

# ELIMINATING THE MOTHERHOOD PENALTY: THE PREGNANT WORKERS FAIRNESS ACT & OTHER SOLUTIONS FOR THE UNITED STATES

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## I. Introduction

The “motherhood penalty” refers to the loss of pay and career advancement opportunities that mothers experience after having a child. In fact, mothers lose an average of four percent of pay for every child they have. By contrast, fathers gain six percent; the “fatherhood bonus.” In a society where women have consistently matched and even out-paced men in areas such as higher education and placement into the workforce, this should not be the case.

In the legal field specifically, women account for over half of all law school graduates and nearly half of all law firm associates.<sup>1</sup> However, they comprise less than a quarter of equity partners.<sup>2</sup> A major factor contributing to the stark gap between these statistics is the motherhood penalty. Between employment opportunities and the track to leadership positions, many women become mothers. This decision to start a family often marks a point of no return in the careers of many women; their wages and opportunities for advancement never catch up to their male and childless-female counterparts.<sup>3</sup> What’s more, even the few women who do make it into these leadership positions are not compensated fairly. In fact, female equity partners earn only seventy-eight percent compared to their male counterparts.<sup>4</sup> Fathers, by contrast, earn more than other workers, including other men without children at home, regardless of education level.<sup>5</sup>

The same set of circumstances—the birth of a child—leads to an increase in pay and opportunity for the father yet leads to a decline in pay and opportunity for the mother. Whether fueled by gender stereotypes of parenting roles, discrimination in the workplace, or unequal distribution of household and corporate labor, this gender inequality has become a prominent stain on the fabric of American society. In order to reach true gender equality, we must focus on increasing female representation in equitably compensated leadership roles and closing the parental pay divide. Solving the motherhood penalty will, thus, require more than simply enrolling more women in higher education and positioning more women in the workforce; instead, solutions must welcome and accommodate pregnant workers and mothers throughout their careers. This

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<sup>1</sup> *Women in the Legal Profession*, AMERICAN BAR ASSOC., <https://www.abalegalprofile.com/intro.php> (last visited Mar. 4, 2023).

<sup>2</sup> *Id.*

<sup>3</sup> One reason the earnings of many women never catch up with their peers after maternity leave is due to prorated bonuses which become the baseline from which subsequent bonuses are based. Alise Henry, *The Motherhood Penalty—Alive and “Well” or on Its Way Out?*, AMERICAN BAR ASSOC. (June 29, 2018), <https://www.americanbar.org/groups/litigation/committees/woman-advocate/practice/2018/motherhood-penalty/>.

<sup>4</sup> AMERICAN BAR ASSOC., *supra* note 1.

<sup>5</sup> Rakesh Kochhar, *The Enduring Grip of the Gender Pay Gap*, PEW RESEARCH CENTER (Mar. 1, 2023), <https://www.pewresearch.org/social-trends/2023/03/01/the-enduring-grip-of-the-gender-pay-gap/>.

Article will describe the historic significance of the motherhood penalty, contrast the motherhood penalty with the fatherhood bonus, and evaluate the 2023 Pregnant Workers Fairness Act and other potential solutions as a promising step forward.

## II. Historic Significance of the Motherhood Penalty

Throughout the second half of the 1900s, women's representation in higher education, the work force, and leadership positions steadily increased.<sup>6</sup> During the late 1940s and 1950s, most law schools had two or fewer women in their first-year class, and one fifth of law schools had no female students at all.<sup>7</sup> Now, through an impressive game of catch-up, women have consistently made up over half of law school students since 2016.<sup>8</sup> Further, women have comprised nearly half of all law firm associates in the United States for several years now.<sup>9</sup> At this rate, women should have easily secured their fair share of representation in leadership positions at these same law firms. However, this has not been the case. Despite consistently comprising nearly half of law firm associates, women still make up less than a quarter of equity partners; only twenty-two percent.<sup>10</sup> In 2018, women represented only nineteen-point-five percent of equity partners, which was up just three percent from twelve years prior.<sup>11</sup> Rates in recent years have followed this modest trend, stalling at just under a quarter in 2021.<sup>12</sup>

