226. *See Coleman*, 132 S. Ct. at 1342 (Ginsburg, J., dissenting).
227. Townsend & Wabiszewski, *supra* note 190.
228. *Id*.
229. *Id*.
230. *See* Escriba v. Foster Poultry Farms, 743 F.3d 1236 (9th Cir. 2014).
231. *Id*. at 1240.
232. Nagele-Piazza, *supra* note 191.
233. *Id*.
234. Ryan Golden, *DOL Will Revisit FMLA Regs to Reduce Employer Compliance Burdens*, HR DIVE (May 23, 2019), https://www.hrdive.com/news/dol-will-revisit-fmla-regs-to-reduce-employer-compliance-burdens/555343.

that this is merely a preliminary step, and changes to the law will likely not occur for some time, as this is a "long process."[235]

V. PROPOSED FEDERAL LEGISLATION FOR PAID FAMILY LEAVE

In recent years, paid family leave has gained bipartisan support.[236] Within this support, however, there are disagreements as to what situations should justify such leave.[237] While there is a swell of support for paid parental leave, especially for newborns and adoptions, the support for leave to care for other family members, such as aging parents, appears to still be separated along party lines, with an overwhelming number of Democrats supporting a broader idea of family leave.[238] In addition to these disagreements about what is covered, politicians have a variety of solutions for the two biggest questions: how much is the pay and where does the money come from?[239]

Seemingly, the answer to the second question will help to answer the first. While many larger companies have already begun instituting paid maternal and parental leave, the business lobby, as a whole, has resisted legislation for paid family leave fearing that employers would bear the cost.[240] Foreseeing this concern, politicians have proposed a variety of methods that would allow parents to elect to take up to three months of leave. Discussed below, four current proposals are: (A) The FAMILY Act, (B) The New Parents Act of 2019, (C) The CRADLE Act, and (D) The Cassidy-Sinema Parental Leave Plan.

A. THE FAMILY ACT

Senator Kirsten Gillibrand (D-NY) and Representative Rosa DeLauro (D-CT) reintroduced the Family and Medical Insurance Leave Act (FAMILY Act) in their respective houses in February 2019.[241] If enacted, it would create a paid leave system similar to those in operation in California, New Jersey, Rhode Island, New York, District of Columbia, Massachusetts, and Washington (as of 2020),[242] wherein employees pay into an administrative system that provides a

235. Jamie Webb-Akasaka, *Possible Changes to the Family Medical Leave Act (FMLA) May be in the Works*, ONEDIGITAL (June 6, 2019), https://www.onedigital.com/blog/possible-changes-to-the-family-medical-leave-act-fmla-may-be-in-the-works.

236. *See* Abby Vesoulis, *Paid Family Leave Has Stalled in Congress for Years. Here's Why That's Changing*, TIME (May 4, 2019), https://time.com/5562960/paid-family-leave-congress/.

237. *See* Caitlin Oprysko, *2020 Dems: Issues: Paid Leave*, POLITICO (July 10, 2019), https://www.politico.com/2020-election/candidates-views-on-the-issues/economy/paid-leave/.

238. *Id.*

239. *See generally* Lorie Konish, *Trump Touts Paid Family Leave in Budget as Taxpayers Worry About Costs*, CNBC (Mar. 12, 2019 11:45 AM), https://www.cnbc.com/2019/03/12/trump-touts-paid-family-leave-in-budget-but-questions-linger.html.

240. Vesoulis, *supra* note 236.

241. *See* S. Rep. No. 463, 116th Cong. (2019).

242. *Id.*; *see also* Adam Bulger, *What are the Laws Around Paternity Leave and Family Leave in the U.S.?*, FATHERLY (May 9, 2019 6:16 PM), https://www.fatherly.com/love-money/paternity-leave-laws-state-us/.

minimum pay for up to three months of leave.[243] The bill intends to provide for two-thirds of an employee's income, within minimum and maximum limits for monthly compensation.[244] Such legislation may be appealing in a nation that is regarded as business conservative when it comes to leave because it is slated to be self-sustaining from a combination of contributions from employees, employers, and self-employed individuals.