For women, a roadblock tends to arise on their way up the corporate ladder: motherhood. Often at the peak of their childbearing years, many women in associate positions take time off work to start a family, forever changing the trajectory of their career path and opportunities. They are left behind by their male and childless female counterparts both in pay and opportunity. In many cases, this includes decreases not just in salary and bonuses, but also fewer project

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<sup>6</sup> Kim Parker, *What's behind the growing gap between men and women in college completion?*, PEW RESEARCH CENTER (Nov. 8, 2021), <https://www.pewresearch.org/fact-tank/2021/11/08/whats-behind-the-growing-gap-between-men-and-women-in-college-completion/>.

<sup>7</sup> Katz, Elizabeth and Rozema, Kyle and Sanga, Sarath, *Women in U.S. Law Schools, 1948-2021*, NORTHWESTERN PUBLIC LAW (Aug. 16, 2022), <http://dx.doi.org/10.2139/ssrn.4194210>.

<sup>8</sup> Elizabeth Olson, *Women Make Up Majority of U.S. Law Students for First Time*, THE NEW YORK TIMES (Dec. 16, 2016), <https://www.nytimes.com/2016/12/16/business/dealbook/women-majority-of-us-law-students-first-time.html>.

<sup>9</sup> AMERICAN BAR ASSOC., *supra* note 1.

<sup>10</sup> Vivia Chen, *Will We See Big Law Gender Parity in 20 Years? Dream On.*, BLOOMBERG LAW (May 31, 2022), <https://news.bloomberglaw.com/business-and-practice/will-we-see-big-law-gender-parity-in-20-years-dream-on>.

<sup>11</sup> Cynthia L. Cooper, *Broken Rungs on the Career Ladder: A New Analysis of Problems Encountered by Women Lawyers in Private Practice*, AMERICAN BAR ASSOC. (Jan. 21, 2020), <https://www.americanbar.org/groups/diversity/women/publications/perspectives/2020/january/broken-rungs-the-career-ladder-new-analysis-problems-encountered-women-lawyers-private-practice/>.

<sup>12</sup> Gerald Schifman, *How Firms Stack Up on Gender Equity*, LAW 360 PULSE (Aug. 22, 2022), <https://www.law360.com/pulse/articles/1517392>.

assignments, lucrative clients, travel opportunities, and promotions.<sup>13</sup> This is what scholars call the “motherhood penalty.”<sup>14</sup>

Even though childbearing has vast economic benefits for society, women’s careers and compensation often suffer for their decision to become mothers. In fact, a Census Bureau study found that between two years before the birth of a couple’s first child and a year after, the wage gap between opposite-sex spouses doubles.<sup>15</sup> While this gap may eventually narrow over time, it never goes away.<sup>16</sup> Much of this phenomenon is based on a stereotypical view that women are primary caregivers and have a duty to stay home and raise their children. Additionally, mothers who do choose to return to work are often seen as less competent or less committed to their jobs.<sup>17</sup> Even more harrowing, a recent study has concluded that the motherhood penalty has remained essentially unchanged for almost thirty years, particularly among high wage earners.<sup>18</sup> This plateau provides dismal hope that the trend will change any time soon without broader intervention.

In a post-*Roe* landscape, the motherhood penalty is especially frightening. Even mothers who calculate their decision to have children at the so-called “ideal” point in their career are irreparably punished financially, so this could be especially detrimental to unexpected mothers. In many states, women have already lost access to abortion options, meaning that an unexpected pregnancy could have serious life- and career-altering effects. Many women in the legal field and beyond may be forced to accept these substantial wage dents without a viable alternative. This would exacerbate the already rampant pay discrimination issue that mothers face. In 2020, a sobering study ranked the United States as the second worst place to raise a family when considering factors such as safety, happiness, cost, health, education, and time off work.<sup>19</sup> Among other factors, the United States ranked worst for time off work with zero mandated paid parental leave. For unexpected mothers with little money saved, this could mean financial ruin and removal of their independence, not to mention the derailment of their careers. If the United States compels women in many states to bear the responsibility of motherhood, then it must work to eliminate the motherhood penalty and improve child rearing conditions.

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<sup>13</sup> HENRY, *supra* note 3.

<sup>14</sup> *The Motherhood Penalty*, AAUW.ORG <https://www.aauw.org/issues/equity/motherhood/> (last visited Mar. 4, 2023).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> Choncé Maddox, *The motherhood penalty affects everything from a woman's wages to hiring and promotions after having a child*, BUSINESS INSIDER (Mar. 10, 2022), <https://www.businessinsider.com/personal-finance/motherhood-penalty>.

<sup>18</sup> HENRY, *supra* note 3.

<sup>19</sup> Laura Begley Bloom, *35 Best and Worst Countries To Raise A Family (You Won't Believe America's Ranking)*, FORBES (July 29, 2020), <https://www.forbes.com/sites/laurabegleybloom/2020/07/29/best-worst-countries-raise-family/?sh=3bac4cbb7bec>.

### III. The Fatherhood Bonus

The counterpart to the motherhood penalty is the fatherhood bonus. While women lose an average of four percent of pay for each child they have, men gain an average of six percent for the same circumstances.<sup>20</sup> According to 2023 Pew Research data, the widening parenthood pay gap actually appears to be driven more by an increase in the earnings of fathers than a decrease in the earnings of mothers.<sup>21</sup> In fact, fathers ages 25–54 earn more than both mothers and childless men in the same age range.<sup>22</sup> This can largely be attributed to internalized notions of fathers as the family breadwinner.<sup>23</sup> Employers may both covertly and overtly recognize these family needs and compensate for it through the channel of increased pay for fathers rather than mothers.<sup>24</sup>

Additionally, despite the fact that research shows the importance of newborns receiving equal bonding time with both parents, fathers take only a fraction of the amount of time in paternity leave that mothers take in maternity leave.<sup>25</sup> Shockingly, seventy-six percent of fathers return to work within only one week of welcoming a newborn.<sup>26</sup> While mothers tend to take more time off work during pregnancy and after childbirth due to a variety of reasons including illness, limitations, and general care for their newborns, fathers forgo a substantial amount of bonding time with their newborns during paternity leave. One reason for this is the United States' failure to prioritize paternity leave. In fact, The United States lags far behind other countries as it is the only Organisation for Economic Co-operation and Development (OECD) country without some form of nationwide, paid maternity, paternity, or parental leave.<sup>27</sup>

Another reason that many fathers take such short periods of paternity leave is to avoid losing income and facing stigma at the workplace.<sup>28</sup> Much of this stigma stems from outdated stereotypes of fathers as primary providers and mothers as primary caregivers.<sup>29</sup> These stereotypes

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<sup>20</sup> Michelle J. Budig, *The Fatherhood Bonus and The Motherhood Penalty: Parenthood and the Gender Gap in Pay*, THIRD WAY (Sept. 2, 2014), <https://www.thirdway.org/report/the-fatherhood-bonus-and-the-motherhood-penalty-parenthood-and-the-gender-gap-in-pay>.

<sup>21</sup> KOCHHAR, *supra* note 5.

<sup>22</sup> KOCHHAR, *supra* note 5.

<sup>23</sup> Chabeli Carrazana, *Dads get paid more when they have kids — as moms earn less*, 19THNEWS.ORG (Mar. 1, 2023), <https://19thnews.org/2023/03/parenthood-stereotypes-gender-pay-gap/>.