Nevertheless, while two-thirds pay is certainly superior to no pay, the economic impact of losing one-third of one's wages while on leave may still deter poor families from taking leave. Unlike the FMLA, the bill applies to companies of all sizes and therefore does not disproportionately impact the poor.

B. NEW PARENTS ACT OF 2019

In March 2019, Senator Marco Rubio (R-FL) introduced the "New Parents Plan of 2019" as another possibility for paid parental leave.[245] This plan would allow new parents (via birth or adoption) to opt for monthly payments equal to payments they would receive as Social Security retirement benefits.[246] Like the FAMILY Act and other proposals, the maximum allowable leave time is three months. The plan seems attractive to employers because they would not have to provide anything aside from the necessary time off from work. Instead, the paid leave would be funded by the employee by either increasing their subsequent income withholdings or delaying their qualifying age for "old-age insurance benefit."[247] These payments would likely be less than the two-thirds proposed in the FAMILY Act and substantially less than the employee's average monthly income.[248] In addition to possible inadequacies the New Parents Act shares with the FAMILY Act—short leave length and insufficient compensation—the New Parents Act presents a three-way Hobson's choice: no paid leave, diminished future paychecks, or a requirement to work further into the employee's golden years.

C. THE CRADLE ACT

Similar to Senator Rubio's "New Parents Act," Senators Joni Ernst (R-IA) and Mike Lee (R-UT) propose another Social Security-based plan for new parents,

243. *See* Heather Boushey & Sarah Glynn, *The Many Benefits of Paid Family and Medical Leave*, CTR. FOR AM. PROGRESS (Nov. 2, 2012), https://www.americanprogress.org/wp-content/uploads/2012/11/GlynnModelLegislationBrief-2.pdf.

244. *See* S. Rep. No. 337, 115th Cong. (2017).

245. *See* S. Rep. No. 920, 116th Cong. (2019).

246. *Id.*

247. *Id.*

248. For a 29-year old full-time wage employee paid $10 per hour ($1720 monthly; $20,000 annually), the monthly payment would only be $761 per month—only 44% of the employee's average monthly income. *See Benefit Calculator*, SOCIAL SECURITY ONLINE, https://www.ssa.gov/OACT/quickcalc/index.html (Enter "9/2/1990" for birthdate; Enter "20000" for "Earnings in the current year;" Enter "9/2052" for "Future retirement date").

"The Child Rearing and Development Leave Empowerment (CRADLE) Act."[249] Under this proposal, new birth and adoptive parents could exchange up to three months of benefits for delaying Social Security retirement by twice as many months.[250] Where the New Parents Act would base leave payments on predicted retirement payout, the CRADLE Act payments would equal Social Security disability amounts.[251] This amount would be greater than that proposed in the "The New Parents Act," but would still be less than the amount proposed by the FAMILY Act.

D. CASSIDY-SINEMA PARENTAL LEAVE PLAN

Senators Bill Cassidy (R-LA) and Kyrsten Sinema (D-AZ) have a proposal that has not yet been presented as legislation: provide $5,000 as an income supplement that serves as a cash advance of tax benefits for the following decade.[252] For parents who choose to accept a $5,000 advance, their annual Child Tax Credit would be reduced from $2,000 to $1,500 for each year in the following decade.[253] In essence, the employee would either receive $500 less in her tax return or pay an additional $500 in taxes each year for ten years. As a result, this proposal that has little or no effect on employers beyond existing requirements of the FMLA.[254] For lower income families earning an hourly wage of $10 or less, $5,000 more than replaces three months of lost income.[255]

Unlike the other three proposals, this supplement is not attached to a stipulation of absence from work. Instead, it allows new parents to choose how to use this

249. *See* Press Release, Mike Lee: U.S. Senator for Utah, Sens. Ernst, Lee Put Forward Paid Parental Leave Plan That is Budget Neutral and Flexible for Parents (Mar. 12, 2019), https://www.lee.senate.gov/public/index.cfm/2019/3/sens-ernst-lee-put-forward-paid-parental-leave-plan-that-is-budget-neutral-and-flexible-for-parents; *see also Paid Parental Leave Summary: CRADLE Act*, JONI ERNST: UNITED STATES SENATOR FOR IOWA (Mar. 12, 2019), https://www.ernst.senate.gov/public/_cache/files/50e52d04-bffd-4373-891b-5d5b8ba405c2/9C6BEA03605DC46CAA4C0C07AF453DA2.cradle-act-summary.pdf.

250. For example, two months of benefits would delay Social Security retirement benefits by four months. *See Paid Parental Leave Summary: CRADLE Act*, JONI ERNST: UNITED STATES SENATOR FOR IOWA (Mar. 12, 2019), https://www.ernst.senate.gov/public/_cache/files/50e52d04-bffd-4373-891b-5d5b8ba405c2/9C6BEA03605DC46CAA4C0C07AF453DA2.cradle-act-summary.pdf.

251. For a 29-year old full-time wage employee paid $10 per hour ($1720 monthly; $20,000 annually), the monthly payment would only be $1,021 per month—58% of the employee's average monthly income. *See Benefit Calculator*, SOCIAL SECURITY ONLINE, https://www.ssa.gov/OACT/quickcalc/index.html (Enter "9/2/1990" for birthdate; Enter "20000" for "Earnings in the current year;" Enter "9/2052" for "Future retirement date").

252. Video: Cassidy Gives Update on Bipartisan Paid Leave Proposal at Joint Economic Committee Hearing, Bill Cassidy, M.D.: United States Senator for Louisiana (Sept. 11, 2019), https://www.cassidy.senate.gov/newsroom/press-releases/video-cassidy-gives-update-on-bipartisan-paid-leave-proposal-at-joint-economic-committee-hearing.

253. Senators Bill Cassidy and Kyrsten Sinema, *A Bipartisan Solution to Help Working Families: Frequently Asked Questions*, BILL CASSIDY, M.D.: UNITED STATES SENATOR FOR LOUISIANA, https://www.cassidy.senate.gov/imo/media/doc/Cassidy%20Sinema%20Proposal%20FAQs.pdf (last visited Oct. 10, 2019).

254. *Id.*

255. For an employee earning $10 per hour, twelve weeks would equal $4,800.

money: "cover lost wages, infant/child care expenses, medical recoupment, or adoption fees."[256] This ability to choose might cut both ways. On the one hand, it gives employees the freedom to choose between continuing to work, taking leave, or pursuing a part-time solution—all without forgoing the offered government benefit. On the other hand, because employees do not have to take leave to qualify, there is a danger that employers could informally pressure employees against taking some or all of the intended leave. In short, this proposal offers a good solution to the financial strains of new parents, but may be less effective towards the goal of ensuring parental leave.

E. FUTURE OF PAID FAMILY LEAVE

The Trump administration has made statements in favor of six weeks of paid leave for new parents and included one billion dollars in its proposed budget for 2020,[257] and in December 2019 President Trump signed into law a bipartisan bill granting up to twelve weeks of paid parental leave to federal civilian employees.[258] The Congressional Budget Office estimates this bill will cost about $8.1 billion over the next ten years, while taxpayers responsible for the cost are not guaranteed paid parental leave by their employers.[259]

All of the broader, countrywide legislative proposals above only offer three months of leave, and none propose 100% income replacement. Under any of the proposals, the U.S. remains far behind most other developed democracies.[260] In place of adding to the federal budget or affecting a company's bottom line, these bills have an employee choose to receive money *now* that they otherwise would have received *later* by way of higher paycheck withholdings, delayed retirement, or a higher tax burden.