<sup>24</sup> *Id.*

<sup>25</sup> *Paid Family Leave: How Much Time Is Enough?*, NEWAMERICA.ORG <https://www.newamerica.org/better-life-lab/reports/paid-family-leave-how-much-time-enough/gender-equality/> (last visited Mar. 4, 2023).

<sup>26</sup> Chris Kolmar, *25+ Telling Paternity Leave Statistics [2023]: Average Paternity Leave Length*, ZIPPPIA (Feb. 9, 2023) <https://www.zippia.com/advice/paternity-leave-statistics/>.

<sup>27</sup> Maggie Wooll, *Paternity leave in the US: How to make it work for everyone*, BETTERUP (April 6, 2022), <https://www.betterup.com/blog/paternity-leave-in-the-us>; Yekaterina Chzhen, Anna Gromada, Gwyther Rees, *Are the world's richest countries family friendly?*, UNICEF (June 2019), <https://www.unicef.org/media/55696/file/Family-friendly%20policies%20research%202019.pdf>.

<sup>28</sup> *Fathers Need Paid Family and Medical Leave*, NATIONALPARTNERSHIP.ORG (June 2022), <https://www.nationalpartnership.org/our-work/economic-justice/reports/fathers-need-paid-leave.html>.

<sup>29</sup> AAUW, *supra* note 14.

are harmful to both mothers and fathers as it places an unfair expectation on mothers to sacrifice opportunities in their careers to care for their newborns and, conversely, an unfair expectation on fathers to sacrifice bonding time with their newborns to earn more money and provide for their families.

Despite these stereotypes, research indicates that paid paternal leave policies have a range of benefits including improved family finances, stronger bonds with spouses and children, and increased gender equity in the workplace.<sup>30</sup> Moreover, each month that fathers spend at home on paternity leave is associated with an income rise of seven percent for the respective mother.<sup>31</sup> Thus, taking this leave alone would help equalize a substantial portion of the disparity between the fatherhood bonus and motherhood penalty and may be even more effective when combined with the solutions presented in the final section of this Article.

#### **IV. Pregnant Workers Fairness Act**

One promising new development is the Pregnant Workers Fairness Act (PWFA), which goes into effect June of 2023. This Act provides hope for the future but leaves many open questions. Essentially, the PWFA creates a legal obligation for employers to grant reasonable accommodations for pregnant workers.<sup>32</sup> The Act applies to employers with fifteen or more employees and employees and job applicants with temporary physical or mental limitations due to pregnancy, childbirth, or related conditions.<sup>33</sup> Importantly, in order for employees and job applicants to qualify, they must be able to perform the “essential functions” of the job—with or without a reasonable accommodation.<sup>34</sup> A person can still qualify if their inability to perform an essential function is temporary, the essential function could be performed in the near future, and the inability to perform the essential function can be reasonably accommodated.<sup>35</sup> Accommodations under the PWFA may include additional restroom breaks, reducing lifting requirements, or providing leave for an employee who does not qualify for leave under the Family and Medical Leave Act.<sup>36</sup>

The PWFA appears to close part of the large gap left by the previous standard from the Supreme Court’s 2015 decision in *Young v. UPS*. This case arose from a discrimination claim under the Pregnancy Discrimination Act and Title VII of the Civil Rights Act of 1964 due to

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<sup>30</sup> Aimee Picchi, *America's troubled relationship with paid time off for dads*, CBS NEWS (Oct. 19, 2021), <https://www.cbsnews.com/news/paternity-leave-pete-buttigieg-criticism-policy-united-states/>.

<sup>31</sup> *Id.*

<sup>32</sup> Leslie Selig Byrd, Amy Karff Halevy and Caroline Melo, *New Protections for Pregnant and Nursing Workers in 2023*, SHRM.ORG (Jan. 11, 2023), <https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/pregnant-nursing-employee-protections-.aspx>.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

Young’s inability to continue work as a UPS driver while pregnant because she temporarily could not lift seventy pounds required by her job description, even though nonpregnant workers with similar limitations were frequently granted accommodations. The Supreme Court’s ruling in *Young* only required employers to provide reasonable accommodations when a person’s pregnancy, childbirth, or related medical condition rose to the level of a disability under the Americans with Disabilities Act (ADA) or when accommodations were made for other similarly situated, nonpregnant workers.<sup>37</sup> While this case was a step in the right direction, the *Young* standard excluded many limitations unique to pregnancy and left ample room for pregnancy discrimination to flourish. The PWFA is likely to help end much of this residual discrimination, promote safe and healthy pregnancies, and protect the economic security of pregnant women and their families.<sup>38</sup>

Although the PWFA is auspicious, it is not a perfect solution. It leaves open many questions that opponents may use to chip away at its protections in court. For instance, what is the scope of the protected “related conditions?” How many pregnancies will be covered per mother? What if the pregnant worker can perform some of the “essential functions” of the job but not all? According to Sharon Gustafson, Young’s attorney in *Young v. UPS*, these are all questions that are likely to be litigated in the coming years.<sup>39</sup> What’s more, employers might see this Act as an incentive to forgo hiring young women of childbearing age to avoid the liability altogether. While this Act is, indeed, a victory that should be celebrated, there is still much ground to be covered for full protections of pregnant workers.

One way to ensure these protections involves taking the PWFA a step further and closing the existing gaps before litigation ensues and courts carve their own meanings. For starters, mothers should be extended explicit protection from the Act for each child they have. Further, the exact parameters of the amount of “essential functions” a worker needs to be able to perform—whether currently, with an accommodation, or in the near future—should be specified, especially for jobs that may have several key functions. Finally, employers should not be able to get around liability from this Act by choosing to forgo hiring women of childbearing age altogether. These extended boundaries and protections would help ensure that this Act accomplishes its intended purpose: to provide more fairness and less discrimination in the workplace for pregnant workers.

## V. Further Solutions

While the PWFA is a great start, more solutions are necessary to work toward eliminating the motherhood penalty. One potential solution involves comprehensive maternity leave in the workplace. Research has shown that generous maternity leave benefits lead more women to remain

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<sup>37</sup> *Young v. United Parcel Service*, 575 U.S. 206 (2015).

<sup>38</sup> *The Pregnant Workers Fairness Act*, NATIONAL PARTNERSHIP FOR WOMEN AND FAMILIES <https://www.nationalpartnership.org/our-work/economic-justice/pregnancy-discrimination/pregnant-workers-fairness-act.html> (last visited Mar. 4, 2023).

<sup>39</sup> GUSTAFSON, Lecture at Georgetown University Law Center (Feb. 2023).

in the workforce compared to no leave benefit.<sup>40</sup> While federal law only requires up to twelve weeks of unpaid maternity leave,<sup>41</sup> states like Massachusetts and California are leading the charge to expand this benefit. The Massachusetts Paid Family and Medical Leave Act grants up to twelve weeks of paid maternity leave for eligible employees—this includes child bonding time for any parent regardless of gender. Additionally, Massachusetts employers are prohibited from retaliating against employees for using their benefits under the Act, reducing anxieties related to job security among employees who wish to use the full extent of this bonding time. In California, employers are generally required to maintain their employees’ medical benefits during their maternity leave. This can be essential to preventing families from being swallowed by costs associated with childbirth like hospital bills, newborn doctor’s visits, and postpartum recovery.