While this outcome seems less than the ideal hoped for by advocates, perhaps a step in the right direction is better than the current system of no financial benefits. Over time, political climates may change, and the passage of paid leave for federal workers is a forward step. As more employers offer paid family leave, the business lobby's stance may shift to a more supportive role for a mandate of more comprehensive coverage either from employers or the federal government. Still, under the current political climate, "budget neutral" legislation may have a greater chance of becoming law quicker than waiting for changes in regimes and public opinion.

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256. Cassidy & Sinema, *supra* note 253.

257. See Lorie Konish, *Trump Touts Paid Family Leave in Budget as Taxpayers Worry About Costs*, CNBC (Mar. 12, 2019 11:45 AM), https://www.cnbc.com/2019/03/12/trump-touts-paid-family-leave-in-budget-but-questions-linger.html.

258. *Paid Parental Leave for Federal Employees*, CHIEF HUMAN CAPITAL OFFICERS COUNCIL, https://www.chcoc.gov/content/paid-parental-leave-federal-employees (last visited Jan. 27, 2020).

259. Jack Kelly, *In a Historic Bill, Federal Workers Will Receive 12 Weeks of Paid Parental Leave*, FORBES (Dec. 19, 2019), https://www.forbes.com/sites/jackkelly/2019/12/19/in-a-historic-bill-federal-workers-will-receive-12-weeks-of-paid-parental-leave/#6774c7192290.

260. Vesoulis, *supra* note 236

VI. STATE LEGISLATION ON FAMILY LEAVE

A. STATES WITH MANDATORY PAID FAMILY LEAVE

Partly due to "congressional inaction,"[261] many states have proposed or enacted legislation to establish paid family leave programs.[262] Four states—California, New Jersey, Rhode Island, and New York—currently require paid family leave.[263] Washington D.C., Massachusetts, Connecticut, Oregon, and the State of Washington have enacted paid family leave legislation, most of which will become effective in the near future.[264]

On January 1, 2018, New York launched its paid family leave program, which the state government claimed to be "the strongest, most comprehensive Paid Family Leave (PFL) in the nation."[265] The program is included under the disability insurance and is fully funded by employees through employee payroll deductions.[266] Every covered employee pays the same deduction rate, and employers use the deductions to pay for the cost of the premium.[267] The benefits phase in over four years: in 2018, employees are eligible for up to 8 weeks of paid leave at 50% of their average weekly wage (AWW), up to 50% of the New York State Average Weekly Wage (SAWW); in 2019 and 2020, employees can get paid for up to 10 weeks at 55% (2019) and 60% (2020) of their AWW, up to 55% (2019) and 60% (2020) of the SAWW; from 2021, employees are eligible for up to 12 weeks of paid leave at 67 % of their AWW, up to 67% of the SAWW.[268] The program covers three reasons for leave: (1) bonding with new child by birth, adoption, or foster; (2) care for family member with serious health condition; and (3) qualifying exigency arising out of a family member being on active duty (or having been notified of an impending order to active duty).[269]

Compared with the other three states with existing paid family leave programs, the New York law provides for longer paid time off[270] with no waiting period[271]

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261. Jackson Brainerd, *Paid Family Leave in the States*, NAT'L CONF. OF STATE LEGS., http://www.ncsl.org/research/labor-and-employment/paid-family-leave-in-the-states.aspx (last visited Feb. 21, 2020).

262. *See id.*

263. *See State Paid Family and Medical Leave Insurance Laws*, NAT'L P'SHIP FOR WOMEN & FAMS., http://www.nationalpartnership.org/our-work/resources/economic-justice/paid-leave/state-paid-family-leave-laws.pdf (last visited Feb. 21, 2020).

264. *See id.*

265. PAID FAMILY LEAVE: 2018 YEAR IN REVIEW, N.Y. STATE, *available at* https://paidfamilyleave.ny.gov/system/files/documents/2019/08/PFL-EOYReport-2018-v1%207-11-19%20FINAL.pdf.