Although eighty-two percent of Americans would favor a federal paid maternity leave policy,<sup>42</sup> the United States currently has none. What’s more, only eight states currently provide access to paid maternity leave.<sup>43</sup> In fact, the United States remains the only developed country in the world without paid parental leave and is one of only seven countries total without any guaranteed paid parental leave.<sup>44</sup> This must change in order for the United States to keep pace with the standards of other wealthy and developed nations. While the United States may not be ready to implement full-scale measures such as the United Kingdom’s policy of up to thirty-nine weeks of paid maternity leave,<sup>45</sup> the Massachusetts and California state policies should serve as helpful models for a revamped federal policy. Under these models, this expanded policy would include implementing up to twelve weeks of paid time off for either parent, job security while using this time off, and maintenance of medical benefits during the parental leave. In order to eliminate the disparity between the motherhood penalty and the fatherhood bonus, the implementation of this federal policy, or something similar, seems imperative.

Another potential solution involves both mothers and fathers taking some form of mandated paid leave. Research shows that mothers suffer additional penalties once returning to the workplace such as judgment from their peers who may question their commitment and even competence.<sup>46</sup> These gender stereotypes about who should prioritize family caretaking can exacerbate the motherhood penalty. Thus, mandated paid leave for mothers and fathers may help the United States reach a workplace norm of equal commitment to family and work by both

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<sup>40</sup> Genevieve Douglas, *Tackling the ‘Motherhood Penalty’? Start With Benefits*, BLOOMBERG LAW (May 31, 2019),

<https://news.bloomberglaw.com/business-and-practice/tackling-the-motherhood-penalty-start-with-benefits/>.

<sup>41</sup> Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2601-2654 (West 2023).

<sup>42</sup> KOLMAR, *supra* note 26.

<sup>43</sup> KOLMAR, *supra* note 26.

<sup>44</sup> KOLMAR, *supra* note 26.

<sup>45</sup> Statutory Maternity Pay and Leave: Employer Guide, GOV.UK

<https://www.gov.uk/employers-maternity-pay-leave> (last visited Mar. 4, 2023).

<sup>46</sup> NEW AMERICA, *supra* note 25.

parents.<sup>47</sup> While nearly ninety percent of fathers take some time off after their child is born, most of them only take less than ten days of leave.<sup>48</sup> Underlying reasons for this minimal leave include the fear that fathers might be stigmatized by their employers, miss out on future opportunities, or will not be adequately compensated during their time off.<sup>49</sup> However, studies have found that fathers taking paternity leave of adequate duration and compensation is associated with “reduced family stress, improved gender equality, and more involved parenting.”<sup>50</sup> In turn, this can lead to “better social, emotional, cognitive and health outcomes for children, as well as healthier, more stable relationships with partners.”<sup>51</sup> Because of the substantial advantages for mothers, fathers, and children, some form of mandated paid parental leave could have far-reaching benefits for society if implemented.

## VI. Conclusion

The motherhood penalty—where women lose significant pay and career advancement opportunities for each child they have—is no new phenomenon. In fact, the disparity between mothers and fathers has been widening over the past several decades. At this rate, it does not appear to be resolving itself without intervention. While women have found themselves near-equally represented in almost every other aspect of education and the workforce, including in law schools and at law firms, they continue to suffer financially when they choose to start a family. Men, however, experience the opposite effect; they earn considerably more when they become fathers. One reason for this is the comparatively long absence of new mothers from the workforce. Several solutions provide hope that this penalty can be overcome, including the Pregnant Workers Fairness Act (PWFA), the possibility of the United States allowing fathers to take paternity leave at more proportional rates, and the implementation of some form of a federal paid parental leave policy. While these solutions may not resolve the issue over night, they provide hope that the United States can eliminate the motherhood penalty in the near future.

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<sup>47</sup> NEW AMERICA, *supra* note 25.

<sup>48</sup> Jessica Grose, *Why Dads Don't Take Parental Leave*, THE NEW YORK TIMES (Feb. 19, 2020), <https://www.nytimes.com/2020/02/19/parenting/why-dads-dont-take-parental-leave.html>.

<sup>49</sup> *Id.*

<sup>50</sup> NEW AMERICA, *supra* note 25.

<sup>51</sup> NEW AMERICA, *supra* note 25.