266. *See id.*

267. *See id.*

268. *See* N.Y. STATE PAID FAMILY LEAVE: EMPLOYER FACTS, N.Y. STATE, *available at* https://www.ny.gov/sites/ny.gov/files/atoms/files/PaidFamilyLeave_BusinessOwnerFactSheet.pdf.

269. *See* PAID FAMILY LEAVE: 2018 YEAR IN REVIEW, *supra* note 265.

270. *See id.*

271. *See id.*

and extends the coverage to military families. It is deemed the "gold standard"[272] by the state government.

B. INTERACTION BETWEEN THE FMLA AND STATE LAW

Neither the FMLA or state laws require private-sector employers to provide paid family leave. However, some states have enacted legislation creating state paid family leave insurance programs. Under these programs, employees who engage in certain caregiving activities receive cash benefits. Program eligibility, maximum weeks of benefits available, wage replacement rates vary between states.[273] Most state programs cover a broader range of private employers than the FMLA. The FMLA only covers private employers with 50 or more employees in a 75-mile radius.[274] By contrast, states including California, Rhode Island, Washington, Massachusetts, Connecticut and Oregon require all private employers to participate in the paid family leave programs.[275] Second, the requirements for eligible employees are less stringent in many state programs than the FMLA. To be an eligible employee under the FMLA, the employee must have worked for the employer for at least 12 months and for at least 1,250 hours in the last 12 months.[276] New York law, for example, only 26 weeks of employment (or 175 days of employment for part-time employees) is required to be an eligible employee.[277]

Although many states provide broader protection than the FMLA in some respects, it should be noted that some state paid family leave programs do not cover an employee's own serious health condition,[278] while the FMLA extends to this type of leave.[279] In addition, the maximum length of paid leave under some state programs is shorter than 12 weeks, the maximum leave protected by the FMLA. For example, California and Rhode Island respectively provide up to 8 and 4 weeks of paid leave.[280] Although most state programs serve both job-protecting and money-compensating purposes, California, New Jersey, and

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272. *Id*.

273. *See* SARAH A. DONOVAN, CONG. RESEARCH SERV., R44835, PAID FAMILY LEAVE IN THE UNITED STATES (2019), *available at* https://fas.org/sgp/crs/misc/R44835.pdf.

274. U.S. DEP'T OF LAB., THE EMPLOYEE'S GUIDE TO THE FAMILY AND MEDICAL LEAVE ACT (2015), *available at* https://www.dol.gov/whd/fmla/employeeguide.pdf [hereinafter U.S. DEP'T OF LAB., EMPLOYEE'S GUIDE]

275. *See* NAT'L P'SHIP FOR WOMEN & FAMS. *supra* note 263.

276. *See* N.Y. STATE, PAID FAMILY LEAVE AND OTHER BENEFITS, https://paidfamilyleave.ny.gov/paid-family-leave-and-other-benefits#short-term-disability.

277. *See id*.

278. California, New Jersey, and Rhode Island provide temporary disability benefits to employees for their own medical conditions through state disability insurance programs, and New York requires covered employers to provide temporary disability benefits to workers who are unable to work due to disability. *See* DONOVAN, *supra* note 273.

279. *See* U.S. DEP'T OF LAB., WHAT'S THE DIFFERENCE? PAID SICK LEAVE, FMLA, AND PAID FAMILY AND MEDICAL LEAVE (2016), *available at* https://www.dol.gov/sites/dolgov/files/OASP/legacy/files/PaidLeaveFinalRuleComparison.pdf.

280. *See* NAT'L P'SHIP FOR WOMEN & FAMS., *supra* note 263.

Washington, D.C. have structured their paid family leave programs as monetary benefits only and do not provide job protection for benefit recipients.[281]

How does the FMLA interact with the state legislation? The purpose of the FMLA is to "make leave available to eligible employees."[282] The current state legislation does not seem to conflict with the purpose or the structure of the FMLA, but instead provides additional employee protection by requiring payment to employees during their time off. The U.S. Department of Labor made it clear that the FMLA does not "supersede any state or local law or collective bargaining agreement that provides greater family or medical leave rights,"[283] and the FMLA "may apply in addition to or along with" state legislation.[284] An employer violating both the FMLA and a state statute may be subject to remedies under either or both statutes.[285] Therefore, when both the FMLA and state law apply to an employer, the employer is required to follow the law that gives the employee greater rights.[286]

VII. CONCLUSION

Congress adopted the FMLA in recognition that women face disproportionate family-related burdens that go beyond pregnancy and physical disability after childbirth. Thus, the FMLA created federal leave rights for both men and women to care for children and sick family members. However, the FMLA has not eliminated society's deep-seated gender stereotypes, and as a result, women are more likely than men to take leave from work.[287] This trend can have negative consequences. For example, it reinforces the notion that women are the primary caregivers (despite the fact women are better educated than men and two-thirds of children live in homes where both parents work[288]) and might make employers less willing to hire a woman thinking she might take time off later.[289]

Despite the shortcomings of the FMLA, the Act created a federal standard for employment leave policy in the United States and represents the progress American public policy has made in attempting to rectify gender inequalities in employment. To continue this progress, Congress might consider a mandate of paid leave for employees. By requiring paid leave under the FMLA, work in the home would be recognized as socially and economically important and valuable. Such a mandate would likely encourage more men to take leave because their

281. *See* DONOVAN, *supra* note 273.

282. U.S. DEP'T OF LAB., EMPLOYEE'S GUIDE, *supra* note 274, at 68

283. U.S. DEP'T OF LAB., EMPLOYEE RIGHTS UNDER THE FAMILY AND MEDICAL LEAVE ACT (2016), *available at* https://www.dol.gov/whd/regs/compliance/posters/fmlaen.PDF.

284. *Id*. at 68.

285. *See id*.

286. *Coordinating FMLA with State and Federal Laws*, HR DAILY ADVISOR (Apr 13, 2017), https://hrdailyadvisor.blr.com/2017/04/13/coordinating-fmla-state-federal-laws/.

287. Kurtzleben, *supra* note 6.

288. *See id*.

289. *See* Bryce Covert, *Women Won't Have Equality Until Dads Stay Home*, NATION (Apr. 20, 2016), https://www.thenation.com/article/women-wont-have-equality-until-dads-stay-home/.

breadwinner role would not be compromised and the paid status of the leave would make it a more credible, socially valued option. Other options, such as affordable workplace day care, would also enable all parents to more easily juggle their conflicting responsibilities. Additionally, a gender-neutral paid family leave policy could also help to equalize the gender pay gap.[290]

On a policy level, policymakers and sociologists may consider methods of updating the "ideal-worker norm" to reflect more realistic attitudes about the multiple roles of most workers. As Wendy Kamimer declared in her book, *The Fearful Freedom:*

> This means that instead of writing special rules for women in the workforce, feminists should endeavor to redefine the ideal worker. Who is the worker? The worker is a person with children and child-care responsibilities or aging, needy parents; a person . . . with a life outside the workplace . . . The worker is a person whose career is interrupted by the demands of family life.[291]

It is possible that with time, revisions, and further dialogue, employers will interpret the Act in a manner that will encourage all employees, regardless of gender, to take leave to attend to socially and economically valued family obligations. Otherwise, the answer lies with individuals to encourage local, state, and federal governments to re-envision the relationship between family and work.

290. *See id*. (In Sweden, where fathers are required to take at least two months off in the first eight years of the child's life or else forfeit the benefits, the mothers' income rose 7% for each month the father was on leave.).

291. WENDY KAMINER, A FEARFUL FREEDOM: WOMEN'S FLIGHT FROM EQUALITY, 63 (1990).